

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

Citation: Re Smith, 2021 BCSECCOM 486

Date: 20211216

Kenneth Edward Smith

Panel	Gordon Johnson Deborah Armour, QC Judith Downes	Vice Chair Commissioner Commissioner
Hearing Date	October 8, 2021	
Submissions Completed	October 8, 2021	
Decision date	December 16, 2021	
Appearing		
Deborah Flood	For the Executive Director	
Kenneth Edward Smith	For himself	

Decision

I. Introduction

- [1] This is the sanctions portion of a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418 (the Act). The findings of this panel on liability made on June 30, 2021 (2021 BCSECCOM 262) are part of this decision. The definitions used in that document are adopted in this decision.
- [2] We found that on November 7, 2017, Smith made a materially false statement to an investigator of the Commission in breach of section 168.1(1)(a) of the Act. We also found that it was in the public interest that an order be made under section 161(6)(c) of the Act based upon the findings of an IIROC panel against Smith which we found represented very serious misconduct.
- [3] The executive director and the respondent made written and oral submissions on the appropriate sanctions in this case.
- [4] This is our decision with respect to sanctions for the breach of section 168.1(1)(a) of the Act and regarding what terms of order are in the public interest in relation to section 161(6)(c).

II. Positions of the Parties

- [5] Counsel for the executive director emphasized that the Commission's ability to exercise its powers to protect public markets is hampered when those compelled to provide information to the Commission do not do so truthfully. Counsel for the executive director noted that Smith's lie

was intentional and that although Smith quickly admitted his lie he did so only after it became clear that the investigator was in possession of banking records that exposed it.

- [6] Turning to the IIROC findings and the application of section 161(6)(c), counsel for the executive director noted that we found Smith's multiple contraventions of the IIROC Dealer Member Rules were very serious and that Smith posed a significant risk to public markets. Counsel for the executive director also noted that the conduct of Smith sanctioned by IIROC included putting himself in a position where his interests conflicted with the interests of clients and that Smith was uncooperative with the investigation conducted by his governing self-regulatory organization.
- [7] The executive director asserted that the range of administrative penalties that emerges from a review of comparable cases is between \$17,033 and \$30,000. The executive director seeks an order that Smith pay an administrative penalty of \$20,000. The executive director also seeks an order requiring Smith to resign from any position he holds as a director or officer of an issuer or registrant and imposing a 5.5 to 8.5 year prohibition against Smith. The details of the activities which would be prohibited are described in more detail below.
- [8] Smith admitted that he lied to the investigator on November 7, 2017, and more than once in the course of this proceeding he acknowledged that what he did was wrong. Smith explained that he was not sure what the investigator knew at the moment Smith told his lie. Smith expressed a wish that the investigator had shared what was already known by the investigator at the time of the interview because then Smith would not have given in to the impulse to minimize his role by lying. Smith described the investigator's conduct as "almost entrapment". We did not take these submissions by Smith as a repudiation of his acceptance of responsibility because Smith was quick to follow those comments with assurances that he understood what he did was wrong and, regardless of what the investigator did, Smith should not have lied.
- [9] Regarding the IIROC findings and Smith's lack of cooperation with IIROC, Smith again admitted the primary facts but offered circumstances which he feels mitigate his responsibility. Smith noted that his conduct primarily consisted of inviting a friend to participate in a small outside business and agreeing to assist two friends who wanted to entrust him with funds so he could make trades on behalf of the friends. Smith noted that the scale of his conduct was small and he did not benefit from any of the trades. Smith asserted that his lack of cooperation with the IIROC investigation took the form of refusing to travel to an interview, something he said resulted from his lack of funds and the refusal of IIROC to pay Smith's costs.
- [10] Smith asserted that he has no funds, something he stated when he gave evidence at the liability hearing. Smith has recently been declared a bankrupt. Smith submitted that any administrative penalty against him should be limited to \$5,000. While Smith agreed that a lifetime prohibition on trading and being a registrant was appropriate, he asserted that whatever prohibitions are imposed against him should be flexible enough to allow Smith to operate a self-directed trading account so that Smith can, over time, conduct trading which will allow him to re-build some financial resources. He asked that he not be required to trade through a registered dealer or registrant. Smith represented that he would not use a self-directed account to trade on behalf of others.

