

Re Lavoie

IN THE MATTER OF:

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

and

The By-Laws of the Investment Dealers Association of Canada

and

Frédéric Lavoie

2013 IIROC 51

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

Heard: May 22, 2013
Decision: September 3, 2013

Hearing Panel

Me Alain Arsenault, Chair, Mr. Gilles Archambault, Ms. Éline C. Phénix

Appearances

Me Myriam Giroux-Del Zotto, Counsel for IIROC

The Respondent was absent and was not represented by counsel

DECISION

I. PREAMBLE

¶ 1 In the Notice of Hearing dated March 22, 2013, IIROC set May 22, 2013, as the date of the disciplinary hearing to determine whether the Respondent Frédéric Lavoie committed the three contraventions alleged by IIROC Staff.

¶ 2 This Notice of Hearing was served upon the Respondent by registered mail on March 27, 2013, along with a letter signed by Counsel for IIROC, Me Myriam Giroux-Del Zotto, which stated that Respondent must serve upon IIROC Staff a Response to the Notice of Hearing within 20 days from the effective date of service of the Notice of Hearing.

¶ 3 The 20-day response deadline was also stated in the Notice of Hearing, as were the consequences for failing to attend or respond, namely the possibility of the Hearing Panel applying the following measures:

- (a) Proceed with the hearing as set out in the Notice of Hearing, without further notice to the Respondent;
- (b) Accept as proven the facts and contraventions alleged by Staff in the Notice of Hearing; and;

- (c) Order penalties and costs against the Respondent pursuant to Dealer Member Rules 20.33, 20.34 and 20.49.

¶ 4 Finally, also in the letter accompanying the Notice of Hearing, Me Giroux-Del Zotto asked the Respondent to inform her as soon as possible in the event that he chose to plead guilty to the allegations, so as to limit the costs associated with preparing for a contested hearing.

¶ 5 On April 2, 2013, Me Giroux-Del Zotto sent the Respondent, by email and registered mail, all of the exhibits in support of the violations alleged in the Notice of Hearing.

¶ 6 In the letter accompanying this mailing, Me Giroux-Del Zotto moreover reminded the Respondent that he had until April 17, 2013 to submit his written response to the Notice of Hearing.

¶ 7 Receipt of this mailing was confirmed by emails from the Respondent.

¶ 8 On April 17, 2013, Me Giroux-Del Zotto sent Respondent, by email and by registered mail, an amended Notice of Hearing, receipt of which was confirmed by email from the Respondent dated April 18, 2013.

¶ 9 In the letter accompanying the amended Notice of Hearing, Me Giroux-Del Zotto once again asked the Respondent to advise her as quickly as possible in the event that he chose to plead guilty to the alleged violations.

¶ 10 On April 19, 2013, Me Giroux-Del Zotto sent Respondent, by email and by registered mail, a letter in which she formally finds that he failed to furnish a written response to the Notice of Hearing within the 20 days provided under Rule 7.1 of the IIROC Rules of Practice and Procedure, and grants him an extension of the deadline until April 24, 2013, due to the fact that he is not represented by counsel.

¶ 11 In her letter, Me Giroux-Del Zotto reminds Respondent yet again that should he fail to respond to the Notice of Hearing before this new deadline expires, the members of the Hearing Panel may accept as proven the facts and contraventions alleged in the Notice of Hearing.

¶ 12 The Respondent confirmed receipt of this letter by email dated April 22, 2013;

¶ 13 On May 10, 2013, Me Giroux-Del Zotto sent the Respondent, by registered mail, a CD containing all of the documents that she intended to enter into evidence at the disciplinary hearing on May 22, 2013.

¶ 14 This mail was picked up at the post office by the Respondent on May 13, 2013.

¶ 15 On May 10, 2013, Me Giroux-Del Zotto's assistant sent the Respondent an email informing him that she had tried repeatedly to reach him by phone, but without success, in order to find out whether he planned to attend the hearing on May 22, 2013, and asked him to inform Me Giroux-Del Zotto of his intentions in this regard.

¶ 16 On May 13, 2013, Me Giroux-Del Zotto sent the Respondent, by email and by registered mail, the excerpts from the transcriptions of the stenographer's notes of the depositions held during IIROC's investigation, which would be used as evidence at the hearing of May 22, 2013.

¶ 17 Me Giroux-Del Zotto once again asked the Respondent to make his intentions known regarding his attendance at the hearing of May 22, 2013.

¶ 18 That same day, the Respondent confirmed receipt of the email, but without mentioning whether he planned to attend the hearing or not.

¶ 19 On May 17, 2013, a new email was sent to the Respondent, asking him to make his intentions known regarding his attendance at the hearing of May 22, 2013, to which he never replied.

¶ 20 In the end, the Respondent did not attend the hearing of May 22, 2013 and was not represented by counsel.

