

# Unofficial English Translation

## Re Giroux-Garneau

IN THE MATTER OF:

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

**and**

**The By-Laws of the Investment Dealers Association of Canada**

**and**

**Denyse Giroux-Garneau**

2016 IIROC 46

Hearing Panel  
of the Investment Industry Regulatory Organization of Canada  
(Québec District)

Hearing held: June 29, 2016  
Decision rendered: November 24, 2016

### **Hearing Panel**

Me Jean Martel, Ad. E., Chair; Me Jacques Lemay and Mr. Marcel Paquette

### **Appearances**

For IIROC: Me Pascale Dionne-Bourassa

For the Respondent: Me Jacques Patry

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## **DECISION ON PENALTY**

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¶ 1 The Investment Industry Regulatory Organization of Canada (IIROC) charged that Ms. Denyse Giroux-Garneau (the Respondent) contravened certain of its rules (the Rules») while she was a representative employed with one of its dealer members (the Firm). The allegations were as follows:

- “1. *On February 11 and 14, 2014, whereas the account of a client deceased on October 12, 2013 had not been designated as a “discretionary” or “managed” account, the Respondent engaged in business conduct or practice which was unbecoming when she carried out two unauthorized and liquidative securities transactions in the client’s TFSA account, by cancelling the client’s TFSA account and by giving instructions to transfer an amount of \$15,294.63 to the client’s bank account, without obtaining the prior authorization of the liquidator of the client’s succession, contrary to Rule 29.1, Rule 1300.4 and Rule 1300.5 of IIROC;*
2. *On February 14, 2014, the representative Giroux-Garneau engaged in business conduct or practice which was unbecoming by unlawfully appropriating, by means of a blank cheque*

*signed by the client while he was still living, the sum of \$15,972.88, contrary to IIROC Rule 29.1;*

3. *Effective October 12, 2013, the representative Giroux-Garneau engaged in business conduct or practice which was unbecoming by not informing her employer of the client's death, by not updating the client's account opening form following the latter's death, and by not changing the client account to an estate account, contrary to IIROC Rule 29.1 and to IIROC Rule 1300.1(a);"*

¶ 2 In a decision dated May 12, 2016 ("Decision on the Merits")<sup>1</sup>, our Hearing Panel found the Respondent guilty of these three counts.

¶ 3 We reached this conclusion after taking into account certain relationships entertained by the Respondent at the material time, namely:

- (i) her business relationship with Mr. J., a client of the Firm, to whom she provided services as an investment representative under conditions regulated by IIROC, in normal fashion, as if these services were provided between parties at arm's length;
- (ii) her parallel relationship as spouse and caregiver of Mr. J., in the course of which she handled the "material direction" of the couple of which she was part; and
- (iii) subsidiarily, her relationship with the liquidator of Mr. J.'s succession, her deceased ex-spouse (and client).

¶ 4 These special circumstances (which we refer to hereinafter as the "family circumstances") are also relevant to the exercise of our jurisdiction to impose a penalty on the Respondent for reasons of the professional exactions of which she has been found guilty.

## **I. THE FACTS**

¶ 5 Referring to the Decision on the Merits, let us briefly review the facts and circumstances that most accurately summarize the facts in this matter :

*[10] The Respondent has been a registered representative in the securities industry since 1978. She met J. in the course of her work, in 1988. He was practicing law as a notary and occasionally referred clients to her in the course of settling estates.*

*[11] In the late 90s, J. experienced professional troubles. He was ultimately stricken from the roll of l'Ordre de la Chambre des notaires and lost his right to practice. He then went back to school and lived very frugally.*

*[12] The Respondent and he renewed contact and began seeing each other regularly. Their relationship grew closer and, in 2001, J. moved in with her.*

*[13] From then on, they conducted themselves publicly as spouses, and each of them, from time to time, attended events that involved the other's family.*

*[14] Then, J. was diagnosed with Parkinson's disease. [...]*

*[15] As long as they were together, the Respondent looked after J. [...]*

*[16] On a material level she handled the majority of the couple's housing, furniture, phone, food and housekeeping expenses; she paid off some of his personal debts.*

*[17] J.'s health deteriorated. In 2008, he had to be admitted to a long-term residential care facility for persons with severe loss of autonomy (a **CHSLD**). He remained in this establishment until his death.*

*[19] The Respondent helped J. with his admission process to the CHSLD. Once he was admitted,*

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<sup>1</sup> *Re Giroux-Garneau* [2016] IIROC 17.

