

# BRITISH COLUMBIA SECURITIES COMMISSION

*Securities Act*, RSBC 1996, c. 418

Citation: Re Smith, 2021 BCSECCOM 262

Date: 20210630

## **Kenneth Edward Smith**

<b>Panel</b>	Gordon Johnson Deborah Armour, QC Judith Downes	Vice Chair Commissioner Commissioner
<b>Hearing Date</b>	October 14, 2020	
<b>Submissions Completed</b>	November 13, 2020	
<b>Date of Findings</b>	June 30, 2021	
<b>Appearing</b>		
Deborah Flood	For the Executive Director	
Kenneth Edward Smith	For himself	

## **Findings**

### **I. Introduction**

- [1] This is the liability portion of a hearing under sections 161, 162 and 174 of the *Securities Act*, RSBC 1996, c. 418 (the Act). This proceeding was initiated by a Notice of Hearing (NOH) issued on February 24, 2020 (2020 BCSECCOM 61).
- [2] There are two distinct aspects to this proceeding. The first aspect arises out of decisions made by the Investment Industry Regulatory Organization of Canada (IIROC) making certain findings of misconduct against Kenneth Edward Smith. IIROC ordered a lifetime ban on Smith's approval in any capacity by IIROC and ordered a substantial fine and an award of costs against Smith. The executive director applies for further orders against Smith under section 161(6)(c) of the Act.
- [3] The second aspect to this proceeding is an allegation by the executive director that Smith lied to an investigator of the Commission during an interview conducted on November 7, 2017 and Smith thereby breached section 168.1(1)(a).

### **II. Background**

- [4] The hearing in this matter was conducted in person on October 14, 2020. The executive director called one witness, the primary investigator for the Commission. Smith gave evidence on his own behalf.

- [5] Smith began working in the securities industry in 1999 and he first became a Registered Representative in 2003. From July of 2011 to September of 2016, Smith was a Registered Representative with a securities dealer. Smith worked alone at the Nanaimo office of the dealer, where he was licensed to sell insurance products as well as to act as a Registered Representative. Smith had both investment clients and insurance clients.
- [6] By November of 2017, both the Commission and IIROC were looking into certain conduct of Smith. In the broadest sense, the concerns related to Smith's business dealings with clients which were outside of the scope of his employment. During November of 2017 the Commission's investigative activities included a compelled interview with Smith. It was that interview, held in November 2017, which led to the allegation that Smith lied to the Commission's investigator.
- [7] On November 23, 2017, IIROC issued a Notice of Hearing against Smith. Five specific contraventions were alleged against Smith.
- [8] On April 6, 2018, an IIROC hearing panel issued its Reasons for Decision in *Re Smith* 2018 IIROC 10 (Merits Decision) regarding the allegations against Smith. The panel found that each of the five alleged contraventions had been proven. Those findings were:
- a) Contrary to the requirement that Smith not engage in business activities outside of his employment without approval, Smith engaged in the operation of a business providing chrome and graphic finishes to automobiles, motorcycles and other surfaces without the knowledge or consent of his employer;
  - b) Contrary to the requirement that Smith refrain from engaging in personal financial dealings with clients, Smith engaged with a client in the chrome and graphic finishing business described above;
  - c) Contrary to the requirement that Smith avoid placing investments for clients outside of the normal processes of his employer, Smith engaged in off-book futures trading on behalf of a client without the knowledge or consent of his employer and despite not being registered to do so;
  - d) Contrary to the rule in place at the time requiring that Smith avoid conduct unbecoming, Smith received investment funds directly from a client to a firm he controlled and invested those funds outside of the normal controls and standards of his employer without the knowledge or consent of his employer; and
  - e) Contrary to the rule requiring him to cooperate in IIROC investigations, Smith refused to attend an interview which IIROC investigators scheduled for Smith.
- [9] At the Commission hearing, Smith did not dispute the findings resulting from the IIROC Notice of Hearing. In fact his reply to the allegations can fairly be characterized as admitting the allegations.

[10] On June 4, 2018, the IIROC hearing panel issued its Reasons for Decision in *Re Smith* 2018 IIROC 18 (Sanctions Decision) regarding the sanctions to be imposed in light of the breaches which had occurred. The hearing panel stated that it was imposing sanctions as follows:

- a) a permanent bar to approval in any capacity; and
- b) a \$125,000 fine.

The IIROC panel also imposed \$20,000 in costs.

### III. **Applicable Law**

#### **A. Standard of Proof**

[11] Any findings of liability which we make require proof on a balance of probabilities: see *David Michael Michaels and 509802 BC Ltd. doing business as Michaels Wealth Management Group*, 2014 BCSECCOM 327, para. 35.

