

**IN THE MATTER OF
A DISCIPLINARY HEARING PURSUANT TO BY-LAW 20 OF
THE INVESTMENT DEALERS ASSOCIATION OF CANADA
RE: STEVEN JAMES WESTMAN**

DECISION AND REASONS OF THE MANITOBA DISTRICT COUNCIL

Hearing: **October 22, 2007**

Panel: **Thomas Kormylo, Chair**
Walter Silicz and Claude Tetrault

Counsel: **Neil N. Eshleman** for The Investment Dealers Association of Canada

Respondent: **S. Brennan** for Mr. Westman
Steven J. Westman, in person

INTRODUCTION:

1. We were constituted as a panel of the Manitoba District Council of The Investment Dealers' Association of Canada (the "**Association**") for the purposes of conducting a discipline hearing (the "**Hearing**") pursuant to a Notice of Hearing (Exhibit 1) dated August 29, 2007 regarding Steven James Westman ("**Mr. Westman**" or the "**Respondent**") to determine whether Mr. Westman committed the contraventions of the regulations of the Association as alleged in the Notice of Hearing.
2. On September 7, 2007, in response to the Notice of Hearing, counsel to the Respondent submitted a Reply (Exhibit 2) to the allegations made by the Association in the Notice of Hearing.
3. Prior to the Hearing, counsel to the Association and counsel to the Respondent agreed on all the facts set forth in the Notice of Hearing and a joint Statement of Agreed Facts (Exhibit 3) was provided to the panel and accepted as evidence at the Hearing.
4. In the Statement of Agreed Facts the Respondent admitted the contraventions of the regulations of the Association as alleged, namely that:
 - (i) Between May 1999 and October 2000, the Respondent, while employed as a Registered Representative at the Winnipeg branch of Merrill Lynch Canada Inc., failed to use due diligence to ensure that the recommendations made for the TLEC account were appropriate for that client and in keeping with its investment requirements and restrictions, as

set out in its Framework Agreement, contrary to Regulation 1300.1(c) ("**Count 1**");

- (ii) In February and March 2001, the Respondent, while employed as a Registered Representative at the Winnipeg branch of Merrill Lynch Canada Inc., failed to use due diligence to learn the essential facts relative to every order accepted, contrary to Regulation 1300.1(a), in that he did not adequately inform himself as to the nature or details of two income trusts, before recommending the purchase of these securities to his client, TT ("**Count 2**"); and
- (iii) In February and March 2001, the Respondent, while employed as a Registered Representative at the Winnipeg branch of Merrill Lynch Canada Inc., failed to use due diligence to ensure that the recommendations made for the TT account were appropriate for that client and in keeping with its investment objectives, contrary to Regulation 1300.1(c) ("**Count 3**").

5. The Statement of Agreed Facts did not include any agreement on the matters raised by the Respondent in his Reply and it was expected that counsel to the Respondent would lead evidence at the Hearing to prove such matters. However, at the commencement of the Hearing, counsel for the Association and counsel to the Respondent advised us that they had reached an agreement (the "**Joint Recommendation**") regarding the disposition of the matters before the Panel. Counsel to the Respondent agreed that no evidence would be called on behalf of the Respondent and counsel to the Association advised us that he and counsel to the Respondent were jointly recommending to the Panel the following disposition:

- (a) in respect of each of the two contraventions of Regulation 1300.1(c) set forth as Count 1 and Count 3 in the Statement of Agreed Facts, pursuant to which the Respondent admitted and agreed that he failed to use due diligence to ensure that the recommendations made for the accounts cited therein were appropriate for the client, a fine of \$10,000 (\$20,000 in total) be levied against the Respondent;
- (b) costs in the amount of \$18,000 be assessed against the Respondent;
- (c) the Respondent, who is currently still in the industry but not employed by a Member firm in the Association, be entitled to re-apply to the Association for registration and admission as an RR/approved person, if, as and when he obtains an offer of employment from a Member of the Association, subject to the following:
 - (i) the Respondent shall be prohibited from applying to the Association for registration and approval as an RR/approved person for a period of six months;
 - (ii) all fines and costs payable by the Respondent shall be paid prior to admission;

- (iii) if admitted, the Respondent shall be required to re-write and pass the Conduct and Practices Exam within one year; and
 - (iv) if admitted, the Respondent shall be subject to strict supervision for a period of one year.
6. Following the Panel being apprised of the Joint Recommendation, counsel for the Association proceeded to make a closing address to the Panel in support of the penalties and costs being recommended and referred to the Panel to precedent decisions. He was followed by counsel to the Respondent, who similarly made a closing address with emphasis on why leniency was justified in the case of Mr. Westman and answered questions put by the Panel.

