2009 BCSECCOM 192

Golden Capital Securities Ltd.
Investment Industry Regulatory Organization of Canada
(formerly 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	March 13, 2009	
Date of Decision	April 9, 2009	

Appearing

Roger D. McConchie Alan McConchie	For Golden Capital Securities Ltd.
Robert W. Cooper Joelle Walker	For the Investment Industry Regulatory Organization of Canada
Bronwyn Turner	For the Executive Director

Decision

I Introduction

¶ 1 This is a hearing and review under section 28 of the *Securities Act*, RSBC 1996, c. 418 of three decisions of a hearing panel of the Pacific District Council of the Investment Dealers Association of Canada relating to IDA member Golden Capital Securities Ltd.

¶ 2 After the events relevant to this hearing and review occurred, the IDA merged with Market Regulation Services Inc. The name of the merged entity is the Investment Industry Regulatory Organization of Canada. We refer to the IDA as IIROC, the acronym for the name of the merged organization.

¶ 3 Summarizing chronologically the three panel decisions under review, the first decision found that Golden Capital contravened paragraph 19.6 of IIROC By-law 19 by withholding information reasonably required for the purpose of an IIROC investigation. The second decision established a procedure to deal with

documents relating to the investigation that are subject to claims of solicitor-client privilege. The third decision imposed penalties and costs.

¶ 4 Golden Capital asks that we set aside all three decisions.

II Background

¶ 5 In June and July 2006 Commission staff provided information to IIROC staff about the handling of some investment accounts by three employees at Golden Capital. All of the employees were registered under the Act and were "approved persons" under IIROC rules. The Commission suspected that the employees had contravened the Know Your Client rule by failing to identify the beneficial owners of securities being traded through the accounts.

¶ 6 IIROC staff started its own investigation. Seeking to establish the identities of the beneficial owners, IIROC staff requested information from Golden Capital, which Golden Capital provided. None of the information requests resulted in information that identified the beneficial owners of the securities being traded in the accounts.

¶ 7 IIROC staff believed that information identifying the beneficial owners would likely exist on the hard drives of the computers used by the three Golden Capital employees. IIROC staff informed Golden Capital of their intention to take mirror images of the hard drives.

¶ 8 Golden Capital expressed concern that records on the hard drives might be subject to solicitor-client privilege, might be not relevant to the investigation, or might be private in nature. IIROC staff agreed to give Golden Capital and the employees an opportunity to identify records that may be subject to claims of solicitor-client privilege. IIROC staff refused to deal with any claims based on relevance or privacy and referred Golden Capital to *Union Securities Ltd.* [2005] IDACD No. 51 – a case in which an IIROC panel found that a member contravened paragraph 19.6 by refusing to provide IIROC with records from a computer hard drive used by the member's employee.

¶ 9 Golden Capital cooperated with the mirror-imaging of the hard drives. A third-party consultant mirror-imaged the drives in November 2006.

¶ 10 In January 2007 IIROC and Golden Capital made an agreement on the process for dealing with records subject to claims of solicitor-client privilege. Under that agreement, IIROC staff would not access the records on the hard drives directly but instead would provide the consultant with search terms (not to be disclosed to Golden Capital and the employees) that the consultant would use to identify the

records IIROC staff would review for the purposes of its investigation. The consultant would then provide copies of the records so identified to the respective counsel for Golden Capital and the employees, who would then identify the records over which they wished to claim privilege. Copies of the balance of the records would be given to IIROC staff.

¶ 11 Once a record was subject to a claim of privilege under that process, the party claiming privilege would give IIROC staff information sufficient to allow it to assess the claim. If IIROC wished to contest the claim of privilege, the party claiming privilege would provide a copy to the IIROC panel for a determination of whether privilege applied.

¶ 12 Between March 7 and April 3, 2007 the consultant provided Golden Capital with copies of the records identified by IIROC staff's search terms. Golden Capital was given until April 18 to identify the records, if any, over which it wished to claim privilege.

¶ 13 On April 18, 2007 Golden Capital told IIROC staff that it would not comply with the January 2007 agreement. It said the search terms used by IIROC staff "must have been too broad" because they generated too many records, which included records clearly not relevant to the investigation and private records of the three employees. Golden Capital took the position that this showed IIROC was not acting reasonably in conducting its investigation.

¶ 14 On May 28, 2007 IIROC staff issued a notice of hearing alleging Golden Capital's contravention of paragraph 19.6 of By-law 19.

