

**ALBERTA SECURITIES COMMISSION  
IN THE MATTER of the *Securities Act*  
R.S.A. 2000 c.S-4 (the Act)**

**Citation: Harrington Capital Partners, Re, 2011 ABASC 62    Date:20120216**

**IN THE MATTER OF Harrington Capital Partners Inc.**

**Application pursuant to s.76 of the Act to consider the registration application of  
Harrington Capital Partners Inc. as an Exempt Market Dealer and of Blaine Russell  
Kennedy as the Ultimate Designated Person for such propose Registrant**

---

**Decision of the Executive Director**

---

**Introduction**

1. Harrington Capital Partners Inc. (**Harrington**) submitted an application to the Alberta Securities Commission (**ASC**) for registration as an Exempt Market Dealer on September 27, 2010 (**Harrington Application**). In that application, Harrington designated Blaine Russell Kennedy (**Kennedy**) as its Ultimate designated person (**UDP**). On, or about that date, Kennedy applied for registration as the UDP, and a Dealing Representative (**DR**) of Harrington(**Kennedy Application**). Kennedy and Harrington will be referred to jointly as the **Applicants**. Kennedy, at the time was the CEO and sole shareholder and director of Harrington. Harrington was a corporation formed under the laws of the province of Alberta, with its head office in Calgary.
2. ASC staff reviewed the Harrington Application and the Kennedy Application. Such review consisted of, *inter alia*, an analysis of fitness for registration based on an assessment of proficiency, integrity and solvency criteria, which are outlined in the companion policy (**CP**) of *National Instrument 31-103 Registration Requirements, Exemptions and Ongoing Registrant Obligations*(**NI 31-103**).
3. By letter dated November 17, 2011, ASC Staff advised the Applicants that Staff was recommending to the Executive Director that Kennedy was not suitable for registration, pursuant to ss. 76(1) of the Act, and that due to Kennedy being put forth as Harrington's UDP, ASC Staff were recommending that Harrington was not suitable for registration, and that the Executive Director should refuse registration of both Kennedy and Harrington. ASC Staff further advised the Applicants that, pursuant to ss. 76(3) of the Act, they had the right to be heard. By letter dated November 23, 2011, through counsel, the Applicants advised the Executive Director they wished to exercise their right to a hearing.

4. By letter dated December 2, 2011, the Executive Director advised counsel to the Applicants and ASC Staff of the process to be followed in the hearing. Essentially, the process provided that Staff would submit the evidence upon which they relied by December 21, 2011, with the Applicants to provide their evidence by January 4, 2012. Cross-examinations on affidavits submitted were to be completed by January 18, 2012, with written submissions by both parties by January 25, 2012. Each party could make a written request to make oral submissions no later than February 1, 2012.
5. ASC Staff materials consisting of an affidavit were filed on December 21, 2011 (**ASC Staff Affidavit**). On December 23, 2011, an email was sent to the Executive Director by Kennedy on behalf of the Applicants, acknowledging receipt of the letter of December 2, 2011 and ASC Staff's affidavit. The Applicants asked for further time to prepare their submission. The Executive Director responded by email of the same date, consenting to a further week and advising Kennedy if he needed more time, to advise.
6. The Executive Director did not receive any communication from the Applicants, however was advised by ASC Staff that they had been informed that Kennedy had sought from the Executive Director one further week extension to the time granted. The Executive Director sent an email to Kennedy, on behalf of the Applicants, on January 4, 2012, extending the date for the Applicant's submission to January 18, 2012, and confirming that the cross-examination deadlines were now February 1, 2012, written submissions by February 8, 2012, with oral argument requests by February 15, 2012. The Executive Director further advised the Applicants that should he not receive any evidence from them by January 18, 2012, then the matter would be decided on the basis of the ASC Staff material.
7. The Executive Director received an email from Kennedy on January 18, 2012 who advised that he had been unable to retain counsel. He suggested that the lawyers he consulted did not wish to compromise their registration relationship with the ASC. He further opined that the "evidence that ASC Staff is relying upon in their recommendation to deny my application is from approximately 10 years ago, and I still take the position that this shouldn't be enough to deny my application". He suggested that rather than continue with the appeal process, he proposed to meet and discuss with the ASC a new UDP for Harrington on a mutually acceptable timeline. The Executive Director, by return email the same day, advised Kennedy that he could decide to abandon his appeal, in which case the recommendation to refuse registration would be accepted. Kennedy and Harrington could pursue with ASC Staff discussions about what might satisfy the registration criteria. However, if Harrington and Kennedy did not abandon the appeal, then the hearing process would continue. The Executive Director advised Kennedy that he would require a decision on abandonment of the right to be heard by noon on January 20, 2012. At 11:31 am, the Executive Director received an email from Mr. Kennedy advising "please allow the matter to continue to move forward as we do not wish to withdraw our right to be heard."
8. The Executive Director by email on February 3, 2012 confirmed to Kennedy that the written submissions of Harrington and Kennedy were required to be received by 5 pm on February 8, 2012.

