Re Wells

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada (IIROC)

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

And

Dale Richard Wells

[2010] IIROC No. 47

Investment Industry Regulatory Organization of Canada
Hearing Panel (Alberta District Council)

Heard: September 2, 2010 at Calgary, Alberta
Decision: October 27, 2010
(22 paras.)

Hearing Panel:
John D. James (Chair), Phil Heimbecker (Panel Member), Martin Davies (Panel Member)

Appearances:
Milton Chan, Enforcement Counsel
Dale Wells, on his own behalf

DECISION ON THE MERITS

¶ 1 This matter came before the panel as a contested hearing arising out of a Notice of Hearing dated May 12, 2010. As stated in the Notice of Hearing, the purpose of the hearing was to determine whether the Respondent, Dale Wells, had committed the following contravention:

> During the period February 2006 to July 2008, the respondent acted as an advisor, within the meaning of the Alberta *Securities Act,* without being registered as such, contrary to IIROC Dealer Member Rule 29.1.

¶ 2 The Respondent was not represented by counsel at the hearing, but attended with and was supported by Mr. Gary Hein who we were advised was the Chief Financial Officer ("CEO") of First Financial Securities Inc. ("First Financial"), where the Respondent has been employed from 2004 to the present day. All of the Particulars alleged in the Notice of Hearing are said to have occurred during the Respondent's employment with First Financial between 2006 and 2008. A response to the Notice of Hearing was provided by the Respondent on June 15, 2010 and in that response, the Respondent made it clear that he was not contesting the factual basis underlying the complaint.

¶ 3 The contested issue between the parties is not one of fact, but rather one based on the correct

interpretation and application of the term "advisor" as contemplated in the Alberta *Securities Act* (R.S.A. 2000, c. s-4). The position of the Investment Industry Regulated Organization of Canada ("IIROC") is that, in doing what he readily admits to doing, the Respondent was acting as an "advisor" on behalf of a portfolio manager without holding or having the necessary registration requirements and further, that none of the exemptions to the registration requirements were available to the Respondent pursuant to National Instrument 31-103. The Respondent concedes that he did not have the necessary registration requirements to act as an advisor on behalf of a portfolio manager, but disputes that the activity that he was involved in constituted acting as an "advisor."

¶ 4 The facts which were either agreed to by the parties in advance of the hearing, or conceded during the course of the hearing, are as follows:

a. The Respondent has been registered with IIROC (or its predecessor the Investment Dealers Association (the "IDA")) since 2001;

b. On June 1, 2008 the Respondent became a regulated person of IIROC;

c. During the material time the Respondent was and continues to be employed by First Financial in its Alberta office;

d. The Respondent's registration history was that from June 2001 – September 2004 he was a Registered Representative and Branch Manager with Assante Capital Management Ltd., and from 2004 to the present time he was a registered representative (retail) with the First Financial ;

e. Peer Financial Ltd. ("Peer Financial") is a financial services company which provides amongst other things, the following services:

    i. Tax planning;

    ii. Estate planning;

    iii. Segregated funds;

    iv. Insurance products; and

    v. Permanent tax structure.

f. Peer Financial is not registered with the Alberta Securities Commission or IIROC;

g. Prior to being registered with IIROC/IDA, Wells was employed with Peer Financial from 1992 to 1995 as a Life Insurance Salesperson;

h. Beginning in February 2006, the Respondent entered into an arrangement with Peer Financial to supply information to Peer Financial which he obtained through a computer generated trading strategy. The information consisted of buy and sell signals with respect to mutual funds. Wells was paid $5000.00 per month by Peer Financial for this information;

i. On April 1, 2007 Wells through DRW Consulting, entered into a written agreement with Peer Financial (the "April Agreement") with respect to their arrangement;

j. The April Agreement stated that:

    i. Wells trading strategy analyzed over 5000 Canadian Mutual Funds on a daily basis and issued suggested buy/sell signals on said mutual funds;

    ii. The signals would be e-mailed to Peer Financial at the close of business each day; and,

    iii. Peer Financial agreed to lease this service for $5000.00 a month payable to DRW Consulting.