¶ 15 On November 26, 2007 the IIROC panel found that Golden Capital contravened paragraph 19.6.

¶ 16 In that decision on liability, the IIROC panel contemplated the holding of a second hearing to deal with two issues: how to handle documents subject to a claim of solicitor-client privilege, and the penalties and costs to be imposed as a consequence of its finding on liability.

¶ 17 That hearing convened on December 20, 2007, but Golden Capital was prepared to make submissions only on the issue of privileged documents. On January 7, 2008, the IIROC panel issued a ruling directing the parties to deal with documents subject to claims of solicitor-client privilege in a manner substantially the same as the terms of the parties' January 2007 agreement. Paragraph 8 of the ruling provides that in any application by IIROC staff to contest a privilege claim,

Golden Capital "shall be entitled to challenge the jurisdiction of the hearing panel to conduct such a review."

¶ 18 After the privilege ruling, Golden Capital reviewed the documents on the list generated by the search terms, identified those over which it wished to claim solicitor-client privilege, and provided that information to the consultant. The consultant then provided IIROC staff with access to the balance of the documents. To date, IIROC has not contested any of the privilege claims.

¶ 19 On March 12, 2008 the IIROC panel heard submissions on penalty and on April 19 ordered Golden Capital to pay a fine of $75,000 and costs of $76,760.

III Issues

¶ 20 Golden Capital says the IIROC panel's decisions should be set aside, because:

1. Paragraph 19.6 of By-law 19 does not entitle IIROC to "obtain, access or retain" the mirror images of the hard drives, because they contain information that is not relevant to the investigation and private in nature. Golden Capital says the onus is on IIROC to demonstrate that the documents it seeks are relevant and reasonably necessary for the investigation, and that it has not done so.
2. The panel does not have the jurisdiction to determine issues of solicitor-client privilege.
3. The penalties and costs the panel imposed on Golden Capital are grossly in excess of any sum that might fairly and reasonably be awarded in the circumstances.

¶ 21 IIROC says that the panel's decisions do not involve any of the factors listed in Policy 15-601 *Hearings* that would lead the Commission to interfere in an IIROC decision, and that we should confirm the panel's decisions.

IV Analysis

A Commission's authority and standard of review

¶ 22 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).

¶ 23 The Commission's standard for reviewing decisions of a self regulatory body like IIROC 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.
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> 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.

B The privilege decision

¶ 24 In our opinion, there is no reason for us to review the IIROC panel's decision relating to privileged documents. To begin with, the decision makes no final determination about whether the panel has the jurisdiction to determine privilege. To the contrary, it gives Golden Capital the right to challenge the panel's jurisdiction to do that.

¶ 25 Moreover, the effect of the decision is hypothetical. In the year or so that IIROC has known which documents are subject to privilege claims, it has not sought to contest any of those claims. The issue is moot until IIROC makes an application contesting a claim of privilege, the panel considers submissions on its jurisdiction, and makes a decision at least about that.

¶ 26 Finally, the decision about privilege has nothing to do with the IIROC panel's decision on liability, which it made about two months before the privilege decision, nor with the penalty decision. The liability decision is not based on any issues involving the treatment of privileged documents, and the penalty decision is based solely on the panel's findings in the liability decision.

¶ 27 There is therefore no substantive decision on the privilege issue for us to review.

C The liability decision

¶ 28 IIROC By-law 19 deals with the investigation of members. These are the relevant excerpts:

> 19.1 [IIROC staff] . . . shall make such . . . investigations into the conduct, business or affairs of any Member . . . or employee of a

> Member . . . as [they consider] necessary or desirable in connection with any matter relating to compliance by such person with . . . the By-laws . . . of the Association . . . .
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> . . .
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> 19.5 For the purpose of any . . . investigation pursuant to this By-law 19, a Member . . . may be required by [IIROC staff]:
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> . . .
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> (b) To produce for inspection and provide copies of any books, records, accounts and documents, that are in the possession or control of the Member . . . that the Association determines may be relevant to a matter under . . . investigation and such information, books, record and documents shall be provided in such manner and form, including electronically, as may be required by the Association;
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> . . .
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> . . . Any person subject to an investigation conducted pursuant to this By-law 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. . . .
>
> 19.6 For the purpose of any . . . investigation pursuant to this By-law 19, [IIROC staff] shall be entitled to free access to, and to make and retain copies of, all books of account, securities, cash, documents, bank accounts, vouchers, correspondence and record of every description of the person concerned, and no such person shall withhold, destroy or conceal any information, documents or thing reasonably required for the purpose of such . . . investigation.

