

BRITISH COLUMBIA SECURITIES COMMISSION  
*Securities Act, RSBC 1996, c. 418*

Citation: Re Lower, 2015 BCSECCOM 433

Date: 20151203

**Scott Philip Lower and  
Investment Industry Regulatory Organization of Canada**

<b>Panel</b>	George C. Glover, Jr. Judith Downes Don Rowlatt	Commissioner Commissioner Commissioner
<b>Hearing date</b>	November 20, 2015	
<b>Date of Ruling</b>	November 20, 2015	
<b>Date of Reasons</b>	December 3, 2015	
<b>Appearing</b>		
Lorne Herlin	For IIROC	
Scott Philip Lower	For himself	

**Reasons for Decision**

**I. Introduction**

- [1] On August 12, 2009, the Investment Industry Regulatory Organization of Canada (IIROC) issued a decision (IIROC Decision) of an IIROC Hearing Panel which found that Scott Philip Lower breached IIROC Dealer Member Rule 19.5 and imposed sanctions on him.
- [2] On August 15, 2015, Lower applied to the Commission for a Hearing and Review of the IIROC Decision.
- [3] On November 2, 2015, IIROC applied to the Commission for an order that it refuse to hold a hearing and review of the IIROC Decision.
- [4] We heard IIROC's application on November 20, 2015. IIROC and Lower made written submissions on the application and made oral submissions at the hearing.
- [5] On November 20, 2015, we issued the following oral decision:

After considering the submissions of the parties on the application of IIROC that this Commission refuse Scott Philip Lower's request for a hearing and review of IIROC's August 12, 2009 decision and sanctions of Lower under IIROC Dealer Member Rule 19.5 (IIROC Decision), we have concluded that we must grant the order. Accordingly, the Commission declines to hold a hearing and review of the IIROC Decision on the basis that Lower's notice requesting a hearing and review of the IIROC Decision is out of time under sections 28(1) and 165(3) of the *Securities Act*, RSBC 1996, c. 418.

[6] These are the reasons for our decision in this matter.

## **II. Reasons for Decision**

### ***A. Background***

- [7] Lower began work in the investment industry in October, 1999 as a Registered Representative (approved person) under the regulatory supervision of the Investment Dealers Association (IDA). Upon the June 1, 2008 effective date of IIROC's assuming regulatory oversight of IDA approved persons, Lower became subject to the IIROC Dealer Member Rules.
- [8] On September 18, 2008, Lower was informed by IIROC that it had commenced an investigation into Lower's conduct.
- [9] By letter dated September 19, 2008, IIROC required Lower to attend a compelled interview under IIROC Dealer Member Rule 19.5 at which he would be required to give information and provide reports.
- [10] The compelled interview was eventually scheduled for November 12, 2008.
- [11] Lower did not attend the compelled interview.
- [12] By letter of April 23, 2009, IIROC informed Lower through his counsel that IIROC intended to commence disciplinary proceedings against him for contravention of IIROC Dealer Member Rule 19.5 because he had failed to attend his compelled interview on November 12, 2008.
- [13] The IIROC disciplinary hearing was scheduled for August 11, 2009. The hearing proceeded on that date but Lower failed to attend in person or by counsel.
- [14] The IIROC Hearing Panel reached the IIROC Decision on August 12, 2009. The IIROC Decision was released on September 1, 2009. The IIROC Decision found that Lower refused and/or failed to attend and give information in respect of an IIROC investigation into his conduct while he was an approved person, contrary to IIROC Dealer Member

Rule 19.5. The IIROC Hearing Panel imposed sanctions on Lower including a permanent ban on registration, a fine and costs.

- [15] IIROC notified Lower of the IIROC Decision by email dated September 1, 2009 to Lower's email address that had been provided to IIROC by Lower's counsel. This email contained a copy of the IIROC Decision. IIROC sent a further email to Lower on September 16, 2009 including a copy of the Notice that IIROC issued in respect of the IIROC Decision and an electronic link to the IIROC Decision.

***B. Position of the Parties***

- [16] IIROC essentially set out two grounds for its submissions on its application that we should refuse to grant Lower's application for a hearing and review of the IIROC Decision:
- (1) that Lower's application is out of time under sections 28(1) and 165(3) of the Act and that the Commission does not have the jurisdiction to extend the time period for filing an application for a hearing and review; but
  - (2) if we determine that we have the jurisdiction to extend the time for Lower's filing of his application for a hearing and review, we should not exercise our discretion to grant an extension.
- [17] Lower submitted numerous bases for his argument that we should allow a hearing and review of the IIROC Decision to be heard by the Commission on its merits.
- [18] On the first ground of the application of sections 28(1) and 165(3) of the Act to this matter, Lower argued that the time limit set out in section 165(3) did not apply to his application for a hearing and review. He also argued that, if we found that section 165(3) applied to this matter, we had jurisdiction to extend the time period in section 165(3) and that we should exercise our discretion in favour of allowing his application for a hearing and review to be heard on its merits.
- [19] Lower's submissions on the first ground essentially came down to what he said is the clear and unambiguous wording of section 165(3) of the Act; namely, that the section refers to the executive director sending notice of his decision to a person directly affected by his decision. The plain meaning, in Lower's submission, did not allow us to read in language applying the 30 day time period from the date on which IIROC sent notice of its decision to Lower.
- [20] Lower submitted that because section 165(3) did not apply to the IIROC Decision, his application for a hearing and review of the IIROC Decision was only subject to the general six year limitation period set out in the Act. He said he sent his application for a hearing and review of the IIROC Decision to the Commission within this six year period.

