Unofficial English Translation

Re Costa

IN THE MATTER OF:

The Universal Market Integrity Rules of the Investment Industry Regulatory Organization of Canada

and

Remo Costa

2019 IIROC 15

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

Hearing: April 8, 2019, Montréal (Québec)
Decision: May 14, 2019

Hearing Panel:
Mr. Stéphane Rousseau, Chair, Mr. Gilles Archambault and Mr. Daniel Houle
Appearances:
Ms. Fanie Dubuc, Enforcement Counsel
Mr. Remo Costa, representing himself

PENALTY DECISION

I. PROCEEDING

¶ 1 Further to a Notice of Hearing dated December 5, 2017, Staff of the Investment Industry Regulatory Organization of Canada (IIROC) made the following allegations against the Respondent, Remo Costa:

> During five (5) days between July 28, 2015 and September 28, 2015, the Respondent, a client and director of JitneyTrade Inc., entered orders or executed transactions on the Toronto Stock Exchange (TSX) when he knew, or ought reasonably to have known, that the entry of such orders or the execution of the transactions would create or could reasonably be expected to create a false or misleading appearance of trading activity with respect to these securities, or an artificial sale price for the securities, contrary to Rule 2.2(2) and Policy 2.2, for which he is liable under Rule 10.4 (1) of the Universal Market Integrity Rules (UMIR).

¶ 2 On September 5 and 6, 2018, a hearing on the merits of the matter was held before the Hearing Panel, in the Carmen Crépin conference room at the Montréal headquarters of IIROC's Québec District Council. Pursuant to the oral submissions, the Hearing Panel took the decision under advisement.

¶ 3 On January 15, 2019, the Hearing Panel published its decisions and reasons. The Hearing Panel was unanimous in finding and declaring the Respondent guilty of the count against him.

¶ 4 On April 8, 2019, the penalty hearing was held before the Hearing Panel. In anticipation of this hearing, the Enforcement Staff prepared a book of rules and authorities, which was communicated to the Hearing Panel. At the hearing, each of the parties delivered oral submissions regarding the penalties. The Hearing Panel took the decision under advisement.

II. POSITIONS OF THE PARTIES

A. Staff of IIROC

¶ 5 Staff of IIROC argued that the following penalties were appropriate in this case:

a) A $25,000 fine that includes disgorgement of the net profits derived by the Respondent from the trading activities which are the subject of the decision on liability;

b) Costs in the amount of $15,000;

c) Suspension of the capacity to enter into a systems interconnect arrangement (or a routing arrangement) allowing direct market access, for a period of six (6) months;

d) Prohibition of registration in any capacity for a period of six (6) months, with the obligation of taking the Conduct and Practices Handbook Course before re-registration and, in the event thereof, the obligation of twelve (12) months of strict supervision.

B. Respondent

¶ 6 The Respondent argued that a $2,500 fine is the appropriate penalty in the circumstances.

III. PRINCIPLES

¶ 7 IIROC's Sanction Guidelines [hereinafter, the "Guidelines"] have been in force since February 2, 2015. Their general aim is to "promote consistency, fairness and transparency by providing a framework to guide the exercise of discretion in determining sanctions which meet the general sanctioning objectives."[1] The Sanction Guidelines are intended, notably, to assist hearing panels in the fair and efficient determination of appropriate sanctions.

¶ 8 As numerous decisions have observed[2], the Guidelines are not binding upon a hearing panel.

> *"The publication of sanction guidelines is an approach that has been adopted by other regulatory bodies. The goal is that hearing panels treat such guidelines as indicative of industry expectations and as relevant to a penalty determination, although they are neither exhaustive nor determinative. The guidelines do not prescribe specific results but set out factors that panels should take into account in determining penalties. The guidelines are careful to preserve the individualization of sanctions and not suggest a blanket approach."*[3]

Thus, the Guidelines are not binding on us. The hearing panel can freely exercise its discretion when determining the appropriate sanctions to be imposed upon the Respondent. The Guidelines confirm this as well: "The determination of the appropriate sanction in any given case is discretionary and a fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. Hearing panels retain the discretion to impose the sanctions they consider appropriate."[4]

¶ 9 The Guidelines are divided into two parts. Part I defines the Sanction Principles for IIROC Disciplinary Proceedings. Part II identifies the Key Factors in Determining Sanctions. The Hearing Panel intends to refer to

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1 IIROC *Sanction Guidelines*, February 2, 2015, p. 2

2 See notably *Re Sadeghi*, 2018 IIROC 31; *Re Suppal*, 2014 IIROC 45.

3 *Re Gareau* 2011 IIROC 72;

4 *Sanction Guidelines*, February 2, 2015, p. 2-3.

these principles, the key factors, and the case law in the exercise of its discretion.