II. DECISION REGARDING THE APPLICATION OF RULES 7.2 AND 13.5 OF IIROC'S RULES OF PRACTICE AND PROCEDURE

¶ 21 Noting Respondent's absence at the hearing of May 22, 2013, Counsel for IIROC asked the Hearing Panel to (1) proceed with the hearing in his absence, (2) accept as proven the facts and contraventions mentioned in the Notice of Hearing, and (3) proceed immediately to determining the sanctions that may be imposed in accordance with Rules 7.1, 7.2 and 13.5 of IIROC's Rules of Practice and Procedure, which read as follows:

“RULE 7: RESPONSE TO NOTICE OF HEARING

7.1 Service of Response

For a discipline proceeding designated on the Standard Track, the Respondent shall serve a Response within 20 days from the effective date of service of the Notice of Hearing.

[...]

7.2 Failure to Serve Response

If a Respondent served with a Notice of Hearing fails to serve a Response in accordance with Rule 7.1:

- (a) the Organization may proceed with the hearing of the matter as set out in the Notice of Hearing without further notice to and in the absence of the Respondent; and
- (b) the Hearing Panel may, accept as proven the facts and violations alleged by the Organization in the Notice of Hearing, and may impose penalties and costs pursuant to Dealer Member Rules 20.33, 20.34 and 20.49.

RULE 13: CONDUCT OF DISCIPLINARY HEARINGS

13.5 Where Respondent Fails to Attend Disciplinary Hearing

Where a Respondent, having been served with a Notice of Hearing, fails to attend a disciplinary hearing, the Hearing Panel may proceed in the absence of the Respondent and may accept as proven the facts and violations alleged by the Organization in the Notice of Hearing.

Upon making a finding of the violations as alleged in the Notice of Hearing, the Hearing Panel may immediately hear submissions of the Organization regarding an appropriate penalty and may impose such penalty, as it deems appropriate, pursuant to Dealer Member Rule 20.33 and 20.34.

¶ 22 After analyzing the chronology of the notification of proceedings, the Hearing Panel is of the opinion that Respondent was amply informed by IIROC's legal counsel of the timeframe within which he was required to serve a response to the Notice of Hearing and of the consequences that might arise should he default, having twice reminded him of this obligation, in addition to granting him one extension.

¶ 23 The evidence having shown that Respondent received the various correspondences from IIROC's legal counsel, the Hearing Panel is of the opinion that it was up to the Respondent at that point to act in accordance with the *IIROC Rules of Practice and Procedure*, otherwise he would be exposing himself to the consequences stipulated therein.

¶ 24 The Hearing Panel is therefore using its discretionary power to uphold IIROC Counsel's request that a hearing be held in the Respondent's absence and that the facts and contraventions alleged in the Notice of Hearing be accepted as proven, especially since the documentary evidence in this regard is conclusive.

¶ 25 Consequently, the Hearing Panel finds the Respondent liable for the following contraventions, as alleged in the amended Notice of Hearing dated April 17, 2013:

- 1) Between March 8, 2008 and March 2, 2009, the Respondent failed to use due diligence by neglecting to take reasonable means to ensure that he had the necessary knowledge of the features and risks inherent in leveraged Exchange-Traded Funds before recommending such an

investment to two (2) of his clients, contrary to IIROC Dealer Member Rule 1300.1(a) (formerly IDA Regulation 1300.1(a));

- 2) Between March 8, 2008 and March 9, 2009, the Respondent failed to use due diligence by neglecting to take reasonable means to ensure that his investment recommendations in leveraged Exchange-Traded Funds constituted a suitable investment for two (2) of his clients, given their financial and personal circumstances and their investment objectives, contrary to IIROC Dealer Member Rules 1300.1(a), (p) and (q) (formerly IDA Regulations 1300.1(a), (p) and (q));
- 3) Between April 2007 and April 30, 2009, the Respondent engaged in another outside business activity without the knowledge of the IIROC Dealer Member with whom he was employed and without the latter's consent, contrary to IIROC Dealer Member Rule 29.1 (formerly IDA By-Law 29.1).

III. PENALTY HEARING

A) Applicable Rules

¶ 26 By virtue of IIROC Dealer Member Rules 33 and 49, the Hearing Panel that finds a Respondent liable for contraventions of the legislation applicable to Approved Persons may impose the following sanctions:

- (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) any other fit remedy or penalty.

20.49 Assessment of Costs

(1) In addition to imposing any of the penalties set out in Rule 20.33, Rule 20.34 or Rule 20.45, the Hearing Panel may assess and order any Corporation Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.

(2) [...] Pursuant to the *Dealer Members' Disciplinary Sanction Guidelines*, it is up to the Hearing Panel to determine the appropriate sanction, according to the circumstances of each matter. It must also have the following objectives, as set out in *Re Derivative Services Inc.*, [2000] I.D.A.C.D. No. 26, at page 3 :

1. Protection of the investing public;
2. Protection of the Investment Industry Regulatory Organization's membership;
3. Protection of the integrity of the Investment Industry Regulatory Organization's process;
4. Protection of the integrity of the securities markets; and
5. Prevention of a repetition of conduct of the type under consideration.