*she continued to act as if she was his spouse.[...] Most of the time, she paid out of her own pocket, since J. really did not have the means to contribute to such expenditures.*

*[20] At an unspecified time, J. gave the Respondent blank cheques which he had signed so that she could draw money on his current account at the Bank of Montréal whenever she needed— notably to reimburse some of the many expenses that she handled for him for his well-being.*

*[21] In fall 2013, the Respondent used some of these cheques to pay expenses in connection with the care that J.'s state of health now required and to obtain cash.*

*[22] While the Respondent was acting as J's caregiver, his family members were not in any way involved in the care and support that his struggle against the disease required.*

¶ 6 It was at this point that the Respondent took the actions that led to her being found guilty of the above cited misconduct:

*[28] [...] in 2010, [...] J. received an inheritance.*

*[29] He then decided to use the Respondent's services to invest the proceeds. To this end, he became a client of the Firm where his spouse worked. [...]*

*[31] The Respondent was the one who helped J. fill out the documentation in P-23, namely the cash account opening form, as well as the relevant documents for setting up the TFSA account. [...]*

*[35] [...] when the accounts were opened, J. did not, and he stated that he did not, confer any power over the cash account to a third party (by power of attorney, for example) or any power to manage the account, as the Rules would have allowed [...]*

*[38] The Respondent was therefore never relieved of her obligation, under the Rules, to obtain J.'s authorization, or that of his assigns, in order to execute trading activities in his accounts. [...]*

*[39] Then, on October 12, 2013, J. died. [...]*

*[42] A representative like the Respondent, who has over 35 years' experience in the industry, has to know that upon the death of a client, the latter's assets devolve to the deceased's estate, and come under the control of an executor, the liquidator of the succession, and the representative of the deceased client must inform his employer of this, and conduct himself accordingly.*

*[43] The Respondent did not see it this way. She abstained from informing the authorities at [the Firm] of the death, which she should have done by updating the account opening form and asking that the accounts be converted to estate accounts. [...]*

*[48] [...] in February 2014, the Respondent was informed that she was not an heir of J's estate.*

*[49] Confronted with this news, the Respondent acted quickly, between February 11 and 14, 2014.*

*[50] Through unauthorized sell transactions which she initiated on the equity market, she monetized the investments held in the client's TFSA account and had the account closed by cancelling the relevant agreements. She then gave cash management instructions within the Firm to have the net cash balance transferred from the TFSA account to the cash account. Finally, she gave instructions to transfer a sum of \$15,294.63 from this cash account to the deceased's current account, which was still operational at the Bank of Montréal. [...]*

*[52] On February 14, 2014, the Respondent completed her appropriation of the assets in J.'s estate. She filled out one of the signed blank cheques in her possession and presented it for payment. The cheque was honoured by the client's bank, the deceased's current account was debited, and the Respondent collected a sum of \$15,972.88 at the estate's expense.*

*[53] Two months later, Mrs. C. contacted the Firm to obtain, in her capacity as liquidator of the succession, information on her brother's investments.*

[54] C. soon found that after J.'s death, a sum of \$15,294, whose transfer she did not authorize, was drawn on the TFSA account.

[55] On April 24, 2014, C. filed a complaint with the Firm and requested restitution of the misappropriated amount.

[56] [The Firm] then conducted an internal investigation. On this occasion, the Respondent admitted having liquidated the TFSA account and maneuvered to retrieve the balance.

[57] The Respondent was dismissed by the Firm on May 16, 2014, without having reimbursed the estate for the amount she had taken from it.

¶ 7 The Respondent admitted the key facts in this matter to Staff of IIROC, in a statement made in the presence of the legal counsel who now represents her before us.<sup>2</sup>

¶ 8 These admissions were reiterated, moreover, by counsel for the Respondent at the hearing on the merits<sup>3</sup>, which the Respondent, now elderly and sick, was unable to attend in person; nor was she able to attend the penalty hearing.