[21] At our hearing on IIROC’s application, we advised the parties that we would first hear submissions on IIROC’s first ground for its application. Depending on our decision on this ground, the other ground would either become moot or we would hear the parties’ submissions on it.

***C. Applicable Law***

[22] Section 27(1)(a) of the Act provides as follows:

- (1) If the commission considers it to be in the public interest, the commission may make any decision respecting the following:
  - (a) a bylaw, rule or other regulatory instrument or policy, or a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy, of a self-regulatory body, an exchange, a quotation and trade reporting system or a clearing agency;

[23] Section 28(1) of the Act provides as follows:

The executive director or a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self-regulatory body...may apply by notice to the commission for a hearing and review of the matter under Part 19, and section 165(3) to (8) applies.

[24] Section 165(3) of the Act provides as follows:

Except if otherwise expressly provided, any person directly affected by a decision of the executive director may, by notice in writing sent to the commission within 30 days after the date on which the executive director sent the notice of the decision to the person, request and be entitled to a hearing and a review of the decision of the executive director.

[25] Section 180(1) of the Act provides as follows:

Unless otherwise provided by this Act, prescribed by the regulations, or ordered by the commission or executive director, a record that under this Act is sent or is required to be sent must be

- (a) personally delivered,
- (b) mailed, or
- (c) transmitted by electronic means

to the person that under this Act is the intended recipient of the record.

[26] Section 44 of the *Interpretation Act*, RSBC 1996, c. 238 provides as follows:

If an enactment provides that another enactment applies, it applies with the necessary changes and so far as it is applicable.

[27] In addition, the *Interpretation Act* states that “enactment” means “an Act or a regulation or a portion of an Act or regulation.”

***D. Reasons for Decision***

[28] In order for IIROC to succeed in its application, first it must have established that it complied with section 165(3) in order to have triggered the 30 day time limit within which Lower was required to have filed his application for hearing and review of the IIROC Decision.

[29] In considering how sections 28(1) and 165(3) of the Act should be interpreted in this matter, we were guided by the well- established principle that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of [the legislature.]”<sup>1</sup>

[30] We were also guided by section 44 of the *Interpretation Act* which prescribes that a cross reference between enactments is to be read with the necessary changes.

[31] It is plain to us that when section 28(1) of the Act states that section 165 (3) to (8) applies to a decision and order of a self-regulatory body such as IIROC, the legislature intended section 165(3) to (8) to be applied *mutatis mutandis*, that is with the necessary changes, to the decision of the decision maker. In other words, in this case, “IIROC” should be substituted for “the executive director” in applying section 165(3). Otherwise, the cross-reference to section 165(3) to (8) for directions, decisions, orders or rulings of IIROC and the other entities described in section 28(1) who are not the executive director would be meaningless.

[32] Although section 165(3) on its face, refers expressly to decisions of the executive director, the words in section 28(1) “and section 165(3) to (8) applies” would be superfluous unless they were intended to apply to the decisions of the other entities referred to in section 28(1) such as IIROC. Thus, applying the statutory principle that words in an enactment should be given meaning and application, we concluded that sections 165(3) to (8) apply *mutatis mutandis* to directions, decisions, orders and rulings of such other entities. Specifically, the sending of notice of a decision by such an entity to a person directly affected by such decision triggers the 30 day period within which such person must file an application with the Commission requesting a hearing and review.

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<sup>1</sup> See, for example, *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54.

- [33] The only other issue relating to whether IIROC met all the requirements of section 165(3) was whether the notice of the IIROC Decision sent by IIROC to Lower within the 30 day time period limit complied with the requirements of section 165(3).
- [34] Section 180(1) of the Act assisted us in determining that IIROC's notice to Lower was validly "sent" to him as that section expressly authorizes electronic means such as email as a valid transmittal method for records required to be "sent" under the Act.
- [35] We were satisfied that the IIROC Decision was validly sent to Lower because:
- a. it was sent within the plain meaning of that term generally;
  - b. the emailed communication was a valid means of sending under section 180(1) of the Act; and
  - c. it was the method of communication with Lower specified by Lower's counsel.