#### **B. Statutory Provisions**

[12] The provisions of the Act which are in issue are the following:

##### *Section 161(6)*

161(6) The commission or the executive director may, after providing an opportunity to be heard, make an order under subsection (1) in respect of a person if the person

- (c) is subject to an order made by a securities regulatory authority, a self regulatory body or an exchange, in Canada or elsewhere, imposing sanctions, conditions, restrictions or requirements on the person,

##### *Section 168.1(1)*

168.1(1) A person must not

- (a) make a statement in evidence or submit or give information under this Act to the commission, the executive director or any person appointed under this Act that, in a material respect and at the time and in light of circumstances under which it is made, is false or misleading, or omit facts from the statement or information necessary to make that statement or information not false or misleading, or ...

[13] Section 161(6) facilitates cooperation between the Commission and other securities regulatory authorities, self-regulatory authorities and exchanges. It is a precondition to our making an order under that section that the respondent be given an opportunity to be heard and Smith has been given that opportunity and participated in the Commission hearing.

[14] This Commission has found that taken together, section 161(6)(c) and section 161 allow a panel to rely on other regulatory bodies' efforts and orders rather than initiate duplicative proceedings. See: *Re Lawrence Chang*, 2020 BCSECCOM 199, para. 15 citing *McLean v. British Columbia (Securities Commission)*, 2013 SCC 67

#### IV. Analysis —Section 161(6)(c) Order

- [15] As outlined by the BC Court of Appeal in *Lines v. British Columbia (Securities Commission)*, 2012 BCCA 316, at para. 32, the issues to be determined at this stage of the application are whether the executive director has established, on the balance of probabilities, that (1) the sanctions imposed by IIROC fall within the scope of section 161(6)(c) of the Act and, (2) there is evidence of Smith's wrongdoing.
- [16] From a review of the IIROC Merits Decision, it is clear there are sufficient facts and findings from which the panel can determine Smith engaged in serious misconduct, involving the contravention of five Dealer Member Rules. According to the IIROC Sanctions Decision, Smith is subject to sanctions by IIROC for his misconduct.
- [17] In similar circumstances, the Commission has found that sanctions issued by IIROC are orders for the purpose of section 161(6)(c): see *Chang*, and *Re Pawar*, 2016 BCSECCOM 174.
- [18] Once both preconditions for an order under section 161(6)(c) have been established as is the case here, the issue that remains is for the Commission to determine whether the order sought is in the public interest to protect investors and markets in British Columbia.
- [19] The misconduct found by the IIROC panel was very serious and posed significant risks to the public and the capital markets:
- a) By engaging in outside business activities and in placing investments for clients outside of his employment without the knowledge and approval of his employer, Smith made it impossible to ensure appropriate oversight and supervision thereby hindering his employer in its obligation to protect the public;
  - b) By engaging in personal financial dealings with clients, he breached obligations of trust towards those clients and placed himself in a conflict of interest. As noted in the IIROC Sanctions Decision, the obligation to maintain trust towards clients is fundamental to the public interest and the reputation of the investment industry;
  - c) The IIROC panel also noted that a registrant's duty to cooperate is fundamental to maintaining the integrity of the securities industry. Smith failed in that duty and threatened that integrity when he refused to attend the IIROC interview.
- [20] In addition to being very serious, these actions indicate a lack of respect for regulatory authority. The securities industry is, for good reasons, a highly regulated industry. Participation in the securities industry is not a right, and participation is not appropriate for someone who demonstrates a strong reluctance to follow regulations.
- [21] We conclude that a reciprocal order under section 161(6)(c) is in the public interest. We will rule on the details of the order after hearing submissions from the parties during the sanctions phase of this process.

**V. Analysis – Materially False Statements to Investigator – Section 168.1(1)**

[22] The interview referred to in the NOH was a compelled interview under section 144 of the Act that took place on November 7, 2017.

[23] Two Commission investigators, appointed under a section 142 Investigation Order issued on June 12, 2017, conducted the interview of Smith under oath.

[24] At the interview, Smith was asked the following questions by one of the Commission investigators and provided the following answers regarding an account into which the subject deposits were made (the “Account”):

16 [Commission investigator]:  
17 Q So again, there’s a company listed in the summons that was  
18 served on you. 1009062 BC Ltd. Does that company have any  
19 bank accounts?  
20 A It ...  
21 Q Or had?  
22 A Had, yes. It had a bank account which was at TD.

2 Q Did this account ever receive any money into it from  
3 investors?  
4 A Just myself and [CB].

[25] The evidence shows that the Account did not only receive money from Smith and CB, who was Smith’s client. In addition to CB’s investment, the Account also received money from another investor, AMC.

