

**Re Cloutier**

**IN THE MATTER OF:**

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

**and**

**Christian Cloutier**

2016 IIROC 25

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

Hearing held on: June 14, 2016  
Decision rendered on: July 13, 2016

**Hearing Panel**

The Hon. Benjamin J. Greenberg, Q.C., Chartered Arbitrator, Panel Chair; Ms. Lise Casgrain; and Mr. François Demers

**Appearances**

Me Francis Larin, Enforcement Counsel for IIROC

Me Marie-Noël Rochon, LCM Avocats, for the RESPONDENT

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**UNANIMOUS DECISION ON THE SETTLEMENT REACHED BY THE  
PARTIES REGARDING RESPONDENT’S GUILT AND ON THE  
ADVERSARIAL DEBATE REGARDING THE PENALTY TO BE  
IMPOSED ON THE RESPONDENT**

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**I. INTRODUCTION**

¶ 1 In this instance, the RESPONDENT was charged with one count, to which he admitted his guilt in the settlement concluded in lieu of the Agreed Statement of Facts (the “STATEMENT”), which is one object of this DECISION. The aforesaid count read as follows in paragraph 6 of the STATEMENT:

“Between May 1, 2008 and November 30, 2011, the RESPONDENT failed to exercise due diligence to ensure that his investment recommendations in leveraged Exchange-Traded Funds constituted a suitable investment for one of his clients, contrary to IIROC Dealer Member Rule 1300.1 (a), (p) and (q) (Regulation 1300.1 (a), (p) and (q) of the IDA, prior to June 1, 2008).”

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**II. HISTORY AND FACTS OF THE MATTER**

¶ 2 With respect to the history of the matter, we could not say it any better than the IIROC Enforcement Department did in paragraphs 7 to 49 of the STATEMENT.

¶ 3 Between May 1, 2008 and November 30, 2011, the RESPONDENT failed to take into consideration the recommended holding period and the risk level associated with the use of leveraged Exchange-Traded Funds (leveraged ETF) before recommending them as a suitable investment to Mrs. GSD, one of his retired clients, who did not have the risk tolerance and the knowledge of investing to understand the risks inherent in trading this type of financial products.

¶ 4 On May 16, 1998, the RESPONDENT was employed as a representative with unrestricted practice with Lévesque, Beaubien, Geoffrion inc.;

¶ 5 On January 19, 1999, the RESPONDENT was also approved as a Registered Representative Options with Lévesque, Beaubien, Geoffrion inc.;

¶ 6 In 1999, the National Bank acquired First Marathon, a Toronto-based investment firm. The Bank later merged this firm’s activities with those of its subsidiary Lévesque, Beaubien, Geoffrion inc. to form National Bank Financial Inc. (“**National Bank Financial**”), a new Canadian investment services company;

¶ 7 On June 1, 2008, RESPONDENT became a registrant of IIROC and consented to be subject to the latter’s jurisdiction;

¶ 8 The RESPONDENT was approved as a Registered Representative with Unrestricted Practice and a Registered Representative Options with National Bank Financial until December 22, 2011;

¶ 9 As at February 24, 2016 (date of the STATEMENT), the RESPONDENT is currently employed with Harris, Bolduc & Associés inc. as an assistant advising representative (portfolio manager).

¶ 10 One of the RESPONDENT’s clients, Mrs. GSD, finished high school and then worked as an office clerk for thirty-six (36) years;

¶ 11 Mrs. GSD has been separated since 1977 and has no children;

¶ 12 In 1999, Mrs. GSD lost the job she had held for thirty-one (31) years. Given that she was not yet 65, she chose to handle the management of the private pension fund accumulated through her former employer by retaining the professional services of the RESPONDENT, who was referred to her by her ex-brother-in-law;

¶ 13 Prior to retaining the professional services of the RESPONDENT, Mrs. GSD had no investment experience;

¶ 14 On April 27, 1999, Mrs. GSD opened a margin account, a Registered Retirement Savings Plan (RRSP) account, as well as a Locked-In Retirement Account (LIRA) with National Bank Financial. The RESPONDENT was the representative with unrestricted practice assigned to these three accounts;

¶ 15 Mrs. GSD had no other brokerage accounts elsewhere than at National Bank Financial and the RESPONDENT looked after all of Mrs. GSD's investments;

¶ 16 On the new account form dated April 27, 1999, we find the following information concerning Mrs. GSD:

- (i) She is unemployed;
- (ii) She is 52 years old;
- (iii) She has known the RESPONDENT for a month;
- (iv) The estimated total net worth of her assets is \$170,000;
- (v) Her estimated annual income from all sources is evaluated at \$30,000;
- (vi) Her knowledge of investing is described as limited;
- (vii) Her investment objectives are as follows:
  1. Income: 30%;
  2. Capital gains:
    - (a) Short-term: 20%;
    - (b) Medium-term: 50%;
    - (c) Long-term: 0%.