DECISION:

7. Upon completion of the submissions, the Panel took the case under advisement and, after an adjournment and deliberation, returned to the Hearing and the Chairman advised counsel and Mr. Westman that we had decided to accept the Joint Recommendation in part. The Chairman advised that under the circumstances in our view it was not necessary, in the public interest, to impose a six month prohibition preventing Mr. Westman from re-applying to the Association for registration and admission as an RR/approved person, should he so choose, if, as and when he obtains an offer of employment from a Member firm of the Association. Subject to that exception, the Panel was otherwise prepared to accept the Joint Recommendation made by counsel for the Association and counsel for the Respondent.
8. The determination therefore that we reached is as follows:
- (a) Mr. Westman shall be assessed a fine of \$10,000 in respect of Count 1 as a result of having failed to use due diligence to ensure that recommendations made to his client with respect to the TLEC accounts were appropriate for that client and in keeping with its investment requirements and restrictions, contrary to Regulation 1300.1(c) of the Association;
 - (b) Mr. Westman shall be assessed a fine of \$10,000 in respect of Count 2 as a result of having failed to use due diligence to ensure that recommendations made to his client with respect to the TT accounts were appropriate for that client and in keeping with its investment objectives, contrary to Regulation 1300.1(c) of the Association;
 - (c) The Respondent shall bear responsibility for costs of the Association in this matter in the amount of \$18,000;
 - (d) Prior to being registered and admitted as an RR/approved person, all fines and costs assessed against the Respondent shall be paid in full; and
 - (e) If admitted, the Respondent shall be subject to strict supervision for a period of one year.
9. We also accept the agreement reached between counsel that the Association will not proceed with Count 2 and, accordingly, we have made no determination with respect to

that Count and agree with the reasons counsel for the Association articulated for not proceeding with Count 2.

10. At the conclusion of the Hearing, the Chairman advised Mr. Westman and counsel that written reasons for the decision would follow.

REASONS:

11. In considering the Joint Recommendation, we found the following factors to be relevant when determining the appropriateness of the penalties being recommended to us, having regard to the particular circumstances of this case as set forth in the Statement of Agreed Facts and the submissions made by counsel for the Association and counsel for the Respondent.
12. **Number and Sophistication of Clients Involved:** We note that the transactions in question involved two accounts maintained on behalf of TLEC and two accounts maintained on behalf of TT. This was not a case of the Respondent engaging in the improper conduct generally in respect of the accounts of his other clients. While the Panel had no evidence of the degree of sophistication of TLEC or TT, the Statement of Agreed Facts indicates TLEC had been established to purchase land for entitled First Nations of Manitoba to fulfill the land treaty entitlement obligations of the Governments of Canada and Manitoba. The Statement of Agreed Facts also disclosed that TT is a Trust established to receive Government funds for a native group. We therefore assume that the clients were not without some degree of sophistication. Further, counsel for the Respondent indicated in his Reply and in his address to the Panel, that TLEC had retained the Royal Trust Corporation of Canada as corporate trustee to manage TLEC's accounts and to approve and fund the purchase of all securities in TLEC's accounts. Royal Trust we consider to be sophisticated. A "Framework Agreement" entered into between the Governments of Manitoba and Canada and TLEC governed the TLEC accounts. Similarly, a "Statement of Investment Policy and Procedures" governed the investment of TT's trust funds.
13. The Statement of Agreed Facts confirms that the Respondent had a copy of both the Framework Agreement for TLEC and the Statement of Investment Policy and Procedures for TT and that both of such documents clearly outlined those investments which were appropriate for each account of the respective client. The inappropriate investments were clearly not compliant with the restrictions imposed by those documents, and we are of the view, that given the nature of the inappropriate investments and the restrictions, it would not have been very difficult for the Respondent to have determined that the inappropriate investments were not compliant with the terms of those governing documents and were clearly offside for the particular accounts in question. For example, confirming whether a particular security was of the type permitted and/or included on the S&P 500 or TSE 300 indices would have been a relatively simple matter.
14. Counsel for the Respondent advised us that management or the Compliance Department of Merrill Lynch, the employing Member of the Respondent, was in possession of both the Framework Agreement and the Statement of Investment Policy and Procedures at all material times and that the Corporate Trustee was also in possession of the Framework Agreement in connection with the TLEC accounts it

oversaw. Those representations were not challenged or refuted by counsel for the Association, and we have assumed such representations to be correct.

15. Under the circumstances, therefore, we concluded that the Respondent's actions were clearly negligent. Obviously both clients went to great lengths to specify in the governing documents provided to the Respondent the precise nature of the securities that were to be acquired for their respective accounts. The nature of the securities that the Respondent was to recommend and acquire on behalf of these clients for these accounts was relatively straight forward. It is important that our disposition of this matter reflect the importance that the Association places on registered representatives complying with Regulation 1300.1(c) and the serious nature of the charges the Respondent has admitted to. However, we are of the view that TLEC, the Corporate Trustee, TT and the employing Member must assume some responsibility for failing to observe that the inappropriate investments failed to comply with the governing documents. As indicated, we concluded the inappropriateness of the investments ought to have been easily determinable. We can only conclude that none of the parties was exercising the appropriate level of due diligence that one would have expected in connection with securities recommended and acquired on these accounts.