## II. JURISDICTION OVER PENALTY

¶ 9 The jurisdiction that allows us to determine and impose disciplinary penalties on the Respondent in this matter arises from the provisions of IIROC Dealer Member Rule 20.33 (2), *Hearing Processes*, which grants us broad discretion in this regard:

*"[...] a Hearing Panel may impose any one or more of the following penalties upon the Approved Person:*

- (a) a reprimand;*
- (b) 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 such Approved Person by reason of the contravention;**
- (c) suspension of approval for any period of time and upon any conditions or terms;*
- (d) terms and conditions of continued approval;*
- (e) prohibition of approval in any capacity for any period of time;*
- (f) termination of the rights and privileges of approval;*
- (g) revocation of approval;*
- (h) a permanent bar from approval with the Corporation; or*
- (i) any other fit remedy or penalty."*

¶ 10 In the exercise of that discretion, the Hearing Panel may draw inspiration from the *IIROC Sanction Guidelines* (the **Guidelines**),<sup>4</sup> which are intended to ensure consistency and promote fairness and transparency in the determination of the sanctions which are part of the administration of IIROC's disciplinary process.

¶ 11 At the penalty hearing on June 29, 2016, IIROC entered into evidence Document PS-1, respecting the costs that it has had to shoulder in this matter. The costs come to \$68,036.53. As for the Respondent, documentary evidence was submitted to us in her name as Exhibit IS-1 concerning her precarious health and

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<sup>2</sup> Respondent's Statement to IIROC investigators, Exhibit P-39, pp. 34 to 40.

<sup>3</sup> Hearing of January 21, 2016, s.n. p. 87.

<sup>4</sup> *IIROC's Dealer Member Disciplinary Sanction Guidelines*, February 2, 2015 version.

financial position.<sup>5</sup>

¶ 12 The Hearing Panel also heard arguments by the legal counsel of both parties, who each in turn invited us to consider certain aspects of the Guidelines, in light of the facts that have been established for us.

### **III. THE PARTIES' ARGUMENTS**

¶ 13 IIROC argues that, in the circumstances, the following penalties should be imposed on the Respondent:

- (i) a fine in the amount of \$50,000;
- (ii) a permanent prohibition from approval in any capacity with an IIROC-regulated firm; and
- (iii) costs in the amount of \$10,000, applicable to costs incurred by IIROC in the course of this matter.

¶ 14 The Respondent is challenging this claim. She argues that the sanctions being called for against her are exaggerated, for they are disproportionate to the pecuniary advantage derived from committing the offenses.

¶ 15 Counsel for the Respondent has also invoked Part I, section 7 of the Guidelines and argues that she clearly does not have the ability to pay the financial penalties that IIROC is calling for.

### **IV. ANALYSIS**

¶ 16 The facts in this matter demand that we return to certain fundamental principles governing the determination of disciplinary sanctions by a Hearing Panel.

#### ***Sanction Principles***

¶ 17 A first principle is that imposed sanctions must be sufficiently strict to produce the required deterrent effect.

¶ 18 On the one hand, the sanctions must not only discourage the respondent from repeating the behaviour for which he was found guilty (specific deterrence), but also discourage his industry peers from committing disciplinary offenses themselves (general deterrence).

¶ 19 The deterrent effect of a sufficiently exemplary sanction helps prevent behaviours that are likely to undermine trust in the honesty and loyalty of investment professionals, taint the market's reputation and potentially affect the soundness of its operation. Appropriate sanctions therefore help strengthen market integrity and, in so doing, protect the interest of the investing public.

¶ 20 A second principle is particularly relevant in this instance: imposed sanctions must be able to strike an appropriate balance between the alleged misconduct and the professional standards that have been transgressed.<sup>6</sup>

¶ 21 It is the public interest that dictates whether the sanction is reasonably proportionate to the conduct at issue.

¶ 22 The Supreme Court of Canada, in *Cartaway*,<sup>7</sup> teaches us in fact that the administrative tribunal of a Canadian securities authority – which includes a domestic tribunal like our Hearing Panel, that is approved by said authority to exercise a disciplinary authority – must use its own discretion to impose a sanction, to give proportional weight to the goal of general deterrence by ensuring that, in aggregate, the imposed disciplinary measures remain reasonable:

*“The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a different remedial emphasis according to the circumstances. Courts should review the order globally to determine*

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<sup>5</sup> Exhibit IS-1, Respondent's sworn statement and income statement for 2015.