¶ 28 Moreover, in order to protect the investing public and the integrity of the securities markets, the disciplinary sanctions must have an aim of general deterrence. The *Dealer Members' Disciplinary Sanction Guidelines* have the following to say on this subject:

“General deterrence will follow from an appropriate decision and deter others from engaging in similar misconduct and improve overall business standards in the securities industry. This can be achieved if a sanction strikes an appropriate balance by addressing a registrant’s specific misconduct, but also being in line with industry expectations. As was observed by the Hearing Panel in *Re Mills*, [2001] I.D.A.C.D. No. 7, April 17, 2001, at p. 3:

Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association’s disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment.

¶ 29 Since the sanction must be tailored to address the misconduct in question, it must be proportionate to the gravity of the misconduct and to the relative degree of responsibility of the Respondent. To properly assess the gravity of specific misconduct, the Hearing Panel must look to a number of factors, as enumerated in the *Dealer Members’ Disciplinary Sanction Guidelines* :

3.1 Harm to Clients, Employer and/or the Securities Market

Actual harm can sometimes be quantified by considering the type of transactions, the number of transactions, the size of the transactions, the number of clients affected by the misconduct, the length of time over which the misconduct took place, and the size of the loss suffered by the client(s). [...]

3.2 Blameworthiness

In appropriate cases, distinctions should be drawn between conduct that was unintentional or negligent, and conduct that involves manipulative, fraudulent or deceptive conduct. Distinctions should also be drawn between isolated incidents and repeated, pervasive, or systemic contraventions of the Dealer Member Rules. [...]

[...]

3.4 Extent to which the Respondent was Enriched by the Misconduct

In cases where the registrant benefited financially from the misconduct in question, it may be appropriate to require that any profits, commissions, fees, or any other compensation earned be disgorged.

3.5 Prior Disciplinary Record

The fact that a respondent has no prior disciplinary record should, in the absence of evidence to the contrary, lead a panel to a presumption that the respondent was of good moral character prior to the misconduct. A first conviction may be seen as a measure of punishment in and of itself, given the attendant stigma attached to the process of charging, finding of guilt, and imposition of sanction. [...]

3.6 Acceptance of Responsibilities, Acknowledgment of Misconduct and Remorse

An admission of wrongdoing by a respondent is usually considered to be a mitigating factor because it implies remorse and an acknowledgment of responsibility. [...]

3.7 Credit for Cooperation

Since Dealer Member regulation is dependent in large part upon the adherence to internal controls and compliance regimes, full cooperation with the Corporation’s investigations by registrants is expected. However, respondents or potential respondents should be given credit for cooperation if they act in a reasonable manner during the

course of the investigation and disciplinary process by self-reporting and self-correcting the misconduct in question. [...]

3.8 Voluntary Rehabilitative Efforts

Remediation efforts prior to (or even subsequent to) detection or intervention by the Corporation should be taken into consideration as mitigating the seriousness of misconduct.

There will no doubt be concerns that subsequent rehabilitative efforts are self-serving, but they warrant credit because they show both recognition of the misconduct and a commitment to remedy it. [...]

[...]

3.10 Planning and Organization

Evidence of planning and pre-meditation are aggravating factors. Hearing Panels should consider the degree of organization and planning associated with the misconduct, along with the number, size and character of the transactions. Evidence of calculated and deliberate acts may foreclose a claim of rash action or temporary lapse of judgment. [...]

3.11 Multiple Incidents of Misconduct over An Extended Period of Time

Generally, blameworthiness is compounded as the number of incidents expands. [...]

3.12 Vulnerability of Victim

The disciplinary process must be seen to provide some degree of protection for the investing public, and in particular, the client with a lower level of sophistication. Consequently, the vulnerability of a victim should be taken into account in determining relative culpability, and hence the relative measure of the sanction imposed. [...]

3.13 Significant Economic Loss to the Client and/or Dealer Member Firm

A finding of a significant monetary loss by the respondent's clients or the Dealer Member firm arising out of the respondent's misconduct can be seen as an aggravating factor to the extent that investing has at its core capital preservation and returns. If that core function is significantly eroded by regulatory misconduct, then it should be taken into account when the appropriate penalty is imposed.

¶ 30 In the case at hand, the alleged violations essentially fall into two categories, namely (1) having made unsuitable recommendations to two of his clients and (2) having engaged in outside business activities without the knowledge of his employer, a Dealer Member.

¶ 31 Out of a concern for clarity, the Hearing Panel will first determine the penalties to impose on the Respondent for counts 1 and 2, which relate to unsuitable recommendations; then it will discuss the penalties to impose for count 3, which relates to outside business activities.