¶ 10 Three principles stated in the Guidelines are especially relevant in the matter at hand. The first is the general principle that disciplinary sanctions are preventative in nature. Their end objective is to protect the investing public, strengthen market integrity and improve overall business standards and practices. With this in mind, sanctions should strive for both specific and general deterrence, as the Supreme Court of Canada explained in *Cartaway Resources Corp.:*

> *A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction […] The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.*[5]

In short, sanctions should prevent and discourage future misconduct by the respondent, as well as deter others from engaging in similar misconduct.

¶ 11 The second principle is more specifically concerned with suspension. According to the Guidelines, a suspension should be considered where:[6]

- there has been one or more serious contraventions;
- there has been a pattern of misconduct;
- the respondent has a prior disciplinary history;
- the contraventions involved fraudulent, willful and/or reckless misconduct; or
- the misconduct in question has caused some measure of harm to investors, the integrity of a marketplace or the securities industry as a whole.

¶ 12 The third principle is that sanctions must be tailored to the misconduct at issue in each case. As the Guidelines note, "(t)his necessitates a review of the nature of the misconduct and both the aggravating and mitigating factors and the degree of responsibility by the respondent ».[7]

IV. SUBMISSIONS

A. Staff of IIROC

¶ 13 Referring the Hearing Panel to the principles of the Guidelines, Staff of IIROC emphasized the ten (10) Key Factors in Determining Sanctions stated in the Guidelines. According to Staff, these 10 key factors, which are present in the matter before us, must be taken into account in determining the penalty. We review them briefly, as presented by Staff:

1. The number, size and character of the transactions at issue

   Respondent executed twenty (20) transactions that are deemed manipulative in five (5) securities listed on the Toronto Stock Exchange over a period of two (2) months.

2. A pattern of misconduct

   The transactions executed by the Respondent reveal a pattern of misconduct, by their repetitive nature in five (5) different securities on five (5) specific dates.

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5 *Cartaway Resources Corp. (Re)*, 2004 SCC 26, par. 61.

6 *Sanction Guidelines*, February 2, 2015, p. 5.

7 *Sanction Guidelines*, February 2, 2015, p. 6.

3. Period of misconduct

The misconduct extended over a two-month period. While the period is not excessively long, the misconduct is not an isolated event.

4. Whether the misconduct was intentional, willfully blind, or reckless with respect to regulatory requirements

The Respondent's conduct was intentional in that he knowingly sought to profit from the market, to get the best possible price with his layering activities.

5. Extent of harm to the clients or other market participants

The Respondent influenced the market and caused other participants to react to the orders he was placing.

6. Extent of harm to market integrity or the reputation of the marketplace, or both.

While it is admittedly difficult to identify the victims, it must be acknowledged that when manipulative trading affects [translation] "investor confidence in the integrity of the market, it undermines the very credibility the entire financial system."[8]

7. The level of vulnerability of the injured or affected client(s)

The Respondent had no clients. However, the market participants that traded with the Respondent did not have the right information and could not make informed decisions.

8. Disciplinary history

The Respondent has no disciplinary history because he was not an IIROC registrant prior to becoming a director of Jitneytrade Inc.

9. Extent to which the respondent obtained or attempted to obtain a financial benefit from the misconduct

The Respondent admitted having sought to get the best price. He benefited financially from the manipulative trading activities.

10. Whether the respondent accepted responsibility for and acknowledged the misconduct to his or her employer or the regulator prior to detection and intervention by the Dealer Member or the regulator

The Respondent engaged in his pattern of misconduct until the strategy of manipulation was brought to IIROC's attention.

¶ 14 Furthermore, referring to the *Gévry*[9] decision rendered by the Financial Markets Administrative Tribunal, Staff of IIROC invited the Hearing Panel to consider as an aggravating factor the Respondent's status of a director of a discount broker, namely Jitneytrade Inc., which is subject to IIROC's jurisdiction.