Relevance and reasonableness

¶ 29 As noted by the panel in the case before us, this matter "goes to the very nature" of how IIROC conducts investigations.

¶ 30 The panel followed earlier IIROC decisions purporting to establish the principle that IIROC has a duty to act reasonably in initiating and conducting an investigation under By-law 19, citing *Derivative Services Inc.* (1999) IDACD No. 29.

¶ 31 That case was about whether Derivative Services Inc. had contravened By-law 19.6 by failing to provide information to IIROC staff. In a preliminary ruling (see *Derivative Services Inc.* (1999) 22 OSCB 5543), the panel said (at page 403):

> In his factum and oral argument, the Association's counsel conceded that there are necessarily limitations on the Association staff's authority to initiate an investigation. He accepted that the staff's investigative powers can only be invoked in good faith, for a proper purpose, and reasonably . . . .
> . . .
> The former standards, good faith and proper purpose, are implicit in paragraph 19.1 of the Association's By-laws . . . . The District Council accepts that the authority to conduct an investigation under By-law 19 must also be exercised reasonably.

¶ 32 We agree that IIROC has a duty to act in good faith. It is fundamental to the rule of law that those with legislative powers to investigate must exercise those powers in good faith. IIROC's investigative powers are contractual, not statutory, but it is a recognized self-regulatory organization under the Act. Under section 26(1) of the Act, IIROC has the duty to regulate its members in accordance with its By-laws and rules. Implicit in that obligation is the duty to exercise its regulatory powers, including its powers of investigation, in good faith.

¶ 33 In the decision on the merits, the *Derivative Services* panel considered whether IIROC had properly initiated and conducted its investigation under By-law 19, and expanded further the scope of the obligation to act reasonably:

> [page 3] In its Third Ruling the District Council accepted that the Association's authority to conduct an investigation under By-law 19 must be exercised reasonably . . . . This reasonableness standard governs the initiation and conduct of an investigation, including the information on which it is based and the nature of the examination or investigation considered "necessary or desirable" by the Association's staff, as is made clear in the obligation to produce documents that are "reasonably required" (para. 19.6). In short, there must be a reasonable basis for the initiation of an investigation and for the steps taken to pursue it.
> . . .
> [page 9] . . . Although [By-law 19] does not expressly so require, the information received by the Association must provide a reasonable basis for opening an investigation, as is stated in the

> District Council's Third Ruling . . . and as was accepted by counsel for the Association and for the respondents.
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> The consequence of this conclusion implicitly accepted by both counsel is that the respondents were not required to comply with [IIROC's] request under paragraph 19.5, if there was not a reasonable basis for the investigation.

¶ 34 In *Union Securities* [2005] IDACD No. 51 IIROC alleged that Union Securities Ltd. contravened paragraph 19.6 by refusing to provide IIROC with records from a computer hard drive used by a Union employee. The *Union Securities* panel accepted the concept of reasonableness, saying (at paragraph 6) that "investigations must be instituted in good faith and reasonably", citing *Derivative Services*, and "must be conducted reasonably".

¶ 35 The panel in the case before us followed *Derivative Services* and *Union Securities*. It said (at p. 9):

> Read together, By-laws 19.5 and 19.6 require that Association staff proceed in a reasonable manner when during the course of an investigation they wish to access information in the possession of a member or a registrant. The indices demonstrating that Association staff have proceeded in a reasonable manner include the following:
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> 1. A determination is made that it is reasonable to begin an investigation into a particular matter;
> 2. The party from whom the information is sought is given notice in writing that this investigation has begun, such notice to contain sufficient detail that the party to whom it is directed has a reasonable understanding of the matter under investigation;
> 3. In accessing the sought after information, the Association staff must proceed in a reasonable manner and one which will have a minimal impact upon the activities and operations of the party from whom the information is sought;
> 4. The information is reasonably required given the purpose and scope of the investigation being undertaken; and
> 5. A reasonable procedure is established to deal with claims of solicitor-client privilege.

¶ 36 There are no words in By-law 19 to provide a basis for concluding that IIROC's authority to conduct an investigation must be exercised reasonably, or that a reasonableness standard applies to the initiation and conduct of IIROC investigations generally. Neither do any of the IIROC cases cited to us identify any authority for those propositions.