III. Analysis—Lying to the Investigator

A. Factors

[11] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission provided a non-exhaustive list of factors relevant to making orders under sections 161 and 162 of the Act:

In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:

- the seriousness of respondent's conduct,
- the harm suffered by investors as a result of the respondent's conduct,
- the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
- the extent to which the respondent was enriched,
- factors that mitigate the respondent's conduct,
- the respondent's past conduct,
- the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,
- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

[12] We have kept all of the *Eron* factors in mind in reaching our conclusions. We have addressed the most relevant factors under the headings which follow.

B. Application of the factors

Seriousness of conduct, Integrity of Public Markets

[13] Lying to a Commission investigator in the circumstances described in our findings is serious misconduct. Within the category of serious misconduct there is a broad range of harmful activity, so it is important that we further characterize Smith's conduct.

[14] Smith's serious misconduct should be distinguished from even more serious misconduct, such as lying repeatedly to investors in order to fraudulently obtain their funds.

[15] We accept that Smith's lie to the investigator was spontaneous and quickly withdrawn. However, we also find that the lie was deliberate and withdrawn only after it was clear that the investigator could prove the truth. In addition, the lie was told in the context of other misconduct by Smith which eventually led to the IIROC proceeding and IIROC's findings. Smith had a motive to prevent the entire picture from being discovered and Smith's lie was told in support of that motivation. This element of Smith's misconduct, the intention to shield his conduct from

scrutiny by regulators, is consistent with other misconduct which led to the sanctions which IIROC imposed.

[16] We do not accept Smith's suggestion that the investigator had an obligation to inform Smith what the investigator already knew before asking Smith certain questions. Smith chose to become an advisor to investors. In doing so Smith accepted an obligation to be trustworthy towards his clients and his employer and the regulatory system which governed Smith's professional conduct. Smith's obligation to tell the truth was not conditional on Smith knowing what could already be proven against him.

[17] In summary, Smith's lying to the investigator was serious, but it is not the most serious misconduct that comes before us.

Harm to investors

[18] No investors were harmed as a result of Smith's false statement.

Enrichment of the respondent

[19] Smith was not enriched by his false statement.

Aggravating factors

[20] There are no aggravating factors.

Mitigating factors

[21] There are no mitigating factors.

Specific and general deterrence

[22] Specific deterrence and general deterrence are related but not identical concepts. Specific deterrence discourages this respondent from participating in future misconduct. General deterrence discourages others from participating in misconduct similar to that in the subject case. Both goals are legitimate in the crafting of a sanction which properly balances all of the factors which are relevant in any particular case.

[23] A relevant consideration in relation to specific deterrence is the financial situation of the respondent. Smith's financial situation is limited. Smith submitted the most he could pay towards an administrative penalty is \$100 per month. Smith asserted that if his payment obligation is limited in that way he will eventually be able to generate a small surplus which he can then grow over time. Smith also noted that he will now be out of the financial services field and he can no longer pose any risk to public markets.

[24] Turning from specific deterrence to general deterrence, we agree with submissions made by counsel for the executive director to the effect that the conduct of effective investigations is important in the maintenance of public markets that have integrity and are trusted by the public. It is important that parties who are interviewed by investigators know that there will be serious consequences for lying.

[25] It is somewhat difficult in this case to integrate the specific deterrence factor and the general deterrence factor. Smith has no access to substantial funds and other elements of this decision will severely limit the extent to which Smith will pose a risk to public markets. However, imposing an administrative sanction which Smith could easily pay would necessarily be at such a low level that it could send a message to others that lying to an investigator can result in very minimal penalties. Our final conclusion on how we bring deterrence and all of the other factors to an appropriate balance is set out below under the hearing “administrative penalties”.

IV. Analysis—Reciprocal Order related to IIROC Contraventions

[26] We now consider the relevant *Eron* factors in the context of this reciprocal order application.

[27] We have already found that the IIROC findings relate to very serious misconduct. Absent protective terms imposed by an order, Smith would pose a significant risk to the public and to capital markets.

[28] Other facts which are particularly relevant to the *Eron* factors are that although Smith was not enriched by the conduct sanctioned by IIROC the clients involved did lose all of their funds. In addition, Smith was a registered representative and had thereby accepted obligations to support the regulatory system that he was a part of. His conduct showed a lack of respect for the regulatory protections which are in place. In short, Smith’s participation in public markets creates risks to investors. As we concluded in our findings on liability, imposing restrictions on Smith’s participation in public markets is in the public interest.

