

2007 BCSECCOM 775

Amended January 8, 2008 with corrected neutral citation.

Previous neutral citation: 2007 BCSECCOM 765

David Michael Michaels
Investment Dealers Association of Canada

Section 28 of the *Securities Act*, RSBC 1996, c. 418

Hearing and Review

Panel	Brent W. Aitken	Vice Chair
	David J. Smith	Commissioner
	Suzanne K. Wiltshire	Commissioner

Date of Hearing November 27, 2007

Date of Decision December 21, 2007

Appearing

Barbara G. Lohmann For the Investment Dealers Association of Canada

William R. Southward For David Michael Michaels
Nan K. P. Aulakh

Decision

¶ 1 This is a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418 of a March 5, 2007 decision of a hearing panel of the Pacific District Council of the Investment Dealers Association of Canada.

¶ 2 The IDA is asking us to review the portion of the panel's decision in which it prohibited Michaels from re-applying for two months for registration as an approved person. The IDA says the prohibition (in essence, a two-month suspension) is too short. The IDA says Michaels should be permanently banned from the industry.

Facts

¶ 3 The facts are not in dispute. At the time of his misconduct, which spanned the period August 1999 through February 2004, Michaels was a mutual fund salesperson at Dundee Securities Corporation. Michaels had no disciplinary history prior to the events leading to the IDA proceedings.

2007 BCSECCOM 775

- ¶ 4 The IDA panel found several instances of misconduct on Michaels' part, but the only misconduct relevant to this hearing and review arises from Michaels' sale of shares of Landstar Inc. to 13 of his clients.
- ¶ 5 At the time, Landstar Inc. was a company quoted on the US OTC Bulletin Board and later on the Pink Sheets. Michaels did not record the sales on Dundee's books, and Dundee was unaware of them.
- ¶ 6 Michaels' clients, who in the aggregate invested \$100,000 in the shares, lost money on the investment. Michaels reimbursed them to the extent of about \$71,000 with his own money. Michaels did not tell Dundee or his subsequent employers about the reimbursements.
- ¶ 7 Dundee eventually found out about the Landstar share sales and made inquiries of Michaels. Michaels admitted to selling the shares to only three clients.
- ¶ 8 Dundee terminated Michael's employment for cause in February 2004. Michaels worked at two other firms after that, then left the industry in May 2006.
- ¶ 9 IDA staff questioned Michaels in writing about the Landstar share sales. Over the next few months, Michaels admitted (in writing) at first to selling Landstar shares to four clients. Later, he told the IDA he sold them to five clients. As a result of its investigation, the IDA discovered another five. When confronted by the IDA with this information, Michaels acknowledged he ought to have disclosed the five clients. However, it was not until his third interview with IDA investigators that Michaels revealed all 13 clients who purchased Landstar shares.

IDA Proceedings

- ¶ 10 Based on Michaels' sale of the Landstar shares to his clients, his transacting the sales off-book, and his failure to tell Dundee about it, and based on other misconduct, the IDA panel found that Michaels engaged in conduct that was unbecoming and detrimental to the public interest, contrary to IDA By-law 29.1. The IDA panel found that Michaels:
- a. transacted securities trades off-book,
 - b. traded securities he was not registered to sell,
 - c. entered into personal financial dealings with clients, and
 - d. maintained an account at another member firm without informing his employer.
- ¶ 11 Most important, for the purposes of this review, the IDA panel also found that Michaels attempted to conceal information during the course of an IDA investigation, misled IDA staff about facts reasonably required for the purposes of

2007 BCSECCOM 775

its investigation, and attempted to frustrate the IDA's investigation, contrary to IDA By-law 19.6.

- ¶ 12 The IDA panel prohibited Michaels from applying for registration as an approved person for two months, required him to re-write the Conduct and Practices Handbook examination before making that application, ordered a period of close supervision for six months after becoming registered, and imposed fines and costs of \$60,000.

Issue

- ¶ 13 The IDA is asking us to review only the portion of the IDA panel decision that imposed the two-month prohibition. It wants us to vary the decision by banning Michaels from the industry permanently. The only grounds on which the IDA asks us to so vary the IDA panel decision is that the IDA panel did not give proper weight to Michaels' conduct that resulted in his contravention of IDA By-law 19.6.
- ¶ 14 The IDA says that by not giving proper weight to Michaels' hampering the IDA investigation into the Landstar matter, the IDA panel failed to give meaningful consideration to the principle of general deterrence, and that its decision failed to protect the public interest.
- ¶ 15 Michaels says that the IDA panel's decision does not involve any of the factors listed in Policy 15-601 *Hearings* that would lead the Commission to interfere in an IDA decision, and that we should confirm the panel's decision.

