

Re Locke

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada**

and

Shirley A. Locke

2020 IIROC 26

Investment Industry Regulatory Organization of Canada
Hearing Panel (Nova Scotia District)

Heard: December 19, 2019 in Halifax, Nova Scotia

Decision: December 19, 2019

Reasons for Decision: August 7, 2020

Hearing Panel:

R. Scott Peacock, Chair, Roland Coffill and Thomas Kostandoff

Appearance:

Kathryn Andrews, Senior Enforcement Counsel

April Engelberg, Enforcement Counsel

Kevin Kiley for Shirley A. Locke

Thomas Keeler for Shirley A. Locke

Shirley A. Locke (present))

DECISION ON RESPONDENT’S OBJECTION RE ADMISSIBILITY

¶ 1 This matter came before the Panel for hearing on the merits commencing on the 16th day of December 2019 and was adjourned on the 20th. The hearing resumed on the 2nd day of March 2020 and concluded on the 5th. The Decision on the Merits was rendered on the 5th of May 2020. Amongst the witnesses heard by the Panel was Ms. Pat Gerada, the investigator for IIROC Enforcement Staff. In her direct examination, Ms. Gerada made reference to materials she had compiled. In particular, it was a chart compiled by Staff in respect to the risk rating for securities held in the relevant accounts. The chart was found in Vol. 1, Tab 7, p. 0343.

¶ 2 Mr. Kiley objected to the admissibility of the chart and the evidence of the investigator in respect to the risk associated with the various securities. Mr. Kiley’s submission was that the investigator had not been qualified as an expert witness but as a “fact witness”. Further, he argued that the rating assigned by the investigator came from no other source than the investigator who was not expert in the subject matter.

¶ 3 In response, Ms. Andrews argued that the act of compiling data in a chart does not constitute expert evidence and that the evidence of the investigator in this regard was not proffered as expert evidence. The data compiled in the chart was fact and not opinion. The investigator had testified that the data compiled in the chart had been gleaned from prospectuses, Annual Information Circulars, and other industry sources in respect to the risk ratings.

¶ 4 The issue for the Panel was whether or not to hear the evidence of the investigator in respect to risk ratings and whether or not to give weight to the chart prepared by her. In support of his argument, Mr. Kiley referred the Panel to *Re Debus* 2019 IIROC 5. There, the Panel stated in respect to a similar chart at paragraph 104:

This kind of pragmatic analysis is no doubt helpful for an initial investigation as well as settlement discussions but is not expert evidence for the purpose of a disciplinary hearing.

Ms. Andrews submitted that the investigator had not been offered as an expert witness but was relating facts as she had discovered and recorded them. Ms. Andrews referred the Panel to *Re Sammy* 2017 ONSEC 21, where the same issue was considered by the Ontario Securities Commission when hearing the appeal of Krishna Sammy. The appeal panel stated in paragraphs 36 and 37:

36. As a specialist tribunal, an IIROC hearing panel will have less need for expert evidence on matters within its own expertise than would a court of general jurisdiction.

37. An IIROC hearing panel is well placed to determine whether there is an issue before it about which it would need expert evidence. The determination of risk associated with particular securities, in the context of assessing compliance with IIROC rules regarding suitability falls squarely within the expertise of IIROC hearing panels....

¶ 5 After hearing the submissions of counsel and considering the cases to which counsel referred, the Panel decided that it would hear the evidence of the investigator and admit the exhibit. It is the role of the Panel as finder of fact to make determinations of fact in respect to the evidence offered in a hearing. It is clearly in the expertise of the Panel to make its own determination of risk based upon what it has heard and the documentary evidence before it. The sources of the data are relevant considerations in determining what weight the Panel should give the evidence. The evidence of the investigator and the exhibit were not determinative of the issue before the Panel. The evidence may be of some assistance, but was evidence to be considered in its totality in making a determination whether or not certain securities were suitable for the clients.

Dated at Halifax, Nova Scotia this 7 day of August, 2020

R. Scott Peacock

Roland Coffill

Thomas Kostandoff

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