[26] Later in the interview, Smith was asked about CB’s deposit. Smith gave the following answers:

7 Q So I’m going to show you another document. It’s two pages  
8 It’s a deposit slip showing \$20,000 being deposited to the  
9 account?  
10 A M’mm’hmm.  
11 Q And a cheque for that \$20,000 on the second page dated July  
12 28, 2014?  
13 A M’mm-hmm.  
14 [Commission investigator]: That will be exhibit 7.  
15  
16  
17 Q You have that document in front of you?  
18 A I do.  
19 Q Can you tell me who [AMC] is?  
20 A You got me there, eh?  
21 Q Sorry. What do you mean by that?  
22 A Ummm ...  
23 Q So I’ll just describe the cheque on the second page. It’s  
24 made out to 1009062 BC Ltd. It’s for \$20,000 dated July  
25 28<sup>th</sup>, 2014, from the account of AMC and the memo

1 line reads “investments”?  
 2 A Yes.  
 3 Q So it looks like this [AMC] was also investing  
 4 with you?  
 5 A Yeah. It was actually her husband John.  
 6 Q And John, what’s his last name?  
 7 A [C].

[27] In a telephone call with that investigator, AMC confirmed that she made the \$20,000 deposit to the Account. The cheque represented AMC’s and her husband’s investment with Smith.

[28] During the interview, Smith admitted his statement was misleading:

8 Q So earlier you told me it was just yourself and [CB]  
 9 ?  
 10 A I did.  
 11 Q So what happened with [AMC]? Why did you not  
 12 mention her?  
 13 A I didn’t mention her, I suppose, because I thought you  
 14 wouldn’t know. That’s the truth of it.  
 15 Q So you’re – can I summarize that you were trying to mislead  
 16 us?  
 17 A Oh, well, I guess you could call it that. Sure.

[29] Smith admitted that AMC was an investor and her deposit was an investment:

20 Q So why was she depositing the money into your account?  
 21 A Same reason.  
 22 Q For trading?  
 23 A Yeah.

[30] At the Commission hearing, Smith did not dispute that he made the statement about having not received funds from another investor and that such statement was false. Any denial of those facts would be futile in any event given the evidentiary record.

[31] We turn to the issue of whether Smith’s false statement to investigators was material. That determination requires an examination of two aspects. As described in *Nuttall (Re)*, 2011 BCSECCOM 521, at para. 44-45, the first determination requires an assessment of how far the statement departs from the truth. This requires a comparison of the information that was given, to the facts that were known to the person giving the information at the time the person gave it.

[32] The second aspect of materiality, as found in *Re CAAS*, 2017 BCSECCOM 296, at para.89, is the measure of the significance of the information that is false or misleading.

[33] The first branch of the test is easily met. When Smith told the investigators that the only two deposits in the Account came from himself and CB, that statement was false and therefore entirely departed from the truth.

- [34] Furthermore, when faced with evidence of AMC's deposit, Smith confessed he attempted to conceal the facts of AMC's investment in the hope that the Commission investigators would not find out about it.
- [35] On the second aspect, the documentary evidence shows that AMC's investment was significant. It was the first deposit into the Account when the Account was opened, and it was largest single investment in the first three years of the Account opening.
- [36] The Commission has previously found that a statement lying about the number of investors who invested is material. In *Dhala (Re)*, 2015 BCSECCOM 336, the respondent was asked by Commission investigators whether he received money from investors for investment purposes. During the interview, Dhala claimed to have received money from one investor but no one else. That statement was false as Dhala received money from four investors for investment purposes. The panel found the statement was false in a material respect in that the answer of one investor is far different than the truthful answer of four investors. Consequently, the panel found the respondent had contravened section 168.1(1)(a).
- [37] We find on a balance of probabilities that Smith breached section 168.1(1)(a) by making a material false statement to the Commission's investigator on November 7, 2017.

#### VI. Submissions on Sanctions

- [38] We direct the executive director and Smith to make their submissions on sanction as follows:

**By July 21, 2021**      The executive director delivers submissions to Smith and the Commission Hearing Office.

**By August 4, 2021**      Smith delivers response submissions to the executive director and the Commission Hearing Office.

Any party seeking an oral hearing on the issue of sanctions so advises the Commission Hearing Office. The Hearing Office will contact the parties to schedule the hearing as soon as practicable after the executive director delivers reply submissions (if any).

**By August 11, 2021** The executive director delivers reply submissions (if any) to Smith and the Commission Hearing Office.

June 30, 2021

**For the Commission**

Gordon Johnson  
Vice Chair

Deborah Armour, QC  
Commissioner

Judith Downes  
Commissioner