k. The April Agreement was signed by the Respondent on behalf of DRW Consulting and by

Ralph Burges on behalf of Peer Financial;

l. Between February 2006 and July 2008 the Respondent and Peer Financial followed this procedure (although not every day in this period):

   i. The Respondent would run his computerized trading program each evening after markets closed;

   ii. The Respondent would send Peer Financial an e-mail that same evening which indicated one or more "sell" signals or "buy" signals, with reference to one or more mutual fund, and:

   iii. That same evening, Well would also send Peer Financial a spreadsheet that listed the "Current Holdings" of the Actively Managed Portfolio ("AMP"), showing unrealized profits or losses expressed in percentage of terms.

m. The spreadsheets demonstrated that the buy or sell signals were always implemented by Peer Financial. Where "sell" signals were sent for a specific mutual fund, indicated that all of the holdings in that fund should be sold, on the following day, the spreadsheet would show "0 percent" holdings in that same fund. And thereafter the fund would not appear on that spreadsheet; and,

n. Wells issued an invoice to Peer Financial on a monthly basis of $5000.00 requiring that cheques be payable to "Dale Wells," these invoices were all paid by Peer Financial up until early to mid 2008 when the agreement ceased.

¶ 5 The Respondent did not specifically agree but the evidence we accept is clear that throughout the material time Peer Financial used the buy/sell signals provided by the Respondent to affect transactions in its Actively Managed Portfolio ("AMP"), a fund of mutual funds offered by Peer to its life insurance clients. The signals provided the basis for the entire trading strategy for the AMP. The evidence also confirmed that Peer Financial advertised its AMP as follows:

> The actively managed portfolio is a computerized trend following system for managing low risk mutual fund portfolios. Purchases are made based on a mathematical momentum formula showing which mutual funds were increasing in value the fastest are they are sold once the fund drops 7 percent from their highest point…

¶ 6 What was also clear from the evidence of the Respondent at the hearing was that he, together with Ralph Burges, the owner of Peer Financial, had developed the computer trading program and strategy and together had devised what the various inputs into the program would be to obtain the desired output of buy and sell signals. The Respondent maintained in his evidence that Peer Financial, through the efforts of Mr. Burgess, was really a co-owner, or at least co-author, of the computer program that generated the buy/sell signals and that the only real value added by Mr. Wells was his ability to operate the program. Mr. Burgess was, according to the Respondent, computer illiterate.

¶ 7 The Respondent has not challenged the applicability of various legislative and registration requirements and exemptions that IIROC counsel maintained were applicable in these proceedings. The Respondent does not dispute that his actions were governed by the Alberta *Securities Act*. In section 1 of the *Securities Act* "advisor" is defined as follows:

> (a) "advisor" means that a person or company engaging in or holding its self out as in engaging in the business of advising in securities or exchange contracts;
>
> ....

¶ 8 Section 75(1) of the *Securities Act* provides:

> Unless registered in accordance with Alberta Securities laws, a person or company shall not act as
>
> ....
>
> (b) an advisor, or
>
> ....

¶ 9 The Respondent does not dispute and we find, that in order to be registered in accordance with Alberta's Securities law as an advisor in the circumstances in this case, National Instrument 31-103, registration requirements and exemptions apply. Part 3.11 of the Registration Requirements for Individuals states as follows:

> **Part 3 Registration requirements - individuals**
>
> 3.11 **Portfolio manager – advising representative**
>
> An advising representative of a portfolio manager must not act as an advisor on behalf of the portfolio manager unless any of the following apply:
>
> (a) the representative has earned CFA Charter and has 12 months of relevant investment management experience in the 36-month period before applying for registration;
>
> (b) the representative has received the Canadian Investment Manager designation and has 48 months of relevant investment management experience, 12 months of which was in the 36 month perio0d before applying for registration.

The evidence clearly established that the Respondent held none of these qualifications and no exemptions were available to him.