¶ 37 How IIROC panels came to their conclusions about a reasonableness standard is not clear, although it appears that the *Derivative Services* panel simply accepted counsel's submissions to that effect. This circumstance was then compounded by an apparent misreading of paragraph 19.6, evident from the statements in IIROC decisions that the information requested of members by IIROC staff must be "reasonably required".

¶ 38 Paragraph 19.6 contains two related but separate thoughts. The first deals with IIROC access to relevant information. This is reflected in the clause "For the purposes of any . . . investigation, [IIROC staff] shall be entitled to free access to . . . all books of account, securities, cash, documents, bank accounts, vouchers, correspondence and record of every description of the person concerned."

¶ 39 According to the *Union Securities* decision, paragraph 19.6 entitles the Association to free access to information "reasonably required" for the purpose of the investigation. This is a misreading of the paragraph – the words "reasonably required" do not appear in the clause entitling IIROC staff free access.

¶ 40 This brings us to the second thought in paragraph 19.6, which deals with the obligation of members not to obstruct IIROC investigations. This is reflected in the words "and no such person shall withhold, destroy or conceal any information, documents or thing reasonably required for the purpose of such . . . investigation." Here the words "reasonably required" do appear, and they modify only the items that the person must not withhold, destroy or conceal. They do not modify the earlier clause entitling IIROC staff to free access.

¶ 41 A similar misreading has arisen in the interpretation by IIROC panels of paragraph 19.5. The *Union Securities* panel, referring to earlier IIROC decisions, noted that because investigations under By-law 19 "must be conducted reasonably", the IIROC had to act reasonably in determining whether the information it sought under paragraph 19.5 was relevant.

¶ 42 Paragraph 19.5(b) says that a member must provide IIROC with information "that the Association determines *may* be relevant to a matter under . . . investigation." There is nothing in paragraph 19.5(b) that imposes any reasonableness standard on the determination of relevance.

¶ 43 As a practical matter, IIROC panels have applied the reasonableness standard so that it requires the IIROC to do no more than what it is already required to do as a result of its duty to act in good faith (or, when it comes to dealing appropriately with claims of solicitor-client privilege, to act in accordance with the rules of natural justice).

¶ 44 *Union Securities* held (at paragraph 31) that, in applying the reasonableness standard in paragraph 19.5(b), the threshold for establishing relevance "is not high", and that the determination of relevance will be reasonable "if the items demanded might possibly be relevant to the matters under investigation." This interpretation effectively removes reasonableness as a factor in determining relevance.

¶ 45 IIROC panels have also correctly held that the discretion of determining relevance under paragraph 19.5(b) rests solely with IIROC – there is no role in this determination for the person under investigation.

¶ 46 Consider, for example, this excerpt from *Union Securities*:

> 36 The IIROC's right to investigate the activities of its members and their employees arises out of its obligation to protect the public interest by ensuring that there is fair trading in securities. There are good reasons why, as between it and a member, it should have the right to determine what is relevant to an investigation.
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> . . .
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> 39 . . . it would seem quite unreasonable to allow the subject of an investigation even to participate in the determination of what is relevant to an investigation into its activities. One does not set a fox, even an alleged one, on guard of a henhouse.

¶ 47 Turning to the criteria identified by the panel in the case before us for testing reasonableness in IIROC investigations, the first is the reasonableness of the decision to start an investigation. *Derivative Services* held (at page 10) that IIROC can meet the reasonableness standard in initiating an investigation if it has received information that "indicates the possibility of a violation of its By-laws or other rules." This is, appropriately, a very low threshold and is nothing more than is required under a duty to act in good faith.

¶ 48 The second criterion – whether IIROC staff gave notice of the investigation is surprising on its face. It is in the nature of investigations that their effectiveness is

often hampered if the nature, or even the existence, of the investigation is disclosed. However, this criterion does not arise from any obligation to act reasonably – it is specifically required by paragraph 19.5. Notice is not an issue in this case, so we need not discuss this criterion further, except to mention that *Union Securities* (appropriately, in our opinion) construed the paragraph 19.5 notice requirement very narrowly.