### **Submissions of the Parties**

9. The Executive Director received ASC Staff submissions on February 8, 2012. No submissions were received from the Applicants.
10. ASC Staff made reference to the ASC Staff Affidavit, specifically the fact that Kennedy had disclosed six civil actions in which he was named personally as a defendant or as a director of a named defendant. ASC Staff identified the following concerns from the civil actions:
  - Several of the claims involved securities transactions and referred to securities-related transgressions, such as a failure to deliver share certificates or an omission to return investment funds when required;
  - Several of the claims alleged not only did Kennedy renege on paying a debt, but that he made misrepresentations, breached his fiduciary duties and prejudiced the rights of shareholders; and
  - All of the claims ended in either consent or default judgments.
11. ASC Staff submitted that the allegations in the civil actions raised concerns about Kennedy's integrity, and the failure to defend the actions pointed to a lack of competence. Further, ASC Staff suggested that the failure to defend was indicative of financial troubles. It was also identified that Kennedy had twice gone through personal bankruptcy, with discharges being obtained June 27, 1998 and October 11, 2007.
12. ASC Staff further submitted that the evidence of past financial difficulties pointed to poor judgment skills and a heightened risk that there may be a propensity to "engage in self-interested activities at the expense of clients", should future financial problems arise.
13. ASC Staff also identified that Kennedy had disclosed 4 convictions for failure to file a tax return under s. 238 of the *Income Tax Act*, RSC 1985. It was submitted that is further evidence of poor financial management and a lack of compliance towards regulatory requirements.
14. ASC Staff also made reference to Mr. Kennedy's non-disclosure of four Criminal Code charges, three of which were stayed and one, which was withdrawn. On my review of the application requirements' explanation, I am not convinced that information was required to be disclosed. At best, it is ambiguous, and accordingly I place no weight on that submission by ASC Staff.

### **The Statutory Framework**

15. Registration to trade in securities in Alberta is governed by Part 5 of the Act. Section 76(1) within that Part states as follows:

76(1) Unless it appears to the Executive Director that

- (a) an applicant is not suitable for registration, reinstatement of registration or amendment of registration, or
- (b) the proposed registration, reinstatement of registration or amendment of registration is objectionable, the Executive Director shall grant to the applicant the registration, reinstatement of registration or amendment of registration applied for.

*Securities Act, R.S.A. 2000, c. S-4, section 76*

- 16. NI 31-103 sets out the current requirements for those who wish to register to trade in securities in Alberta, along with exemptions to those requirements. CP to NI 31-103, provides guidance on how Canadian Securities Administrators (CSA) will apply NI 31-103.
- 17. Section 76(1) of the Act sets out two grounds for rejecting a registration application under Part 5. The Executive Director can decline to register an applicant that is not “suitable” and he can refuse a registration that is otherwise “objectionable.”
- 18. CP to NI 31-103 indicates that CSA regulators will apply three fundamental criteria when assessing a prospective registrant’s suitability: proficiency, integrity and solvency. CP 31-103 states as follows:

(a) Proficiency

Individual applicants must meet the applicable education, training and experience requirements prescribed by securities legislation and demonstrate knowledge of securities legislation and the securities they recommend.

Registered individuals should continually update their knowledge and training to keep pace with new securities, services and developments in the industry that are relevant to their business. See Part 3 of this Companion Policy for more specific guidance on proficiency.

(b) Integrity

Registered individuals must conduct themselves with integrity and have an honest character. The regulator will assess the integrity of individuals through the information they are required to provide on registration application forms and as registrants, and through compliance reviews. For example, applicants are required to disclose information about conflicts of interest, such as other employment or partnerships, service as a member of a board of directors, or relationships with affiliates, and about any regulatory or legal actions against them.

## (c) Solvency

The regulator will assess the overall financial condition of an individual applicant or registrant. An individual that is insolvent or has a history of bankruptcy may not be fit for registration. Depending on the circumstances, the regulator may consider the individual's contingent liabilities. The regulator may take into account an individual's bankruptcy or insolvency when assessing their continuing fitness for registration.