¶ 10 The evidence is also clear, and the Respondent does not dispute, that Peer Financial was operating its AMP as a mutual fund under the direction of a portfolio manager. The Respondent was being paid $5000 per month by Peer Financial for him to provide his "buy" and "sell" signals to their portfolio manager. This was done on a daily basis. IIROC counsel presented evidence, again not disputed by the Respondent, that these daily communications often took the form of e-mails in which recommendations to either "BUY" or "SELL" specific mutual funds were made.

¶ 11 The position of the Respondent is simply that his sale of these computer generated "signals", as he called them, did not constitute "advising" within the meaning of the Alberta *Securities Act*. His position is succinctly stated in his own words in the course of an investigative interview conducted by IIROC on April 24, 2008, which formed part of the evidence in the hearing. At page 79, lines 22 -29 the Respondent states:

> Well, exactly, that's what (inaudible), your, you keep, you keep pulling out these things and, and squeezing things. I provide signals, not advice. You call it advice, I call it signals; if you want to pay me some money, I will give them to you to. You understand what I am saying. I am not trying to be ignorant to you, I am trying, what I am trying to get at, is, your trying to say, trying to, to, to massage this into that, oh, I am advising this guy to do that. No. No. I sell them guys signals, that's what I do.

¶ 12 Before proceeding further to determine whether, on the facts as we find them, the Respondent's actions constituted "advising" within the meaning of the Alberta *Securities Act*, we wish to note that we are satisfied that the Respondent's position that he was not acting as an advisor is not taken by him as an attempt to justify activities uncovered by investigators responding to a complaint or other outside concerns. There were no public or client complaints that gave rise to these proceedings. The activity complained of appears to have come to light solely as a result of the Respondent self-reporting it in a timely fashion through the National Registration Database. In this self-reporting database, the Respondent describes what he is doing with Peer Financial as "conducting business that sells Buy and Sell signals for Mutual Funds to third parties."

¶ 13 On the basis of evidence led by IIROC counsel in these proceedings, it appears that there has been an ongoing "dialogue" between various regulatory authorities, the Respondent and his employer, First Financial as to the proper characterization of the Respondent's activities in providing these "signals" to Peer Financial and the AMP portfolio advisor. In a July 13, 2007 letter to Mr. Gary Hein, the Respondent's employer and CEO of First Financial, the IDA made clear their position with respect to the Respondent's activities with Peer Financial when they stated as follows:

> Dale Wells periodically e-mailed trade recommendations and/or order to a Peer employee. Regardless of how the Member chooses to define investment advice, it must acknowledge that an e-mail with a "BUY" header and then the name of a specific mutual fund in a large bolded font, is an investment recommendation. Please refer to Wells e-mail of January 12, 2007 under tab 27 of the Supplementary Reference binder sent to the Member in late March for an example.

¶ 14 In determining whether or not the Respondent acted as an advisor within the meaning of the Alberta *Securities Act* by engaging in the above described, and admitted, activity, a review of the authorities provided to us by the parties is essential.

¶ 15 In *Costello v Ontario (Securities Commission)* (2004) (O.J. 2972) the Ontario Court of Appeal, considering an appeal from a decision by the Ontario Securities Commission, stated as follows:

> 41. Accordingly the Commission held the trigger of registration for an advisor is not the doing or one for more acts that constitutes the giving of advice, but engaging in the business of advising. It first considered whether the appellant was giving advise and then considered whether he was in the business. The Commission commented that the unique facts called upon its knowledge and expertise on advising.
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> 42. On the first question, whether the appellant provided advice, the Commission referred, at paragraph 28, to its own decision in Canadian Shareowners [See Note 21 below], as support for the view that:
>
> > Providing mere information as to specific securities does not constitute the giving of advice, but providing an opinion on the wisdom or value or desirability of investing in specific securities does.
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> Note 21: Re Canadian Shareowners Association (1992), 15 O.S.C.B. 617.