¶ 15 Finally, Staff produced a summary table of the relevant case law of IIROC's hearing panels, which outlines the mitigating factors, the aggravating factors, and the penalty imposed in decisions involving market manipulation.

B. Respondent

¶ 16 The Respondent essentially made three submissions regarding the penalties, without referring to the

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8 *Autorité des marchés financiers* c. *Gévry*, 2017 QCTMF 110, par. 103; conf. 2018 QCCQ 8204.

9 *Autorité des marchés financiers* c. *Gévry*, 2017 QCTMF 110, par. 162; 2018 QCCQ 8204.

Guidelines.

¶ 17 First, the Respondent reiterated the argument put forward at the hearing on the merits, and which was reported in the hearing panel's decision.[10] He argues that he committed no market manipulation by placing the orders in question in this matter. His trading practices are intended to counteract algorithmic trading, as well as trading strategies which he terms manipulative and monopolistic. The Hearing Panel notes that no evidence was submitted relative to these allegations. The Hearing Panel adds that if the Respondent entertains doubts regarding the legality of trading activities, it is up to him to file a complaint with IIROC.

¶ 18 Secondly, the Respondent emphasized that after 38 years as an independent trader, he had never been disciplined. In addition, he admitted not having known that he was subject to the rules and jurisdiction of IIROC as a director of Jitneytrade Inc.

¶ 19 Finally, the Respondent irreverently called into question the integrity of the disciplinary process, including the impartiality of the Hearing Panel and the competence of Staff of IIROC.

V. DECISION

¶ 20 To decide on the appropriate penalty, the Hearing Panel considered all of the facts and circumstances of the matter, in light of the principles and key factors of the Guidelines. The Hearing Panel also took into account the submissions of Staff of IIROC and the case law invoked, as well as the Respondent's submissions.

¶ 21 As a starting point, the Hearing Panel notes that the infraction of manipulative or deceptive trading activities provided under UMIR 2.2, which the Respondent was found to have contravened, is a serious offence, as the Bureau de décision et de révision (now the Financial Markets Administrative Tribunal) emphasized: [translation] "Manipulation is a cancer on the investment markets, investors and society in general. Its effects are disastrous and the Bureau must act to put an end to such activities. It undermines the foundation and credibility of the markets. It hinders the price setting mechanisms of various financial instruments."[11]

¶ 22 Second, the absence of any disciplinary record on the Respondent can constitute a mitigating factor. However, the mitigating effect is neutralized in the matter before us by other factors. In particular, the Respondent has not admitted that he engaged in manipulative trading activities under the meaning of UMIR 2.2. Furthermore, he challenged the decision on the merits handed down by the Hearing Panel and, in so doing, denied having engaged in manipulative and deceptive trading activities, including the practice of layering.

¶ 23 In short, in the context of a serious offence that is prejudicial to the integrity of the financial markets, the Respondent's refusal to accept responsibility, together with his position of denial that he engaged in manipulative trading activities, constitutes a major aggravating factor.

¶ 24 In light of these remarks, we will now discuss the penalties to impose on the Respondent by virtue of the powers conferred on the Hearing Panel by the Universal Market Integrity Rules (UMIR).

A. Fine

¶ 25 Staff of IIROC is calling for a $25,000 fine to be imposed on the Respondent, including disgorgement of any profits. The Respondent, for his part, argues that a $2,500 fine constitutes the appropriate penalty in the circumstances.

¶ 26 The Hearing Panel reiterates that this matter involves a serious offence. The fine must therefore reflect the gravity of the infraction of manipulative or deceptive trading activities. It must also be high enough to

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10 *Re Costa*, 2019 IIROC 02.

11 *Autorité des marchés financiers* c. *Lemire*, 2015 QCBDR 63 ¶87, citing *Autorité des marchés financiers* c. *Normand Bouchard et al*., 2009 QCBDRVM 78; conf. 2016 QCCQ 8932.

achieve the aims of both specific deterrence and general deterrence.

¶ 27 In light of the case law concerned with contraventions of UMIR 2.2, where fines ranging from $10,000 to $75,000 have been imposed, the Hearing Panel estimates that the $25,000 fine constitutes the appropriate penalty in the matter at hand.