*Companion Policy 31-103CP, Registration Requirements and Exemptions Section 1.3, p. 10*

19. While CP to NI 31-103 does not discuss the meaning of "objectionable," it would appear to refer to broader public interest grounds for rejecting a registration application.

*Re, Swift Trade Inc. (2008), OSC Bull 1519, 2008 Carswell ONT 449 at paras. 19-21*

20. The Ontario Securities Commission (OSC) has provided a further description of what the suitability criteria involves. Several registration cases note the following formula:

1. *integrity*, which includes honesty and good faith, particularly in dealing with clients, and compliance with Ontario securities laws;

2. *competence*, which includes prescribed proficiency and knowledge of the requirements of Ontario securities laws; and

3. *financial solvency*, which is considered relevant because it is an indicator of a firm's capacity to fulfil its obligations and can be an indicator of the risk that an individual will engage in self-interested activities at the expense of clients.

*Re Florence (2004), 27 OSC Bull 7583, 2004 CarswellOnt 3522 at para. 21*

21. CSA registration decisions clearly state that it is necessary and appropriate for regulators to look at the past conduct of applicants when assessing suitability. Registration decisions often cite the authority of *Re Mithras Management Ltd.*, an OSC decision that states as follows:

...[T]he role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts... We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be...

*Re Mithras Management Ltd (1990), 13 OSC Bull 1600, 1990 LNONOSC 119 at 5.*

22. In the *Albinati* decision, a panel of ASC members made similar comments in explaining why the ED is entitled to look at various factors including past conduct in assessing registration applications:

[50] The Commission's overarching responsibility is the protection of the investing public and the fostering of a fair and efficient capital market and confidence in that market. Registrants play a crucial role in both the capital market system and investor protection. The requirement to register under Alberta securities laws exists for the protection of the investing public by ensuring that applicants for registration have a certain degree of integrity, competence and solvency when application for registration is made. Without registration (or an available registration exemption), no sales of securities can be made. Thus, registrants are given the privilege of selling securities, a privilege that is not available to others.

.....

[52] The Act imposes on the Director a duty to satisfy himself that an applicant for registration is fit for registration. The evaluation undertaken by the Director during the registration process exists for the protection of the investing public. In assessing fitness for registration the Director necessarily relies heavily on **present and past conduct** as predictors of what an applicant's future behaviour might reasonably be expected to be. [emphasis added]

.....

[53] We believe that it is integral to our public policy regulatory regime that the Director retain broad discretion to consider all circumstances he deems relevant in making his determination as to suitability and non-objectionability at the time an application is made. Members of the public who deal with those who participate in the securities industry, including mutual fund salespersons, directors and officers, should be confident that they are dealing with persons of integrity who possess certain competencies. This is assured by the Act giving the Director the positive obligation to assess fitness of potential applicants for registration.

*Albinati, Re, 2009 ABASC 279 at paras. 50-53*

23. The Executive Director in the ASC registration case of *Re Doe* thus considered past conduct. The applicant had in the past falsely witnessed another individual's signature on a form. An insurance industry regulator sanctioned her for this misconduct. She also pled guilty to a criminal charge relating to a false signature and received a conditional discharge. These circumstances indicated to the ED that registering the applicant might put the public at risk.

*Re Doe, 2007 ABASC 296 at paras. 10-15*

24. CSA regulators considering registration applications have taken into consideration allegations of past misconduct set out in civil pleadings or regulatory notices of hearing. The existence of a regulatory investigation into the affairs of an applicant is itself a matter of concern, according to past registration cases. CSA regulators have frequently denied

registration in cases where allegations against a respondent in civil, criminal or regulatory proceedings were not yet proven, or where an investigation was ongoing.

*Re Wall (2007), 30 OSC Bull 7521, 2007 CarswellOnt 5359 at paras. 9, 13, 25 31*

*Re Florence (2004), 27 OSC Bull 7583, 2004 CarswellOnt 3522 at paras. 2, 9, 13-18&26*

*Re Gevaert (2009), 32 OSC Bull 1243, 2009 CarswellOnt 527 at paras. 6-7, 31, 43 at para. 31*

*Re, Swift Trade Inc., 2008 Carswell ONT 449 (2008), OSC Bull 1519, 2008 Carswell ONT 449 at paras. 1, 4, 37-39, 41-42*

*Re Vilas-Boas (2002), 25 OSC Bull 6401 paras. 1-3, 5, 26*

25. According to CSA case law, insolvency and financial difficulties may reflect poorly on the judgment and competence of an applicant. Further, they indicate a danger to the public, since an insolvent person may be tempted to do inappropriate things with client funds.