<sup>6</sup> *Re Mills* [2001] I.D.A.C.D. No. 7, p. 3.

<sup>7</sup> *Re Cartaway Resources Corp.* [2004] 1 RCS 672, par. 64.

*whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest. Nevertheless, unreasonable weight given to a particular factor, including general deterrence, will render the order itself unreasonable.”*

¶ 23 In short, a Hearing Panel must take a measured and balanced approach in exercising its jurisdiction to discipline, otherwise it risks betraying the public interest objectives of the disciplinary process that it embodies.

¶ 24 To establish this balanced approach, we must of course rely on the precedents established by the sanctions imposed in similar circumstances for comparable offenses. Nevertheless, we must also temper the application of these precedents with the mitigating or aggravating factors that emerge from the evidence submitted in each case.

#### ***Key factors to consider***

¶ 25 During the penalty hearing, counsel for the parties reviewed certain of the key factors suggested in Part II of the Guidelines against the evidence. Here are the conclusions that we drew.

¶ 26 With regard to the **aggravating factors**, we find the following:

- (i) the Respondent failed to inform the Firm of a client’s death for more than four months;
- (ii) she knowingly contravened her Firm’s internal policies and procedures, which stipulated that a representative must apply very clear disclosure and control measures in the event of a client’s death;
- (iii) once the Respondent found out that she was not her spouse’s heir, she planned the commission of the acts for which IIROC is prosecuting her in this matter;
- (iv) she quickly cancelled her client’s TFSA account and ordered that two unauthorized trades be carried out, which allowed her to appropriate the sums held in her spouse/client’s account;
- (v) the Respondent procured an unlawful financial advantage for herself by appropriating a sum of \$15,972.88 which belonged to her client’s estate;
- (vi) she never acknowledged her guilt in this regard, maintaining, to the contrary, that the sum concerned was her due;
- (vii) the Respondent has not reimbursed J.’s estate for any of the amounts of which it was unjustly divested through her actions.

¶ 27 Next, we have listed the following evidence under **mitigating factors** to consider:

- (i) the Respondent has no disciplinary history;
- (ii) the misconduct alleged by IIROC in the matter was an isolated event in a long, 35-year career in the securities industry;
- (iii) the Respondent took the actions concerned during a relatively short period of time, for reasons that were exclusively to do with her family circumstances; and
- (iv) she has already been the object of an administrative penalty for her misconduct, having been dismissed by the Firm that employed her.

¶ 28 The Respondent was clearly not in a position where, according to the standards promulgated in IIROC’s Rules, she would have had the necessary authority to validly carry out the alleged trades, or to recover any sum of money owed to her client’s estate. She had to have known that her actions were a departure from the Rules, but convinced that in her case they were legitimate, she overrode them and knowingly took these actions, in spite of everything.

## **V. THE SANCTIONS**

¶ 29 During arguments, Counsel for IIROC invited our Hearing Panel to consider an aggregate approach, intended to sanction the Respondent's misconduct in a reasonable manner.

¶ 30 Regarding the monetary penalties, IIROC breaks down the \$50,000 fine that it is calling for as follows: \$25,000 for the misappropriation of funds; \$15,000 in regard to the sums of money of which the estate was deprived; \$5,000 for the unauthorized trades; and \$5,000 for the failure to update the Firm's client information form.<sup>8</sup>

¶ 31 IIROC also requests that Respondent be permanently barred from approval in any capacity with an IIROC-regulated firm.

¶ 32 On the whole, with respect to the general deterrence objective, the monetary penalties claimed by IIROC appear consistent with the case law that was submitted to us.<sup>9</sup>

¶ 33 Furthermore, *Chher*<sup>10</sup> was used as the authoritative reference to the effect that family circumstances cannot be invoked to lower the standard or exempt someone from observing the standard of professional conduct to which the representative of an IIROC dealer member is subject in all of his client relations.

¶ 34 For his part, counsel for the Respondent invited us to consider that his client would be unable to pay the fines that IIROC is asking the Hearing Panel to impose, that she is over 70 years old, is very ill, and her subsistence-level income approaches the poverty line.

¶ 35 Our Hearing Panel is prepared to grant this claim and to recognize that it is appropriate to take into account the Respondent's inability to pay, which is not in doubt given the evidence presented.