B) Sanction for Violations Alleged in Counts 1 and 2

¶ 32 From January 20, 2006 to April 30, 2009, Respondent was approved as a registered representative (retail) with Laurentian Bank Securities Inc. (LBSI), an IIROC-regulated firm;

¶ 33 On June 1, 2008, Respondent became a registrant of IIROC;

¶ 34 Respondent has not been approved as a registered representative (retail) since April 30, 2009;

¶ 35 In March 2011, Respondent declared bankruptcy;

¶ 36 As for the unsuitable recommendations, Respondent's alleged misconduct is summarized in the Notice of Hearing:

SUMMARY OF THE RESPONDENT'S ALLEGED MISCONDUCT

1. The Respondent recommended to two (2) of his clients, one a retired person and the other, semi-retired, that they invest in complex financial instruments involving leveraging and a high degree of risk, whereas he did not have sufficient knowledge of these products and the products were unsuited to the financial and personal circumstances of these clients, and to their investment objectives.

[...]

7. On or around August 8, 2006, Mrs. A, a retired individual, opened RRIF account no. 4AU53V2. Mrs. A's new account application form contains the following information:

- (i) the Respondent is designated as the representative (retail) for this account;

- (ii) annual income: \$20,000;

- (iii) net worth: \$100,000-\$300,000

- (iv) investor profile:

- i. investment knowledge, good;

- ii. risk tolerance, average.

- (v) investment objectives:

- i. non-registered: 50% income and 50% growth.

- (vi) other than her investments at LBS, Mrs. A holds with her husband, Mr. B, an account at the National Bank of Canada, containing approximately \$25,000.

8. When Mrs. A first retained the Respondent's professional services, the understanding was that she was looking for investments that could generate income and preserve her capital, **stressing the fact that her pensioner status did not permit her to opt for speculative investments;**

[...]

10. On or about October 30, 2006, the Respondent sold all of the securities that Mrs. A held with the Investors Group, for the total sum of \$156,098.06, and repurchased dividend or income generating financial instruments that met her investment objectives;

11. On or about March 6, 2008, the Respondent for the first time recommended that Mrs. A purchase Horizons BetaPro leveraged Exchange-Traded Funds (leveraged ETFs). At the time the Respondent made this recommendation, he did not inform Mrs. A that leveraged ETFs's are **highly speculative** financial products, because he thought that they presented a rather moderate risk;

12. On or about April 22, 2008, Mr. C, an individual who had been semi-retired for approximately two (2) years, opened RRSP cash account no. 4AV81R2. Mr. C's new account application form contained the following information:

- (i) the Respondent was designated as the representative (retail) for this account;

- (ii) net annual income: \$50,000;

- (iii) net worth: \$1.2 million;

- (iv) investor profile:

- i. investment knowledge, average;

- ii. risk tolerance, medium;

- iii. investment horizon, 3 to 5 years.
 - (v) investment objectives:
 - i. non-registered: 50% growth and 50% short-term growth;
 - ii. registered: 50% growth and et [sic] 50% short-term growth.
 - (vi) brokerage account with other financial institution: yes, CIBC.
13. At the outset of his business relationship with the Respondent, Mr. C was willing to consider moderate growth for his portfolio;
- [...]
15. On or around May 21, 2008, the Respondent for the first time recommended the purchase of leveraged ETFs to Mr. C. When he made this recommendation, the Respondent did not inform Mr. C that leveraged ETFs are **highly speculative** financial instruments because he was of the opinion that they presented rather a moderate level of risk;
16. When the Respondent recommended the purchase of leveraged ETFs to Mrs. A and Mr. C, he did not possess accurate and sufficient knowledge of the features and risks inherent in this type of financial instrument and **had not read the prospectus concerning leveraged ETFs**. In fact, he based his assessment of the features and risks inherent in leveraged ETFs solely on the demonstration given by the leveraged ETFs representative, Mr. D, who gave a presentation on these products to all of the representatives (retail) employed at the LBS branch where the Respondent worked;
17. **The Respondent contented himself with the summary explanations given by Mr. D**, without questioning the adequacy and objectiveness of the information communicated by the latter, whose job mainly is to promote leveraged ETFs, without making any further inquiries;
18. A reading of the leveraged ETFs prospectus would have told him the following:
- [...]
- “ETF units are **highly speculative** and involve a **high degree of risk** (...);
 - “**An ETF by itself does not constitute a balanced investment plan**. ETFs are not for investors whose main objective is a regular income or the preservation of capital. Investors must be prepared to lose a large portion or even all of the money that they invest in an ETF (...);
 - “Investing in Units of an ETF is speculative, involves a high degree of risk and may only be suitable for persons who are able to assume the risk of losing their entire investment. (...);
- [...]
19. At the time the Respondent recommended that Mrs. B and Mr. C invest in leveraged ETFs, the latter were unfamiliar with this type of financial trading vehicle and had never held such complex financial instruments in their portfolios before. Nevertheless, they accepted the Respondent’s recommendation that they invest in leveraged ETFs, based on the explanations given by the Respondent who was of the opinion that they presented a moderate investment risk. [...]
- [...]
23. In total, Mr. C invested \$46,570.30 in leveraged ETFs;