¶ 16 The Ontario Court of Appeal in *Costello* at paragraph 57 went on to cite with approval the decision of the British Columbia Securities Commission in *Re: Donas* (1995) (BCSCWS Ed. 95) where the Commission stated at page 39:

> ....
>
> > As indicated by the definition of "advice", the nature of the information given or offered by a person is the key factor in determining whether that person is advising in respect to investment in or the sale of securities. A person who does nothing more than provide factual information about an issuer and its business activity is not advising in securities. A person who recommends an investment in an issuer or the purchase or sale of an issuer or security, or who distributes or offers an opinion on the investment merits of an issuer or issuer's securities is advising in securities. If a person advising in securities is distributing or offering the advise in a manner that reflects a business purpose, the person is required to be registered under the Act.

¶ 17 The Alberta Securities Commission in *Kustom Design Financial Services Inc.* (2010) ABASC 179 cited with approval the decision of the British Columbia Securities Commission in Re: *Donas (supra)* and went on to state of paragraph 219 of its decision as follows:

> Thus, the mere providing of factual information of a proposed investment does not constitute advising. Rather, advising involves a business of providing subjective views, opinions, and recommendations on the merit or value of a specific investment or security to a person or company.

¶ 18 In *Re: Global Trading Centre LLC* (2009) ABASC 614, at paragraphs 32 and 33 the Alberta Securities Commission made the following finding in terms of the requisite components of "advising" for the purpose of the *Alberta Securities Act*:

> The determination of whether a person is "advising," for the purposes of the Act, involves two considerations, described as follows by D. Johnston and K.D. Rockwell in *Canadian Securities Regulation*, 4th ed. (Markham: LexisNexis, 2006) at 359:
>
> > First, did the purported advisor express an *opinion* or make a *recommendation*? Merely reciting facts does not make one an advisor; recommending an investment or opining on the investment merits of an issuer or securities is advising. Second, did the purported advisor offer the recommendation in a way which reflected a business purpose? [original emphasis]
>
> As to whether the person is in 'the business of advising," this in our view connotes elements both of intended profits and a degree of organization, repetition or regularity-neither a gratuitous provision of advice nor a merely isolated act or incident would generally suffice to evidence a business.

¶ 19 We accept that the Respondent's belief that he was not acting as an "advisor", as that term is defined in the Alberta *Securities Act*, was and is sincerely held. However, we find on the basis of the facts as we have found them that his activity went well beyond what he attempted to characterize as the provision of "mere information". While we accept that most of the data that was the basis of the formula or calculation performed by the program created by the Respondent might be described as "informational" or "fact based", the "signals" created by the program and the very clear terms given to them by the Respondent of "buy" and "sell", satisfy us that this was "advising" in almost its purest form. Even if we were to accept, and we do not, that the inputs for the computer program were entirely factual or "informational", the program's outputs or "signals" were clearly recommendations on the merit or value of buying or selling a specific investment or security. The Respondent , in charging a $5000 monthly fee for the signals, or "recommendations" as we find them, has indicated his view of the value to be placed on them.

¶ 20 That the portfolio manager(s) of the AMP at Peer Financial were free to accept or reject these very clear recommendations in relation to very specific securities is irrelevant to the proper characterization of the Respondent's conduct. However, the evidence that these recommendations were acknowledged and understood by both the Respondent and Peer as forming the entire basis for the portfolio manager's trading strategy in the AMP does support our further finding that the Respondent was engaging "in the business of advising" .

¶ 21 Having found that the Respondent's conduct clearly constituted "advising" we have no hesitation in also finding that he was engaging in that activity as a "business" as required by the *Securities Act*. Providing "signals", or as we have more correctly characterized them, "recommendations," on a daily basis for almost two years and being paid $5000.00 per month for this very activity clearly establishes that the Respondent was "engaging in the business of advising in securities" as alleged in the Notice of Hearing. That he was not registered to conduct this activity in relation to those he was advising is not in dispute.

¶ 22 We find, on the evidence, that the sole allegation in the Notice of Hearing to have been established.

Dated at Calgary in the Province of Alberta, 27th of October, 2010

John D. James (Chair)

Martin Davies (Panel Member)

Phil Heimbecker (Panel Member)