

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, s. 27.1, as amended**

AND

**IN THE MATTER OF A DECISION OF A HEARING PANEL OF THE
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA
("IIROC") PURSUANT TO THE RULES OF THE INVESTMENT DEALERS
ASSOCIATION OF CANADA ("IDA")**

AND

**IN THE MATTER OF A DISCIPLINARY PROCEEDING BETWEEN STAFF OF
IIROC AND MARK ALLEN DENNIS**

APPLICATION FOR A HEARING AND REVIEW

The Applicant, Investment Industry Regulatory Organization of Canada ("IIROC"), applies to the Ontario Securities Commission (the "Commission") pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") for a hearing and review of the decision of the Hearing Panel dated June 3, 2011, *In the Matter of Mark Allen Dennis*, [2011] IIROC No. 35 (the "Decision").

1. **THE APPLICANT REQUESTS** that the Commission make an order:
 - (a) pursuant to section 21.7 and subsection 8(3) of the Act setting aside the fine of \$1,000,000 imposed by the Hearing Panel in the Decision with respect to the misappropriation of funds by Mark Allen Dennis (the "Respondent"),
 - (b) pursuant to section 21.7 and subsection 8(3) of the Act
 - (i) imposing in its place a fine in the amount of \$1,450,000, or
 - (ii) alternatively, remitting the matter of the fine to the Hearing Panel to reconsider in light of the Commission's decision, and

- (c) granting such further and other relief as counsel may request and the Commission may order.

2. THE GROUNDS FOR THE APPLICATION are:

- (a) the Hearing Panel found that the Respondent fraudulently misappropriated \$1,408,592.36 from the account of a client and imposed a fine with respect to this conduct in the amount of \$1,000,000, which it held to be the maximum allowable fine under IDA Rules, which are identical to IIROC's Rules, in particular, Dealer Member Rule 20.33 ("Rule 20.33"), which authorizes a hearing panel to impose "a fine not exceeding the greater of (i) \$1,000,000 per contravention; and (ii) an amount equal to three times the profit made or loss avoided by ...[a respondent who is an] Approved Person by reason of the contravention",
- (b) the Hearing Panel erred in principle in characterizing Rule 20.33 as a penal rule requiring a strict construction and interpreting "profit" narrowly to exclude funds fraudulently misappropriated by the Respondent,
- (c) the authority of hearing panels under Rule 20.33 is not intended as punitive but is aimed at prevention of misconduct by members and approved persons of IIROC in order to protect the investing public and the integrity of the securities market,
- (d) IIROC is directly affected by the Decision, as it is responsible as the successor to the IDA to administer the IDA Rules and to enforce its own Rules,
- (e) the interpretation of Rule 20.33 in the Decision will limit IIROC's ability to accomplish the enforcement objectives described in paragraph (c) with respect to an approved person who misappropriates client funds, whether or not the amount misappropriated exceeds \$1,000,000,

- (f) the Decision will also limit IIROC's ability to accomplish these enforcement objectives under Dealer Member Rule 20.34 in similar circumstances with respect to a member firm that misappropriates funds from its clients,
- (g) the Hearing Panel erred in law in adopting an interpretation of "profit" that is narrower than the meaning intended by Rule 20.33,
- (h) the Hearing Panel erred in law in holding that amendments to Rule 20.33 in 2004 were intended to narrow the scope of the authority of hearing panels to impose a fine based on the amount of the benefits obtained by the Respondent through the misappropriation of funds,
- (i) the Hearing Panel erred in interpreting IIROC's Disciplinary Sanction Guidelines to exclude a fine based on disgorgement of misappropriated funds from the meaning of "profit" in Rule 20.33,
- (j) the Hearing Panel's interpretation of Rule 20.33 is inconsistent with the public interest in that it would preclude a Hearing Panel from imposing a fine greater than \$1,000,000 based on the benefits obtained by a Respondent through a misappropriation of funds in violation of IIROC's rules, securities laws or other laws,
- (k) sections 8 and 21.7 of the Act,
- (l) Rules 2.2 and 14 of the *Ontario Securities Commission Rules of Procedure* (the "OSC Rules of Procedure"), and
- (m) such further and other grounds as counsel may advise.

THE DOCUMENTARY EVIDENCE to be used at the hearing of this application is:

- (a) the record of the proceeding before the Hearing Panel as provided in Rule 14.3 of the OSC Rules of Procedure, including, in particular,

- (i) the Notice of Hearing dated February 17, 2011,
- (ii) the affidavit and other documentary evidence presented to the Hearing Panel,
- (iii) the transcript of the oral evidence at the hearing before the Hearing Panel,
- (iv) the Decision and Reasons of the Hearing Panel dated June 3, 2011, and
- (v) such further and other evidence as counsel may advise and the Commission may permit.

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