¶ 49 The third criterion deals with disruption of the business activities of the person from whom the information is sought. This is another aspect of the duty to act in good faith. The language used by the panel in this criterion is unfortunately broad, appearing to require the IIROC to proceed in a manner that "*will* have a minimal impact". There is nothing in By-law 19 to support that interpretation. Although IIROC, to meet its duty to act in good faith, must minimize disruption of business activities, some disruption may be unavoidable if the aims of the investigation are to be met. In some circumstances, the disruption could be considerable, but so long as IIROC is otherwise acting in good faith, disruption alone is not sufficient to impugn an investigation. Whether IIROC acted reasonably could be relevant in determining whether it acted in good faith, but the point is that the fundamental obligation is to act in good faith, not to act reasonably.

¶ 50 The fourth criterion is whether the information IROC seeks is reasonably required. *Union Securities* interpreted the scope of person's right to withhold information under paragraph 19.6 as follows:

> 29 . . . We interpret the words 'reasonably required', for the purposes of the investigation, to be that information which the IDA has determined may be relevant to the investigation. The clear meaning of the language of the two paragraphs of By-law 19 is that once the IDA has determined possible relevance, it is entitled to free access to it.

¶ 51 We find that IIROC has no obligation to act reasonably in making any decisions in connection with the initiation or conduct of an investigation under By-law 19. Its only duty is to act in good faith.

¶ 52 Accordingly, there is no need to "read together" paragraphs 19.5 and 19.6 for them to work properly. Paragraph 19.5(b) gives IIROC power to order an IIROC member to produce information relevant to an investigation. IIROC has sole discretion to determine what is relevant.

¶ 53 Paragraph 19.6 entitles IIROC to free access to information, including "records of every description" in the possession of a member that IIROC considers may be

relevant. Once IIROC considers information relevant, it is entitled to free access to it. Paragraph 19.6 prohibits IIROC members from withholding "information, documents and things" reasonably required for an investigation. Anything that IIROC has determined is relevant under paragraph 19.5(b) is, by definition, reasonably required for the investigation and cannot be withheld.

¶ 54 The notion that IIROC has an obligation to act reasonably in addition to its duty to act in good faith is also contrary to the public interest. The duty to act in good faith is long-established, well-understood, and adequately protects the interests of persons under investigation. It is the only duty that applies to Commission investigations – investigations that can lead to far more severe sanctions than those IIROC can impose.

¶ 55 It is in the public interest that IIROC be able to pursue investigations in good faith without having to consider whether every decision it makes in the course of initiating and conducting an investigation will be considered "reasonable" when viewed after the fact.

¶ 56 This case is itself a demonstration of the problems associated with introducing a reasonableness standard to the conduct of investigations. When the IIROC search terms produced what Golden Capital considered to be too many documents to review, and inevitably contained irrelevant and private documents, Golden Capital felt itself entitled to deny IIROC access to the mirror-imaged records. It took the position that IIROC had the onus of proving that it was conducting the investigation reasonably, and that it acted reasonably in determining which records were relevant. IIROC having failed to do so to Golden Capital's satisfaction, Golden Capital decided it was justified in refusing access to the mirror-imaged records.

¶ 57 The ultimate outcome of this line of reasoning is that IIROC cannot gain the free access to records to which it is entitled until agreement is reached with the person who has possession of the records (and who quite possibly is the subject of the investigation) about whether IIROC has made reasonable decisions about what was relevant, and has otherwise conducted its investigation reasonably. What is this, if it is not, in the words of the *Union Securities* panel, setting a fox, even if only an alleged one, on guard of a henhouse? It is hard to imagine an interpretation more crippling to IIROC's power to investigate effectively and efficiently in the public interest.

Expectation of privacy

¶ 58 Most of the authorities cited by Golden Capital are not relevant. Many relate to the rules of production and access in the context of private litigation, which has nothing to do with investigations under securities laws or by IIROC.

¶ 59 The law is clear that firms and individuals in the business of trading in securities have an extremely low expectation of privacy over records and things connected to their business.