24. On or around August 31, 2008, brokerage account 4AV81R2, held by Mr. C, was almost 100% comprised of leveraged ETFs. This proportion of leveraged ETFs is contrary to Mr. C's investment objectives;
 25. After April 22, 2008, the date Mr. C's brokerage account was opened at LBS, no updates were made by the Respondent;
 26. On or around March 31, 2009, the portion of Mr. C's portfolio composed of leveraged ETFs was now worth only \$2,436.40. In all, Mr. C lost \$44,133.67, namely 94.77% of the value of his brokerage account comprised of leveraged ETFs;
 27. The total commissions earned by the Respondent for his recommendations that Mr. C invest in leveraged ETFs came to \$345.62;
- [...]
30. In total, Mrs. A invested \$47,204.60 in leveraged ETFs;
 31. On or around May 23, 2008, brokerage account 4AU53V2, belonging to Mrs. A, was more than 35% comprised of leveraged ETFs, which was contrary to her investment objectives;
 32. After August 8, 2006, the date Mrs. A's brokerage account was opened at LBS, no updates were made by the Respondent;
 33. The total commissions earned by the Respondent for his recommendations that Mrs. A invest in leveraged ETFs was \$293.44;
 34. On or around April 30, 2009, the portion of Mrs. A's portfolio comprised of leveraged ETFs, was worth just \$8,839.10;
 35. Mrs. A's total loss in connection with leveraged ETFs is \$38,365.50, representing 81.27% of the total amount invested in these financial instruments. [...]

[our emphasis]

¶ 37 According to the *Dealer Members' Disciplinary Sanction Guidelines*, the fact of a registered representative making unsuitable recommendations to a client is tantamount to a breach of trust:

3.1 Unsuitable Recommendations - Regulation 1300.1(p)

The core of a registered representative's business activity is to make recommendations for his/her clients. Registrants have a basic duty to ensure that the recommendations are suitable, and in accordance with the clients' investment objectives and risk factors. The courts have generally held that a registrant owes a fiduciary duty to the client where the client relies upon the advice and recommendations of the registrant. This fiduciary relationship requires the registrant to act carefully, honestly and in good faith in dealing with the client. Therefore, a registrant who makes unsuitable recommendations has breached his/her fiduciary duty owed to the client.

Even in absence of general fiduciary relationship between registrant and client, there is at the very least, a relationship of trust and confidence that exists between a registrant and client. A client will rely upon and place confidence in the recommendations made by the registrant, who has an obligation to ensure the recommendations are suitable. **Where the recommendations are unsuitable for the client, the registrant has breached his position of trust and failed to fulfill the most basic of responsibilities towards the client.**

[our emphasis]

¶ 38 Moreover, the Supreme Court of Canada, in *Laflamme v. Prudential-Bache Commodities Canada Ltd.*, [2000] 1 S.C.R. 638, defined as follows the intensity of the bond of trust that unites the client with his full-service securities dealer, as well as the resultant duty to provide advice:

28. As in the case of any mandate, the mandate between a manager and his client is imbued with the concept of trust, since the client places his trust in the manager — the mandatary — to manage his affairs. [...]

[...]

31. A professional mandatary also has a duty to provide advice. [...] This duty results from the very nature of the portfolio management contract [...].As noted by L’Heureux [...] the dealer’s duty to advise is [TRANSLATION] “in fact what often induces a client to retain his services”. And according to Philippe Pétel [...]:

[TRANSLATION] Plainly, a mandator using the services of a professional as an intermediary in his relations with third parties expects a great deal from that intermediary. It is not merely a matter of performing a legal act in his absence, since such an outcome could in most cases be achieved by means of modern telecommunications. The mandator also wishes to have his interests *better taken care of* than they would have been had he acted directly. This is the reason for the existence of certain professional mandataries such as insurance brokers or freight forwarding agents. [Emphasis in original; references omitted.]

32. For the same reasons, a securities portfolio manager is also subject to this duty.

33. The duty to provide advice requires that the manager make his knowledge and expertise available to the client, and that he use them better to serve the client’s interests in light of the client’s objectives. However, the duty to provide advice is not the same as the obligation to inform, the substance of the latter being more objectively quantifiable. As Pétel says [...] [TRANSLATION] “advice is not just any kind of information. It is directed information, designed to guide its recipient toward a decision **consistent with his interests**”. This duty relates not only to the risks associated with certain initiatives, but also to the very nature of the matters agreed to between mandatary and mandator, especially where the mandator is a lay person. Thus, the duty to advise extends to everything involved in the mandate to manage the portfolio, including the consequences for the client of any change in the object of the mandate. [...]

[our emphasis]

¶ 39 It appears that, in the matter before us, the Respondent’s alleged violations under counts 1 and 2, relative to unsuitable recommendations, are major contraventions since they concern a fundamental duty of the registered representative, namely the duty to advise one’s client.

¶ 40 The Ontario District Council, in *Re Dyck*, 2012 IIROC 31, expressed itself on the subject in the following terms:

15 Ensuring that a product is suitable for a client is one of the most basic obligations of an advisor. If the advisor does not understand a product he is selling, it is impossible to make a determination whether that product is suitable for a particular client.

¶ 41 Moreover, the Respondent’s alleged violations under counts 1 and 2 jeopardize the relationship of trust that must exist between the representative and his client and on which the entire securities industry is founded, which confirms its gravity.

