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Discipline

Discipline Penalties Imposed on Union Securities Ltd.; Violation of By-law 19.6- Failure to Provide Business Records to IDA Investigators

Person Disciplined	A Hearing Panel of the Investment Dealers Association of Canada, (“the Association”) appointed pursuant to Association By-law 20 has imposed discipline penalties on Union Securities Ltd., a Member of the Association.
By-laws, Regulations, Policies Violated	By written Decision dated June 6 th , 2005, the Hearing Panel concluded that Union Securities Ltd. failed to provide to the Enforcement Department of the IDA free access to all records reasonably required by it for the purposes of an investigation into the conduct of Union Securities Ltd. and into the conduct of T.F., one of its employees, contrary to By-law 19.6.
Penalty Assessed	By written Decision dated October 11, 2005, the Hearing Panel ordered that Union Securities Ltd. pay to the Association a fine in the amount of \$50,000 and also pay the costs of the investigation and prosecution of this matter in the amount of \$30,000.
Summary of Facts	On October 14 th , 2004, Association Staff (“Staff”) wrote to Union Securities Ltd. (“Union”) and advised that an investigation had been commenced into the conduct of T.F., a Registered Representative employed by Union at its Toronto branch. Union was also advised that Staff was investigating Union’s supervision of T.F.. On November 3 rd , 2004, Staff once again wrote to Union and advised that the focus of the investigation related to certain client accounts traded in securities of certain U.S. over-the-counter bulletin board companies. At the same time, Staff requested that Union provide to the Association certain information, including copies on compact disk of all user data, including any and all electronic file folders, files, file fragments, email boxes, incoming and outgoing emails, recovered from backup media and contained on hard drives previously and currently assigned to T.F. and his assistants for a specified period of time (“the Electronic Data”). Subsequent to this correspondence, the Electronic Data requested by staff were preserved, secured, and held by the Union’s outside legal counsel. However, Union refused to provide the IDA with free access to the Electronic Data. Union took the position that the Association had not provided

sufficient detail to Union for it to determine whether or not some of the information in its possession was relevant to the investigation. It also contended that some of the information among the Electronic Data was personal to T.F., and was therefore irrelevant. It also took the position that some of the material was protected by solicitor and client privilege that had been previously claimed by T.F..

In its written decision finding that Union had contravened By-law 19.6, the Hearing Panel found that the purpose of advising a Member firm of an investigation is to engage the Member's obligation to cooperate pursuant to By-law 19. It was the Panel's view that the information in the IDA's letters to Union, read together, provided reasonably sufficient information to Union to know that it was obliged to cooperate with the IDA's investigation of it and T.F.. The Panel held that the notice given to Union was not so uncertain that Union would be entitled to decline to give its cooperation to the investigation.

The Hearing Panel then went on to review the scope of the Association's investigatory powers under By-laws 19.5 and 19.6, finding that "[i]n essence, those provisions require the production of information which the IDA determines may be relevant. They also entitle the IDA to free access to information reasonably required for the purposes of the investigation. We interpret the words 'reasonably required', for the purpose 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."

The Hearing Panel found that the Electronic Data were business records recorded on equipment provided to T.F. by Union to be used in the performance of his employment duties. The position taken by Union that some of the Electronic Data was irrelevant to the IDA's investigation because it was purely personal to T.F., was rejected by the Hearing Panel. The Panel referred to the Supreme Court of Canada's 1995 decision in *British Columbia Securities Commission v. Branch*, which held that persons working in the business of trading in securities have a low expectation of privacy in documents or records which are produced by them during the course of their business activities. The Panel found that "[T.F.] must or ought to have known that 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 know that what he did would no longer be considered 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 computers for private purposes."

The Hearing Panel ultimately held that the Electronic Data sought by the Association were business records and were clearly relevant to the investigation. Consequently they were reasonably required for the purposes of an investigation and the fact that they may contain some information which ultimately turns out to be irrelevant and/or personal can not detract from the fact that as business records, they are relevant and required. Therefore, the Panel concluded that when Union Securities declined to provide all of the materials required by the Association (other than the material over which solicitor client privilege was claimed), it withheld information reasonably

required for an IDA investigation. Consequently Union's conduct constituted a breach of By-law 19.6.

The Hearing Panel held that it did not need to rule whether the claim for solicitor client privilege asserted by T.F. was well founded. Instead, it ordered that the documents over which solicitor and client privilege had been asserted be removed from the Electronic Data to be produced to the Association, and that the alleged privileged information be sealed and kept in the custody of legal counsel for Union, pending any further order of a Hearing Panel that may be seized of future disciplinary proceedings arising from the main investigation of either Union or T.F..

In rendering its decision on penalty, the Hearing Panel held that "[a] failure to cooperate, even if based upon 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 calls for a significant penalty." The Hearing Panel concluded that the principles of specific and general deterrence required the imposition of a fine in the amount of \$50,000. Furthermore, it was held that Union's refusal to cooperate required the Association to direct resources to this case- resources which otherwise could have been directed elsewhere. Therefore, it was held that Union should pay the investigation and prosecution costs incurred by the Association, which were assessed in the amount of \$30,000.

The full text of both the liability and penalty decisions of the Hearing Panel is available on the Association's website (www.ida.ca) under "Enforcement > Reasons for Decisions in Disciplinary Hearings."

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