¶ 60 In *British Columbia Securities Commission v Branch* [1995] 2 SCR 3, Justice L'Heureux-Dube, in concurring reasons, said:

> 77 . . . although activity in the securities sphere is of immense economic value to society generally, it must be remembered that participants engage in this licenced activity of their own volition and ultimately for their own profit. In return for permitting persons to obtain the fruits of participation in this industry, society requires that market participants also undertake certain corresponding obligations in order to safeguard the public welfare and trust. Participants must conform with extensive regulations and requirements set out by the provincial securities commissions. Many of these requirements are fundamental to maintaining an efficient, competitive market environment in a context where imperfect information is endemic. They are also essential to prevent and deter abuses of such asymmetries of information, and therefore maintain the integrity of the securities system and protect the public interest.
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> . . .
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> 82 . . . Although such powers of investigation may not always be necessary in regulatory contexts, I conclude that they are indeed necessary in the present instance, given the profound asymmetry of information facing securities regulators, the close relationship between such investigatory powers and the obligations voluntarily undertaken by those participating in this regulated activity, and the lack of less intrusive alternative means to investigate and deter market irregularities and improper conduct by market players.

¶ 61 These principles apply equally to investigations conducted under IIROC By-laws.

¶ 62 The appropriate expectation of privacy was well-articulated in *Union*:

> 22 . . . the IDA is a self-regulating voluntary organization. Anyone who is member, or is employed by a member, is explicitly, or by necessary implication, bound by the constitution and the by-laws of the Association. If a person wants to enter the securities business, he/she must agree to be bound by them.
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> 23 . . . Bylaw 19 is, to adopt language from *British Columbia Securities Commission v Branch* [1995] 2 SCR 3, the primary vehicle for the effective investigation and deterrence of insider trading, stock manipulation and other trading practices which are contrary to the public interest . . .
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> 24 . . . persons working in the business of trading in securities can have only a low expectation of privacy in documents or records which are produced by them during the course of their business activities. This has been pointed out by the Supreme Court of Canada in *British Columbia Securities Commission v Branch, supra.* At para. 64 of that decision, the following appears:
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> > 'We have already mentioned that in a highly regulated industry, such as the securities market, the individual is aware, and accepts, justifiable state intrusions. All those who enter into this market know or are deemed to know the rules of the game. As such, an individual engaging in such activity has a low expectation of privacy in business records. In fact, there will instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed.'
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> . . .
> 35 . . . It is now well known that records are kept of communications generated by computer. [The employee] must or ought to have known, when he used his employer's computer for personal purposes, that his employer, or persons authorized by it, would be able to access the records of that activity. He must, as a Registered Representative, be taken to have known that the IDA had wide powers to examine material and records maintained by its members. When he used his employer's facilities for private purposes, he had to have known that what he did would no longer be completely private. In those

> circumstances, his reasonable expectation of privacy must be considered to be reduced almost to nil. Doubtless, this case will be a cautionary tale for people who use their employer's computer for private purposes.
> . . .
> 41 In our opinion, the records sought by the . . . demand are business records. They were clearly relevant to the investigation. As such they were reasonably required for the purposes of the investigation. The fact that they may contain some information which ultimately turns out to be irrelevant and/or personal cannot detract from the fact that, as business records, they are relevant and required.

¶ 63 Golden Capital objects to being required to produce the hard drives, on the basis that hard drives are not among the list of items a Member is required to produce under paragraph 19.5(b). We disagree. In our opinion, the requirement in that paragraph that the member provide "information, books, records and documents . . . in such manner and form, including electronically, as may be required by the Association" are broad enough to include computer hard drives. In addition, paragraph 19.6 entitles IIROC to records "of every description." Accordingly, Golden Capital was prohibited, under paragraph 19.6, from withholding from the IIROC "any information, document or thing" reasonably required for the investigation. A hard drive is a thing included in the list of items required to be produced under paragraph 19.5(b) and to which IIROC has free access under paragraph 19.6.

Conclusion

¶ 64 We find that in its decision on liability the panel erred in law in finding that IIROC has a duty to act reasonably in the course of an investigation, other than to the extent necessary to meet its duty to act in good faith. However, we do not fault the panel for that error – it was simply following the precedents of earlier IIROC decisions.

¶ 65 In light of our finding that IIROC has no duty to act reasonably, Golden Capital's submissions that IIROC failed to prove it acted reasonably are not relevant. However, the panel considered those submissions in applying the reasonableness standard, and we find that, had that been the standard, the panel correctly concluded, for the reasons it stated, that IIROC acted reasonably.

¶ 66 There was no suggestion in the submissions, nor did we find any evidence, that IIROC failed to act in good faith.

D The penalty decision

¶ 67 Golden Capital says that the panel's decision on penalties and costs is "grossly in excess of any sum that might reasonably be awarded in the circumstances."