¶ 36 Nevertheless, this factor by itself cannot disclaim the principle that an approved person brought before us must not be allowed to emerge from disciplinary proceedings deriving a benefit from an offence for which she was found guilty. This seems evident to us.

¶ 37 Recognizing, as was done in *Cusson*, that "the misappropriation of funds is an offense that undermines the very foundations of the relationship of trust that must exist between the representative and his client," and that this demands a penalty serious enough to deter its commission, we feel the imposition of a substantial fine is necessary for having misappropriated funds entrusted to her control and depriving J's estate of these funds.

¶ 38 We note that the earlier version of the *IIROC Sanction Guidelines* recommended the imposition of a minimum fine of \$25,000 in the case of a misappropriation of funds, but that the new guidelines provide no such minimum.

¶ 39 Regardless, in the rather unique circumstances of this matter, a fine of this magnitude seems to us an appropriate penalty for misappropriating the assets of a client of her Firm.

¶ 40 As for the fact of having acted in such a way as to prevent her firm's control systems from detecting and preventing a misappropriation of J.'s funds and for ordering unauthorized trades in order to complete this misappropriation, the imposition of a \$10,000 fine seems justified to us.

¶ 41 Nevertheless, our Hearing Panel is not convinced that these same circumstances justify imposing a permanent bar from approval in any capacity with an IIROC-regulated firm.

¶ 42 We agree with the statement that even when she was acting for J., her own spouse, it behooved the Respondent to observe high standards of ethics and conduct in the transaction of her business as a registered representative of the Firm, and to refrain from any business conduct or practice which is unbecoming or

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<sup>8</sup> Hearing of January 21, 2016, our emphasis. p. 16.

<sup>9</sup> See *Re Jannetta*, [2010] IIROC No. 23; *Re Cuthbertson*, [2012] IIROC 24; *Re Sloan*, [2014] IIROC 35; *Re Cornacchia*, [2011] IIROC 25; *Re Cusson*, [2012] IIROC 62; *Re Jones*, [2011] IIROC 17; *Re Silvaggio*, [2011] IIROC 63; *Re Steel*, [2013] IIROC 06; and *Re Chher*, [2011] IIROC 79.

<sup>10</sup> Op. cit., note 9.

detrimental to the public interest. If she failed in this duty, she must be sanctioned accordingly.

¶ 43 While the family circumstances in question do not excuse the commission of the offenses of which the Respondent has been found guilty in this instance, we must nonetheless find that in this matter, we are not in the presence of as heinous a scheme to misappropriate funds as one might find in other circumstances.

¶ 44 Indeed, the evidence shows that the acts and omissions committed by the Respondent were motivated, not by a quest to enrich herself at the expense of the estate of the person with whom she shared her life, but rather by a desire to seek justice for herself, considering that she had impoverished herself taking care of her spouse/client only to find herself disinherited. This is, we believe, what incited her to take advantage of her position as the person responsible for the deceased's account with her Firm.

¶ 45 Granted, it is a tenuous line, but a line nonetheless, and we believe that it justifies using our discretion to distinguish the present case from certain of the precedents to which we were referred regarding the principles discussed above concerning the determination of sanctions.

¶ 46 Accordingly, we are in agreement with prohibiting the Respondent from approval in any capacity with an IIROC-regulated firm for a period of 10 years.

## **VI. COSTS**

¶ 47 IIROC has asked us to order costs in the amount of \$10,000. The sworn statement (PS-1) of an IIROC staff member dated June 28, 2016 shows that IIROC incurred a total of \$68,036.53 in charges and expenses in connection with this matter.

¶ 48 This request from IIROC, though obviously clement, seems to us acceptable in the circumstances.

### **FOR THESE REASONS, THE HEARING PANEL IMPOSES THE FOLLOWING PENALTIES ON THE RESPONDENT:**

1. An aggregate fine in the amount of \$35,000;
2. A ban on approval in any capacity with an IIROC-regulated firm for a period of 10 years;
3. Costs in the amount of \$10,000, payable to IIROC in connection with this matter.

Signed at Montréal, Québec this November 24, 2016.

*Jacques Lemay*

**Panel Member**

*Jean Martel*

**Panel Chair**

*Marcel Paquette*

**Panel Member**

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