¶ 42 Other aggravating factors emerge in this matter as well, and must be taken into account by the Hearing Panel in order to determine the most appropriate penalty under the circumstances.

¶ 43 First of all, the loss caused to two of the Respondent’s clients was considerable, namely 94.77% of the value of Mr. C’s portfolio, and 81.27% of the value of Mrs. A’s.

¶ 44 In this regard, the Hearing Panel notes that Mrs. A was a vulnerable person in that she was retired with an annual income of \$20,000 and depended on the income from her portfolio to provide herself with a decent

retirement.

¶ 45 What's more, the file revealed that since the date the brokerage accounts were opened for the two clients in question, namely in 2006 for Mrs. A and in 2008 from Mr. C, the Respondent had made no updates.

¶ 46 Finally, the Respondent never acknowledged his responsibility, or expressed any remorse. At most, he was content to submit to an interrogation when required by staff of IIROC, but never even bothered to respond to the Notice of Hearing or to attend the hearing to try to explain himself or answer the Hearing Panel's questions.

¶ 47 Nevertheless, certain mitigating factors have also emerged from this matter, which the Hearing Panel must also take into account in order to impose the most appropriate sanction possible, considering its objective of deterrence.

¶ 48 Thus, the Respondent's alleged violations under counts 1 and 2 concerned only two of his clients, and the misconduct did not involve manipulation or deception, but rather negligence. No planning or premeditation can be attributed to the Respondent on these counts.

¶ 49 In *Re Dyck*, supra, the respondent was accused of making unsuitable recommendations to 141 clients, namely over half of his clientele. The Ontario District Council accepted the sanctions that were jointly proposed by the parties' legal counsels and imposed the following penalties on the respondent:

- “(a) a prohibition from registration with IIROC at any time within 7 years from the date of our decision;
- (b) a fine of \$20,000; and
- (c) an order for costs for \$2,500.”

¶ 50 In the reasons for its decision, the Ontario District Council indicated that it had assigned a great deal of importance to the fact that the recommendations regarding penalties were submitted jointly. It also noted that there had been no dishonesty or malicious intent on the part of the respondent in this matter and that the latter had no disciplinary history.

¶ 51 It further noted that the respondent had displayed negligence and that he had been inexplicably simplistic in his understanding of the products that were the object of the unsuitable recommendations.

¶ 52 Finally, the Ontario District Council took into account the respondent's age to conclude that, after a seven-year suspension, which it moreover considered a little long, the respondent would probably not come back to work in the securities industry.

¶ 53 In *Re Beaulne*, 2012 IIROC 61, the respondent was accused of making unsuitable recommendations to two of his clients. The Québec District Council imposed the following sanctions:

- a) a fine in the amount of \$30,000;
- b) costs in the amount of \$10,000;
- c) disgorgement of \$1,490.72 in fees collected;
- d) a two-year suspension of approval in any capacity with an IIROC-regulated firm; and
- e) upon expiration of the two-year suspension, having repeated or repeating the Conduct and Practices Handbook course before seeking reapproval and, in the event of reapproval, strict supervision for a period of twelve (12) months.

¶ 54 In rendering its decision on penalties, the Québec District Council thought it appropriate to add the following:

29 The Hearing Panel considers Respondent's behaviour equivalent to blatant mismanagement of his clients' accounts and intends to remind Respondent, and the industry generally, that such behaviour demands real deterrence.

¶ 55 To decide what sanctions to impose, it notably took into account the seriousness of the misconduct and the respondent's lack of remorse, and the fact that he did not respond to the Notice of Hearing and was absent on the day of the hearing.

¶ 56 The Québec District Council also noted that not only did Respondent appear not to have a good knowledge of the complex and risky financial instruments that he recommended to his clients but he ignored the instructions stated on their new account application forms.

¶ 57 Finally, the Québec District Council took into account the vulnerability of the clients affected, namely a retired couple who depended on the income from their respective portfolios. Yet, despite his clients' deteriorating portfolios, Respondent continued his strategy, risking it all.

¶ 58 In *Re Lambert*, 2013 IIROC 16, the respondent was alleged to have made unsuitable recommendations to 42 of his clients, who suffered considerable losses. Ten (10) of them filed a complaint with IIROC. The Saskatchewan District Council imposed the following sanctions:

- a. A global fine of \$10,000;
- b. Successful re-right [sic] of the Conduct and Practices Examination within six months of returning to industry;
- c. Costs in the amount of \$3,000.

¶ 59 To decide what sanction to impose, the Saskatchewan District Council notably relied on the fact that the respondent had made efforts to try to understand the product that he inappropriately recommended to his clients. His misconduct resulted from the fact that despite his efforts, he still did not understand the product and yet recommended it anyway. This was not a lack of diligence motivated by laziness, indifference or greed. Quite the contrary, the respondent seemed to care about his clients and went to some trouble to fill their investment needs.