B. Costs

¶ 28 According to UMIR 10.7, the Hearing Panel may order the Respondent to reimburse the cost of IIROC's investigation and prosecution. In this respect, the Hearing Panel notes that an award of costs should not constitute an additional penalty on the Respondent. The award should reflect the costs associated with Staff of IIROC's work in the matter. Also relevant to the decision are factors such as the complexity of the case, the degree of cooperation by the respondent and the degree of success of the respondent.[12]

¶ 29 In the matter before us, Staff at the hearing introduced into evidence (as Exhibit R-5) a sworn statement by Linda Vachet, Enforcement Assistant in IIROC's Enforcement Department, which attests that the total cost of the matter amount to $113,469.43, as detailed in the Bill of Costs appended to the Statement.

¶ 30 Of the amount of $113,469.43 indicated in the Bill of Costs, Staff of IIROC is claiming $15,000.

¶ 31 Considering the length of the investigation and prosecution, the gravity of the offence and the fact that IIROC won its case, the Hearing Panel considers an amount of $15,000 to be a fair and reasonable award of costs in this case. The Hearing Panel therefore awards IIROC costs in the amount of $15,000.

C. Suspension

¶ 32 The Respondent is party to an interfacing agreement ("routing arrangement") with Jitneytrade Inc. that allows his orders to be routed directly to the Canadian exchanges, or to any Canadian marketplace. Such an agreement, which is usually signed with an experienced trader, is governed by UMIR 7.13 which relates to Direct Electronic Access and Routing Arrangements.

¶ 33 Staff of IIROC stressed that direct electronic access arising from a routing arrangement is a privilege. However, according to Staff, this direct access to the market allowed the Respondent to engage in the manipulative trading activities that are at issue here. In the circumstances, Staff is calling for a suspension of direct electronic access to the marketplace for a period of six (6) months.

¶ 34 The Hearing Panel is of the opinion that the Respondent's actions justify suspension in accordance with Principle 5 of the Guidelines and the case law. Indeed, the Respondent's manipulative trading activities constitute a major contravention of the Universal Market Integrity Rules. Furthermore, the Respondent has a pattern of misconduct. Finally, the manipulative activities have harmed the integrity of the marketplace as a whole.

¶ 35 More specifically, the Hearing Panel considers it fair and reasonable to suspend the Respondent from direct electronic access to the market for a period of six (6) months in the circumstances. Though relatively short, the suspension nevertheless provides sufficient specific deterrence as well as general deterrence, considering the other penalties that are imposed. On the other hand, during this period, the Respondent will still be able to continue trading through a dealer.

D. Prohibition of registration

¶ 36 The Respondent is not currently a registrant of IIROC. Staff is requesting a penalty of prohibition of registration in any capacity for a period of six (6) months. Subsequently, before applying for registration in any capacity, the Respondent would have to take the Conduct and Practices Handbook Course. Furthermore, in the event of registration, the Respondent would be subject to strict supervision for a period of twelve (12)

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12 *Re Suppal*, 2014 IIROC 45, par. 59.

months.

¶ 37 The Hearing Panel notes that the Respondent admitted not knowing that he was a registrant of IIROC and thus subject to its rules. Such an admission is certainly disturbing. In this context, it seems appropriate to subject any application for registration to a six-month moratorium and, as applicable, to impose the obligation of taking the Conduct and Practices Handbook Course, specifically the section on ethics. As well, in the circumstances, twelve (12) months of strict supervision is entirely justified following registration.

VI. DISPOSITION

¶ 38 For all these reasons, the Hearing Panel imposes:

a) A $25,000 fine on the Respondent, which includes disgorgement of the net profits derived by the latter from the trading activities that are the subject of the decision on liability;

b) Costs in the amount of $15,000 to be paid to IIROC;

c) A suspension of the capacity to enter into a systems interconnect arrangement (or a routing arrangement) allowing direct electronic access to the market, for a period of six (6) months;

d) A prohibition of registration in any capacity for a period of six (6) months, with the obligation of taking the Conduct and Practices Handbook Course before re-registration and, in the event thereof, the obligation of twelve (12) months of strict supervision.

Dated at Montréal, Québec, this 14th day of May 2019.

Stéphane Rousseau

Gilles Archambault

Daniel Houle