¶ 68 Golden Capital says that it acted reasonably and in good faith. It says it was merely seeking to protect from disclosure documents that were subject to claims of solicitor-client privilege, were irrelevant, or were private in nature.

¶ 69 Golden Capital made no specific submissions about what penalties would be appropriate. We assume its position, as it was in the penalty hearing before the IIROC panel, is that a reprimand would be sufficient, or, alternatively, any fine should be "modest".

¶ 70 *Derivative Services* held that the failure by an IIROC member to cooperate with an investigation is a serious contravention of IIROC By-laws (see [2000] IDACD No. 26 at page 12):

> The District Council views a refusal to comply with a request for information pursuant to an Association investigation as a serious matter. . . . Full cooperation with a request under [By-law 19] is necessary if the Association is to be able to fulfil its self-regulatory supervisory functions with respect to its members and their approved persons. Failure to provide information requested in an investigation undermines the integrity of the self-regulatory system and the effectiveness of its operations.
> . . .
> A failure to cooperate, even if based on a matter of principle, strikes at the very integrity of the Association's duty and ability to police itself. For that reason, the seriousness of the offence mitigates against a new reprimand. The penalty must be a significant one.

¶ 71 In considering the matter of penalty in the case before us, the IIROC panel considered and applied IIROC's Disciplinary Sanction Guidelines to the facts of the case and its findings. It noted that Golden Capital had a disciplinary history, intended to act in the manner that the panel found to be a contravention of By-law 19, failed completely to produce the mirror-imaged records when requested by IIROC staff, and delayed the investigation and increased its costs. It also noted that the information withheld was of central importance to the investigation. In our opinion, its conclusions on all these matters were reasonable.

¶ 72 The panel also rejected Golden Capital's submissions that it acted in good faith and on legal advice in challenging IIROC's authority under By-law 19. Referring to *Derivative Services*, the panel said:

> . . . it is clear that there was a conscious intention on the part of the Respondent to test the rules. With this test comes a concomitant acceptance of a risk by the Respondent that penalties will follow if its position is not sustained.

¶ 73 We agree. There was no new legal ground to be tilled on the issues around IIROC's entitlement to the information it was seeking from Golden Capital. All of the issues that were relevant in this case were addressed and settled in *Union Securities*, a case IIROC provided to Golden Capital at the outset of the dispute over access.

¶ 74 The only issue that *Union Securities* did not deal with was the application of the *Personal Information Protection and Electronic Documents* Act, SC 2000, c. 5 and the *Personal Information Protection Act*, SBC 2003, c. 63. However, there are no real issues to be argued here. The federal legislation permits the disclosure of information when required to comply with "an order made by a court, person or body with jurisdiction to compel the production of information." IIROC has that jurisdiction under paragraph 19.6.

¶ 75 The British Columbia legislation specifically permits the disclosure of information for investigations related to trading in securities by organizations recognized by the Commission, of which IIROC is one.

¶ 76 In determining the amount of the penalty, the panel noted that the minimum suggested fine in IIROC's Disciplinary Sanction Guidelines is $50,000 for a contravention of paragraph 19.6. The panel then weighed the aggravating and mitigating factors, considered appropriate precedents, and set the fine at $75,000. In our opinion, the penalty it imposed and the process it followed in setting it were reasonable. Indeed, we would have considered a higher penalty reasonable and appropriate in the circumstances of this case.

¶ 77 In determining costs, the panel considered the costs submitted by IIROC staff, and reduced them for the reasons described in the decision. In our opinion, the costs it imposed and the process it followed in determining them were reasonable.

V Decision

¶ 78 As stated in BC Policy 15-601 the Commission generally confirms IIROC decisions unless one or more of the criteria in section 5.9(a) of the Policy apply. The two criteria relevant in this case are whether IIROC erred in law and whether the Commission's view of the public interest differs from IIROC's.

¶ 79 Although the IIROC panel erred in law in applying the reasonableness standard in its liability decision, we find its decision was otherwise made in accordance with the law, the evidence and the public interest.

¶ 80 None of the section 5.9(a) criteria apply to the panel's penalty decision. We find its decision was made in accordance with the law, the evidence and the public interest.

¶ 81 We confirm the IIROC panel's liability and penalty decisions. As noted above, it is not necessary to review the panel's privilege decision.April 9, 2009

¶ 82 **For the Commission**

Brent W. Aitken
Vice Chair

David J. Smith
Commissioner

Suzanne K. Wiltshire
Commissioner