ANALYSIS OF THE NATURE, EFFECT AND DURATION OF IMPROPER TRADING:

16. The Respondent effected the improper trades on the TLEC accounts over a period of 17 months. A total of 43 securities were purchased for the TLEC accounts over that period which did not meet the criteria established by the Framework Agreement. We were advised that the total value of the inappropriate securities recommended and acquired by the Respondent on behalf of the TLEC accounts was approximately \$500,000 and that the total dollar value of those accounts at the time was approximately \$15,000,000. The dollar value of the improper trades, therefore, represented approximately 3% of the dollar value of those accounts. The trades, we understand, were approved and funded by the Corporate Trustee.
17. The Respondent effected the improper trades on two of the ten accounts comprising the TT accounts over a one year period. Both of such trades involved securities that were non-compliant with the Statement of Investment Policy and Procedures. The aggregate dollar value of those trades amounted to \$950,000 (\$500,000 plus \$450,000 respectively). The \$500,000 investment represented 12% of the total dollars invested in the TT "Implementation Account". The Statement of Agreed Facts does not disclose the percentage that the \$450,000 investment represents in relation to the total dollar value of the TT "Asset Replacement Reserve Account". We were advised that the total dollar value of the ten TT accounts at the time was approximately \$30,000,000. The improper trades, therefore, represented approximately 3% of the total dollars invested in all ten TT accounts. The Statement of Agreed Facts acknowledges that both of the inappropriate securities acquired by the Respondent on behalf of TT were recommended and made by the Respondent in reliance on recommendations made by the Respondent's Branch Manager.
18. The Statement of Agreed Facts makes no mention of whether or not any losses were sustained by the Respondent's clients as a result of the improper trades. The Reply filed by Respondent's counsel maintains that no losses were suffered by either client as a result of the trades. Upon questioning by the Panel, counsel for the Association indicated Association Staff was unable to determine definitively the net result of the improper

trades and, therefore, he could not verify if there was a profit or the amount, however he conceded that the investigation had been unable to conclude that any losses occurred as a result of the Respondent's clients acquiring and owning the inappropriate securities and that we have, therefore, concluded that the actions of the Respondent did not result in any financial loss to the clients.

19. It is clear from the above analysis that while the unauthorized trading involved significant amounts (\$500,000 and \$950,000 respectively), in relative terms the inappropriate securities reflected only 3% of each clients total equity being handled by the Respondent. Whether by sheer coincidence or by design, the vast majority of the recommendations and securities acquired by the Respondent for these clients appear to have been compliant. The panel finds it disturbing that the recommendation to acquire the inappropriate securities on the TT accounts emanated from the Respondents manager. While that does not in any way relieve the Respondent from his obligation to ensure the appropriateness of the trades done on behalf of TT, it is a factor that we have considered in assessing the reasonableness of the Joint Recommendation. Fortunately the clients did not suffer any financial loss as a result of having purchased the inappropriate securities. That fact does not in any way detract from the seriousness of the Respondent's failure to comply with his obligations, nevertheless it is also a factor that we have considered in assessing the reasonableness of the Joint Recommendation.

EXPERIENCE AND COOPERATION OF RESPONDENT:

20. We note that the Respondent has been registered as an RR with the Association for approximately eight years and has no prior or other disciplinary record. Association counsel has confirmed that Mr. Westman has cooperated fully with the IDA investigation and has facilitated this Hearing by agreeing to the Statement of Agreed Facts and the Joint Recommendation.
21. With respect to costs, the Bill of Costs provided by Association counsel indicates \$94,980.63 of adjusted costs were incurred by the Association in connection with this matter. The Joint Recommendation was that the Respondent be assessed costs of \$18,000, which represents close to 20% of the adjusted costs. Counsel to the Association advised us that some of the work performed by Association staff on this matter was also relevant to other matters being investigated by the Association. As a consequence, Association counsel was prepared to accept and recommend that the Respondent be responsible for only part of those costs and that, in his view, \$18,000 was a reasonable allocation for the account of the Respondent. We are prepared to accept counsel's assessment of the portion of the costs to be borne by Mr. Westman.
22. Without losing sight of the seriousness of the Respondent's conduct, but having regard to the totality of the evidence before us and the unique circumstances of this case, the relative sophistication of the clients, the limited extent of the inappropriate trading, the absence of any financial loss, the cooperation and otherwise clear record of the Respondent and the involvement of the Respondent's manager in connection with one of the TT trades, we are not persuaded that this case is a situation where it is necessary in the public interest that Mr. Westman be prohibited from applying for registration and approval as a registered representative/approved person for a period of six months, as proposed in the Joint Recommendation. We are of the view that the other sanctions and the close supervision that will be implemented if Mr. Westman is granted registration and approval by the Association are sufficient and that no prohibition is necessary. To that

extent, we are not prepared to order the prohibition included in the Joint Recommendation.

Executed on original by:

"Thomas J. D. Kormylo"
Thomas J. D. Kormylo, Chair

"Walter Silicz"
Walter Silicz

"Claude Tetrault"
Claude Tetrault