[29] We will not list here all of the specific prohibitions sought by the executive director. Those are listed in detail below. Smith opposed only one of the terms which is sought by the executive director, namely the term that Smith be prohibited from trading in or purchasing any securities or derivatives except for specified types of investment accounts “through a registered dealer or registrant, if he gives the registered dealer or registrant a copy of this decision”. Smith asserted that the type of trading he has specialized expertise in requires that he be able to operate a self-directed trading account which enables him to trade in “securities, options or futures contracts” without the delays inherent in providing instructions through a registered representative. Smith said that his trading activities will only be successful if he can implement instant decisions.

[30] The executive director sought a term continuing all restrictions for 5.5 - 8.5 years. That duration was supported on the basis that eight years was appropriate in terms of public protection arising from the conduct established in the IIROC proceeding and a further 0.5 year was an appropriate sanction for the breach of section 168.1(1)(a). Smith did not take a strong position on the duration of the restriction. His emphasis was more on asking that the scope of the restriction be shaped to allow him to conduct the type of trading which he believes he will succeed at.

[31] In our view Smith has shown a pattern of not respecting the securities regulatory scheme in British Columbia. On more than one occasion, he has taken steps to skirt regulatory requirements and to later hide his conduct. Some of his improper conduct, according to his own explanation, was motivated by a desire to help friends participate in the benefits of his trading skills. However, we note that trading activity that he wants to continue to do is similar to the type he engaged in on behalf of the two investors where he lost their money. Given these circumstances

we have concluded that Smith should be prevented from engaging in the type of trading that caused the harm.

- [32] The other terms sought by the executive director were not opposed by Smith. As noted below in paragraph 34, we have reviewed each of them and we conclude they are sufficiently connected to the type of misconduct in question and the type of risk of harm that the public should be protected against in this case.
- [33] Turning to the duration of the prohibitions, our conclusion is that the appropriate term is five years. We do not see a benefit in allocating that term as between the section 168(6)(c) breach and the sanction for breach of section 168.1(1)(a).

V. Conclusion on appropriate sanctions

Market prohibitions

- [34] As described above, Smith's conduct demonstrates a lack of respect for the regulatory scheme of which he was a part as a registered representative.
- [35] Considering the factors outlined above, and the need for both specific and general deterrence, we find it to be in the public interest to impose market prohibitions against Smith for a period of five years, as specified below.

Administrative penalties

- [36] As noted above, the setting of an administrative penalty requires a balancing of a number of factors. We have provided our analysis above regarding the key factors. Bringing them all into balance we have determined that the general range of administrative penalty identified by the executive director is appropriate for these specific circumstances and also that it is appropriate to set this administrative penalty near the bottom of the general range in this case.
- [37] We carefully considered Smith's ability to pay as one of the factors, but in the end our conclusion is that the other factors together establish that the appropriate administrative penalty is \$20,000.

VI. Orders

- [38] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order that:
- (a) under section 161(1)(d)(i), Smith resign any position he holds as a director or officer of an issuer or registrant;
 - (b) Smith is prohibited for the later of five years and the date the amount set out in subparagraph (c) below is paid:
 - i. under section 161(1)(b)(ii), from trading in or purchasing any securities or derivatives, a specified security or derivative or a specified class of securities or class of derivatives, except that he may trade and purchase securities or derivatives for his own account (including one RRSP account, one TFSA account

and one RESP account), through a registered dealer or registrant, if he gives the registered dealer or registrant a copy of this decision;

- ii. under section 161(1)(d)(ii), from becoming or acting as a director or officer of any issuer or registrant;
- iii. under section 161(1)(d)(iii), from becoming or acting as a registrant or promoter;
- iv. under section 161(1)(d)(iv), from advising or otherwise acting in a management or consultative capacity in connection with activities in the securities or derivatives markets; and
- v. under section 161(1)(d)(v), from engaging in promotional activities by or on behalf of
 - (a) an issuer, security holder or party to a derivative, or
 - (b) another person that is reasonably expected to benefit from the promotional activity; and

(c) Smith pay to the commission an administrative penalty of \$20,000 under section 162 of the Act.

December 16, 2021

For the Commission

Gordon Johnson
Vice Chair

Deborah Armour, QC
Commissioner

Judith Downes
Commissioner