¶ 60 Consequently, the Saskatchewan District Council concluded that the respondent deserved to be sanctioned for his lack of diligence, but that the imposed penalties should be at the low end of the range in terms of seriousness.

¶ 61 In the matter at hand, counsel for IIROC recommends, for all of the Respondent's alleged violations, the following penalties:

- a) An aggregate fine of \$45,000, plus disgorgement of the commissions earned by reason of the contraventions;
- b) A two-year suspension from approval in any capacity with an IIROC-regulated firm;
- c) Upon reapproval of the Respondent, 12 months of strict supervision with monthly reports from his supervisor;
- d) Successful completion of the examination based on the Conduct and Practices Handbook Course, within six months of re-entering the industry;
- e) Payment of \$40,000 representing half of the costs in the matter.

¶ 62 According to the *Dealer Members' Disciplinary Sanction Guidelines*, the sanctions indicated for cases of unsuitable recommendations are as follows:

- a) Fine: minimum of \$10,000;
- b) Disgorgement of profits;
- c) Rewrite of exam based on the Conduct and Practices Handbook Course;
- d) Period of close and/or strict supervision;
- e) Period of suspension (in most egregious cases involving elements of deception and

misrepresentations).

¶ 63 It should be noted in this regard that the minimum fines suggested within the individual guidelines are intended to establish the “baseline” fine for specific offences where all mitigating factors have been taken into account, but not the aggravating factors.

¶ 64 After analysis of the particular facts of the matter, including the aggravating and mitigating factors, legislation and the applicable case law, the Hearing Panel hereby imposes the following penalty on the Respondent, Frédéric Lavoie, for counts 1 and 2:

- a) A \$30,000 fine;
- b) A two-year suspension of approval in any capacity with an IIROC-regulated firm (this sanction also covers count 3, for the reasons described hereinafter);
- c) Upon reapproval of the Respondent, 12 months of strict supervision, with monthly reports by his supervisor (this sanction also covers count 3, for the reasons described hereinafter);
- d) Successful completion of the Conduct and Practices Handbook Course within six months following his re-entry into the securities industry (this sanction also covers count 3, for the reasons described hereinafter);
- e) Costs in the amount of \$40,000 (out of \$90,469.50) (this sanction also covers count 3, for the reasons described hereinafter).

¶ 65 Concerning the \$40,000 in costs in the matter, the Hearing Panel wishes to note that, while the amount may seem high at first glance, it takes into account the numerous opportunities that were given to the Respondent to make his intentions known regarding an eventual guilty plea or his attendance at the disciplinary hearing, to which he never responded.

¶ 66 Consequently, counsel for IIROC had to prepare for a contested hearing, as well as prepare for an *ex parte* hearing, which resulted in some very high costs, a large part of which could have been avoided if Respondent had bothered to indicate his intentions, at least a few weeks prior to the disciplinary hearing.

¶ 67 Finally, the Hearing Panel estimates that the sanctions imposed here on the Respondent are proportional to the relative seriousness of his alleged misconduct under counts 1 and 2, taking into account the aggravating and mitigating factors in this matter, and support an objective of general deterrence.

C) Sanction of the violations alleged in Count 3

¶ 68 Under count 3, which relates to outside business activities, the Respondent’s alleged misconduct is summarized as follows in the Notice of Hearing:

SUMMARY OF THE RESPONDENT’S ALLEGED MISCONDUCT

[...]

2. Also, the Respondent did not inform his employer that he was acting as a director and officer of a private company while he was a registered representative (retail). Neither did he inform his employer that one of his clients had invested in a private placement in this company, for which he received a consideration.

[...]

37. On April 3, 2007, company 6747671 Canada Inc. was incorporated. This company is a computer services company that operates websites. The Respondent is an officer of this company, being the initial stockholder, secretary and president. The legal address of the company is the same as the Respondent’s legal address;
38. At no time did the Respondent inform LBS of the fact that he was acting as initial stockholder, secretary and president of 6747671 Canada Inc.;

39. The Respondent spends ten (10) to thirty (30) hours a week working for 6747671 Canada Inc. At no time did the Respondent inform LBS of the fact that he was devoting time to 6747671 Canada Inc.
40. The Respondent notably solicited three (3) of his friends to invest personally in 6747671 Canada Inc. [...]
41. When Mr. E invested in 6747671 Canada Inc., he was also a client of the Respondent who was acting as a representative (retail) in the employ of LBS, with whom Mr. E held a brokerage account;
42. At no time did the Respondent inform LBS of the fact that his client, Mr. E, had invested in 6747671 Canada Inc.;
43. A large part of the amounts invested by Messrs. E, F and G was deposited in the Respondent's personal bank account;
44. The money invested by Messrs. E, F and G in 6747671 Canada Inc. was used, notably, to remunerate the Respondent;
45. At no time did the Respondent inform LBS of the fact that he was accepting, either directly or indirectly, remuneration from 6747671 Canada Inc.;
46. 6747671 Canada Inc.'s charter was finally cancelled upon request on October 4, 2010.