Analysis

- ¶ 16 On a hearing and review under section 28 of the Act, the Commission may confirm or vary the decision under review, or make another decision it considers proper: section 165(4).
- ¶ 17 The Commission's standard for reviewing decisions of a self regulatory body like the IDA is set out in section 5.9(a) of BC Policy 15-601 as follows:

5.9(a) The Commission does not provide parties with a second opinion on a matter decided by an SRO. If the decision under review is reasonable and was made in accordance with the law, the evidence, and the public interest, the Commission is generally reluctant to interfere simply because it might have made a different decision in the circumstances. For this reason, generally, the person requesting the review presents a case for having the decision revoked or varied and the SRO responds to that case.

2007 BCSECCOM 775

In these circumstances, the Commission generally confirms the decision of the SRO, unless

- the SRO has made an error in law
- the SRO has overlooked material evidence
- new and compelling evidence is presented to the Commission or
- the Commission's view of the public interest is different from the SRO's.

¶ 18 The IDA argues that a two-month prohibition is inadequate “to deter others from engaging in similar misconduct and improving the overall business standards in the securities industry.” It says that the standard “must be that there is zero tolerance for deception.”

¶ 19 This position is not supported by the IDA's own Disciplinary Sanction Guidelines. Those Guidelines say this about permanent bans:

A permanent ban from approval of an individual . . . is a severe economic penalty and should generally be reserved for cases where:

- a. The public itself has been abused;
- b. Where it is clear that a respondent's conduct is indicative of a resistance to governance;
- c. The misconduct has an element of criminal or quasi-criminal activity; or
- d. There is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole.

¶ 20 The statement in the Guidelines that a permanent ban “is a severe economic penalty and should generally be reserved” for certain circumstances shows that the IDA does not, in fact, have a “zero tolerance” policy for deception.

¶ 21 The IDA also cited various authorities involving contraventions of IDA By-law 19.6, or other instances of hampering investigations by securities regulators, that resulted in suspensions much longer than the two-month prohibition, some permanent. However, all of these cases involved other serious misconduct as well. The IDA says that conduct that is deceptive or otherwise hampers an investigation is so serious that we ought to conclude that in all these cases it was that conduct that was the primary reason for the significant suspensions.

¶ 22 However, the decisions themselves do not say that. They are cases involving serious misconduct, including deception, which then go on to impose an array of sanctions to address all of the misconduct, including significant suspensions. In

2007 BCSECCOM 775

our opinion, they do not support the proposition that any deception must necessarily invoke a permanent ban from the industry.

- ¶ 23 In making its decision, the IDA panel considered the IDA's Disciplinary Sanction Guidelines as a whole. It also considered the cases cited to us by the IDA. Having done so, the panel imposed a package of sanctions that included the two-month prohibition.
- ¶ 24 In our opinion, the IDA panel considered the facts before it and applied the relevant authorities appropriately in the public interest.
- ¶ 25 In presenting the IDA's submissions in the hearing, counsel for the IDA said "there are no other cases that I could find involving a failure to co-operate, whether non-co-operation or deception, where the suspension has been as low as two months."
- ¶ 26 In response, in the hearing, we referred IDA counsel to the July 20, 2007 decision of this commission in *Johnson* 2007 BCSECCOM 437. In doing so, we noted that it was curious, given that the IDA did not cite the case, that paragraph 52 of the IDA's statement of points quotes word for word and at length paragraphs 29 and 30 of *Johnson*. We also asked the parties to provide supplementary submissions on the relevance of *Johnson* to this case, which they did.
- ¶ 27 *Johnson* knowingly accepted trading instructions on an account without proper authorization, and failed to exercise due diligence, contrary to IDA rules. He also gave untrue answers under oath at two separate compelled interviews with commission investigators, contrary to section 168.1 of the Act. The commission suspended *Johnson*'s registration for two months, ordered a period of close supervision for six months after the suspension, and imposed an administrative penalty of \$68,000.
- ¶ 28 In our opinion, the penalty imposed on *Michaels* by the IDA panel was within the range of penalties appropriate in the circumstances.
- ¶ 29 We find that the IDA panel's decision is consistent with the public interest.

2007 BCSECCOM 775

Decision

¶ 30 We therefore confirm the IDA panel's decision.

¶ 31 December 21, 2007

¶ 32 **For the Commission**

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner

Suzanne K. Wiltshire
Commissioner