*Re Huckerby (2004), 27 OSC Bull 5654 at 6, 10-11.*

*Re Florence (2004), 27 OSC Bull 7583, 2004 CarswellOnt 3522 at para. 21.*

26. Whether to permit or refuse registration will turn in some cases on the position applied for. In that regard, Staff notes that under NI 31-103 a UDP has broad and significant responsibilities to promote compliance with securities laws:

#### 5.1 Responsibilities of the Ultimate Designated Person

The ultimate designated person of a registered firm must do all of the following:

- (a) supervise the activities of the firm that are directed towards ensuring compliance with securities legislation by the firm and each individual acting on the firm's behalf;
- (b) promote compliance by the firm, and individuals acting on its behalf, with securities legislation.

*NI 31-103, Section 5, p. 16 (TAB 2)*

27. No other registrant supervises a UDP's compliance with securities laws in a firm; rather, they are ultimately responsible for compliance in the firm.

### **Analysis**

28. ASC Staff has presented a fairly compelling history of Kennedy's past financial difficulties. Clearly, his bankruptcies suggest he has not been able to manage his personal financial affairs. He has been involved as a defendant in a number of civil actions where his conduct has been alleged to be of a character that would not be conducive to being a gatekeeper in the capital markets. He has chosen not to defend these actions and the accompanying allegations, but rather either consented to judgment against him or had default judgment entered against him. There may be reasons why Kennedy chose to adopt this course of

action, but he provided no explanation as to his conduct. Accordingly, for purposes of this hearing, they are accepted as evidence of a lack of integrity and a lack of competence as submitted by ASC Staff.

29. The only input into the hearing process that Kennedy and Harrington, through Kennedy, have offered, have been requests to prolong timelines or to put the hearing in abeyance while a discussion could occur. Kennedy has suggested that he has been unable to retain counsel because the law firms consulted are concerned with compromising their relationship with the ASC. The ASC conducts many hearings every year, and in most of these hearings, there are lawyers from a considerable number of different law firms located in Calgary. Most of these law firms also act in relation to corporate financing transactions and registration matters with the ASC. Kennedy's explanation is simply not believable.
30. Kennedy also provided an email comment that the ASC Staff evidence was "from approximately 10 years ago, and [he] still take[s] the position that this shouldn't be enough to deny [his] application". This is not technically evidence in the hearing, nor are his comments about inability to obtain legal advice, but notwithstanding, they were submitted to the Executive Director. The evidence is all somewhat dated, however there is no evidence or explanation offered by Kennedy as why it is not reliable, other than the email that it should not be enough to deny the application. The whole purpose of the hearing was for Kennedy and Harrington to provide evidence to rebut ASC Staff's evidence that they were not suitable for registration. They chose not to do so.
31. The conduct of Kennedy and Harrington throughout this process must be commented upon. Asking for the right to be heard, and then not providing any meaningful input into the process amounts to disrespect for the ASC, and the regulatory process. It suggests that Kennedy does not either understand regulatory requirements, or alternatively, does not care what the rules are. This mirrors his conduct previously in the civil courts. It leads me to the conclusion that the entire hearing process was a sham, in order for him to conduct his business as long as possible.
32. I am satisfied that Kennedy's financial history, combined with uncontroverted allegations in civil actions which became judgments, along with his conduct in this hearing demonstrate a lack of integrity and competence which is fundamental to being a registrant in the Alberta capital markets. I would find him unsuitable, and objectionable as a registrant in Alberta. Harrington's application is dependent upon a positive finding on Kennedy's status and accordingly it too fails to be suitable.

## **Finding**

33. Based on the foregoing, I find that Kennedy and Harrington are not suitable for registration in any capacity with the ASC, specifically:
  - 1) Harrington's application for registration as an Exempt Market Dealer is denied;

- 2) Kennedy's application as a Dealing Representative and the Ultimate Designated Person for Harrington is denied; and
- 3) To the extent that Harrington and Kennedy were relying upon a registration exemption set forth in s.16.7 of NI 31-103, that exemption is no longer available to them by virtue of this decision.

Dated at the city of Calgary, in the province of Alberta, this 16<sup>th</sup> day of February, 2012.

) "original signed by David C. Linder"

) David C. Linder, Q.C.

) Executive Director

) Alberta Securities Commission