¶ 69 According to the *Dealer Members' Disciplinary Sanction Guidelines*, the fact of a registered representative engaging in outside business activities without the knowledge of the Dealer Member that employs him is of a nature to undermine the public's confidence:

3.10 Outside Business Activities – Dealer Member Rule 29.1

Standard C of the Standards of Conduct relates to professionalism and states among other things, that all methods of conducting business must be such as to merit public respect and confidence. Outside business activities that is [sic] not known or consented to by the Dealer Member firm, does [sic] not merit public confidence or respect. As explained in the related commentary to Standard C of the CPH handbook, "Dealings in securities outside of the normal business of the firm, sometimes referred to as selling away or outside deals may expose clients to unknown risks and expose registrants and firms to civil liability. Such activity done without the knowledge of the firm also prevents effective supervision of the handling of client accounts, which is a requirement placed upon firms by the SROs. Firms may be exposed to liability for the actions of their employees in the effecting of such trades, even though the firm is unaware of the activities."

¶ 70 The Saskatchewan District Council, in *Re Arapis*, [2011] IIROC No. 37, was of the same opinion when it wrote, in paragraph 21:

21. The Metamedia purchases were not processed through the books and records of Assante. As a result, Assante was not able to assess the viability of the product nor were they able to assess the suitability of the purchases, thereby exposing both the clients and the Dealer Member to potential harm.

¶ 71 In this matter, the respondent was notably alleged to have solicited 12 clients to participate in a private placement of shares in a company in which he held an interest, transactions that were carried out off book and without the consent of his brokerage firm and in exchange for which he received remuneration from the company.

¶ 72 For his outside business activities, the Saskatchewan District Council imposed the following sanctions on the respondent:

- a) \$25,000 disgorgement of profits relating to the sale of shares through the relevant

transactions;

- b) \$10,000 fine;
- c) \$5,000 in costs.

¶ 73 In the *Dealer Members' Disciplinary Sanction Guidelines*, the following sanctions are indicated for having engaged in outside business activities without the consent of the Dealer Member:

- a) Fine: minimum fine of \$10,000
- b) Disgorgement of profits received from outside business activity
- c) Rewrite of exam based on the Conduct and Practices Handbook Course
- d) Period of strict/close supervision
- e) Period of suspension (in most egregious cases involving large value high risk off-book distributions).

¶ 74 In the matter before us, numerous mitigating and aggravating factors have emerged from the record, and which the Hearing Panel must take into account in order to determine a sanction that will be proportional to the relative seriousness of the Respondent's misconduct under count 3.

¶ 75 First of all, the outside business activity was relatively small in scope, given the value and size of company 6747671 Canada Inc., operated by the Respondent. Plus, the outside business activities carried on by the latter were legal.

¶ 76 Moreover, only one client and two friends of the Respondent were involved, and none of them filed a complaint with IIROC regarding Respondent's outside business activities.

¶ 77 Nevertheless, the fact that the Respondent had a direct interest in the outside business, being the initial shareholder and president of company 6747671 Canada Inc., and the fact that he received a remuneration of \$30,000-\$35,000 for operating the company, constitute aggravating factors.

¶ 78 After analysis of the particular facts of the matter, including the aggravating and mitigating factors, the legislation and the applicable case law, the Hearing Panel hereby imposes the following penalties on Respondent Frédéric Lavoie, for count 3:

- a) a fine of \$15,000;
- b) A two-year suspension of approval in any capacity with an IIROC-regulated firm (this sanction also covers counts 1 and 2);
- c) Upon reapproval of the Respondent, 12 months of strict supervision, with monthly reports by his supervisor (this sanction also covers counts 1 and 2);
- d) Successful completion of the Conduct and Practices Handbook Course within six months following his re-entry into the securities industry (this sanction also covers counts 1 and 2);
- e) Costs in the amount of \$40,000 (out of \$90,469.50) (this sanction also covers counts 1 and 2).

¶ 79 The Hearing Panel estimates that the penalties thus imposed on the Respondent are proportionate to the relative gravity of the misconduct alleged in count 3, given the aggravating and mitigating factors particular to the matter, and are directed toward an objective of general deterrence.

NOW THEREFORE THE HEARING PANEL:

ORDERS Respondent Frédéric Lavoie to pay a fine of \$30,000 for counts 1 and 2;

ORDERS Respondent Frédéric Lavoie to pay a fine of \$15,000 for count 3;

SUSPENDS Respondent's right to approval in any capacity with an IIROC-regulated firm for a period

of 2 years;

ORDERS

Respondent, upon his reapproval, to submit to strict supervision with monthly reports from his supervisor for a period of 12 months;

ORDERS

Respondent Frédéric Lavoie to rewrite the exam based on the Conduct and Practices Handbook course within six months following his reentry into the securities industry;

ORDERS

Respondent Frédéric Lavoie to pay IIROC costs in the amount of \$40,000.

Dated at Montréal, this 3rd day of September 2013

Me Alain Arsenault, Chair

Mr. Gilles Archambault, Panel Member

Ms. Éline C. Phénix, Panel Member

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