Lower did not suggest that he had not received notice of the IIROC Decision or the IIROC Decision itself.

- [36] Thus, we find that notice of the IIROC Decision sent by IIROC to Lower met all of the requirements of section 165(3) and triggered the 30 day period within which Lower was required to apply to the Commission for a hearing and review of the IIROC Decision.
- [37] Given that IIROC sent a copy of the IIROC decision to Lower on September 1, 2009 and Lower did not apply to the Commission for a hearing and review of the IIROC decision until August 15, 2015, his application was clearly out of time under sections 28(1) and 165(3) of the Act.
- [38] The remaining issue under the first ground of IIROC's application is whether we have jurisdiction to extend the 30 day time period set out in section 165(3).
- [39] There is no express authority in the Act for the Commission to extend the time limit set out in section 165(3). As a statutory tribunal, this Commission's jurisdiction is limited to the authority granted to it by the legislature under its governing legislation.
- [40] A decision of this Commission on the question of the Commission's jurisdiction to extend the 30 day time period is *Dengin (Re)*, 1990 LNBCSC 219; [1990] BCSC Weekly Summary 36, where the Commission panel stated at page 5 of its decision: "It is clear that the Commission has no jurisdiction to extend the time for filing a notice requesting a hearing and review under s. 147(3) of the Act [the predecessor of section 165(3)], which, by virtue of section 15 of the Act [the predecessor of section 28(1)], applies to the Decision." We agree.

- [41] Following our hearing and the issuance of our oral Decision on November 20, 2015, Lower sent an email to the Commission Secretary and to IIROC requesting the panel to consider his additional submission that we have discretionary jurisdiction under section 27(1)(a) of the Act to grant him a hearing and review of the IIROC Decision notwithstanding that his application was out of time.
- [42] We did not need to consider the issue whether we had jurisdiction to vary our Decision based on Lower's additional submission given our conclusion below. Additionally, given that conclusion, we did not need to call upon IIROC to make submissions in response to Lower's additional submission.
- [43] In support of Lower's submission, he invited the panel to take guidance from the decision of the Vice-Chair of the Ontario Securities Commission in the *Matter of Mark McQuillen*, (2014) 37 OSCB 8454, in which the Vice-Chair of the OSC granted an exemption to McQuillen from the 30 day time period in the Ontario *Securities Act*, R.S.O.1990, c.S.5, as amended, (the Ontario Act) for filing an application for a hearing and review of decisions by Market Regulation Services Inc. and IIROC affecting McQuillen.
- [44] The circumstances in the *McQuillen* matter were substantially different from the circumstances in the Lower matter. More importantly, in granting McQuillen an exemption from the 30 day time period under the Ontario Act, the OSC Vice-Chair relied on section 147 of the Ontario Act which permits the OSC to exercise a general authority to grant exemptions "from any requirement of Ontario securities law." There is no comparable provision in our Act which affords the Commission such general authority to grant exemptions from any and all requirements of our Act.
- [45] Lower submitted that, assuming section 165(3) applies to the IIROC Decision, we have jurisdiction under section 27(1)(a) of our Act to extend the 30 day time period in section 165(3) and to exercise our discretion in favour of allowing his application for a hearing and review.
- [46] We do not agree that section 27(1)(a) gives us the jurisdiction to exercise discretion to change the 30 day time period in our Act by exempting Lower from the statutory imperative in section 165(3) that an application for a hearing and review of an IIROC decision must be sent to the Commission within 30 days after notice of that decision is sent to a person directly affected. Section 27(1)(a) cannot be read to permit the Commission to override the statutory 30 day time limit set out in section 165(3). It would be meaningless for the legislature to set out a statutory time limit if a Commission panel could simply set another time limit or grant an exemption at any time.
- [47] Accordingly, Lower's late submission did not affect our Decision.
- [48] As we concluded that:

- a. IIROC's notice to Lower of the IIROC Decision met all the requirements of section 165(3) of the Act;
- b. Lower did not apply for a hearing and review of the IIROC Decision within 30 days of the sending by IIROC of the IIROC Decision to him as required under sections 28(1) and section 165(3) of the Act; and
- c. we do not have jurisdiction to extend the time limit set out in section 165(3)

we declined to hold a hearing and review of the IIROC Decision.

[49] This disposed of IIROC's application on the first ground and made moot IIROC's second ground as well as the additional issues raised by the parties.

[50] By disposing of this matter on the basis that Lower's application for a hearing and review of the IIROC Decision was out of time, it was unnecessary for us to review in detail the circumstances giving rise to the IIROC investigation of Lower or the conduct of Lower that precipitated the IIROC investigation or the allegations relating to Lower's conduct. We express no opinion on those matters.

December 3, 2015

**For the Commission**

George C. Glover, Jr.  
Commissioner

Judith Downes  
Commissioner

Don Rowlett  
Commissioner