- (viii) Risk tolerance:
  1. Low: 70%;
  2. Moderate: 30%;
  3. High: 0%.

¶ 17 Between the years 2000 and 2006, Mrs. GSD worked for a private company. Her principal duties consisted in data entry;

¶ 18 On July 4, 2006, the RESPONDENT proceeded to update Mrs. GSD's client file. On reading the updated client file, we learn the following information about Mrs. GSD;

- (i) She is still unemployed;
- (ii) The net worth of her assets is \$140,000 and she has no property holdings;
- (iii) Her annual income from all sources is \$20,000;
- (iv) Her knowledge of investing is described as fair;

- (v) Her investment objectives are as follows:
1. Portfolio type: Growth;
  2. Risk tolerance: High;
  3. Asset category:
    - a. Cash/cash equivalents: 0%-25%;
    - b. Fixed income: 25%-45%, but a handwritten notation states 35% instead;
    - c. Equity: 40%-75%;
    - d. Alternative investments: 0%-20%.

¶ 19 On December 13, 2006, the RESPONDENT updated Mrs. GSD's client file a second time, when her LIRA was converted to a LIF. On it, we find the following information about Mrs. GSD:

- (i) She is still unemployed;
- (ii) The net worth of her assets is established at \$140,000;
- (iii) Her annual income from all sources is \$20,000;
- (iv) Her investment objectives are as follows:
  1. Portfolio type: Growth;
  2. Risk tolerance: High;
  3. Asset category:
    - a. Cash/cash equivalents: 0%-25%;
    - b. Fixed income: 25%-45%;
    - c. Equity: 40%-75%;
    - d. Alternative investments: 0%-20%.

¶ 20 To update Mrs. GSD's client file, on December 13, 2006, RESPONDENT mailed the completed form to Mrs. GSD for her to sign and return to him by mail;

¶ 21 Between May 1, 2008 and November 30, 2011, the RESPONDENT recommended numerous buy and sell transactions involving leveraged ETFs to Mrs. GSD. The following table shows the type of leveraged ETF that was recommended by the RESPONDENT, the type of transaction that was executed in Mrs. GSD's LIF account, the date of the transaction and its value:

Type of leveraged ETF recommended by the RESPONDENT	Type of transaction executed (buy/sell) in Mrs. GSD's LIF account	Date transaction was executed	Value of transaction executed (\$)
PROSHARES TR ULTRA FINLS	Buy	May 1, 2008	7,382.27
PROSHARES TR ULTRA FINLS	Buy	September 19, 2008	4,867.49
ULTRA S&P 500 PROSHARES	Buy	September 19, 2008	9,234.21

Type of leveraged ETF recommended by the RESPONDENT	Type of transaction executed (buy/sell) in Mrs. GSD's LIF account	Date transaction was executed	Value of transaction executed (\$)
HB S&P/TSX 60 BULL+A ETF	Buy	October 29, 2008	11,059.20
HB S&P/TSX CP EG BULL ETF	Buy	October 29, 2008	6,959.67
HB NYMEX CRUDE OIL BULL+A	Buy	October 29, 2008	9,163.50
PROSHARES TR ULTRA FINLS	Buy	March 24, 2009	3,680.39
HB S&P/TSX CP EG BULL ETF	Sell	January 29, 2010	6,780.00
HB S&P/TSX 60 BULL+A ETF	Sell	May 28, 2010	13,794.30
HB NYMEX CRUDE OIL BULL+A	Sell	July 20, 2010	1,204.00
ULTRA S&P 500 PROSHARES	Sell	November 30, 2011	6,749.62
PROSHARES TR ULTRA FINLS	Sell	November 30, 2011	5,760.00

¶ 22 Prior to May 1, 2008, Mrs. GSD had never traded financial products that were as speculative as leveraged ETFs;

¶ 23 At no time between May 1, 2008 and November 30, 2011 did the RESPONDENT discuss the prospectuses of the leveraged ETFs that were bought or sold with Mrs. GSD;

¶ 24 From May 1, 2008 to November 30, 2011, Mrs. GSD trusted the RESPONDENT she had retained as an investment professional, and the buy and sell transactions involving leveraged ETF were ultimately executed by the RESPONDENT;

¶ 25 Although the RESPONDENT recommended the purchase and sale of leveraged ETFs to Mrs. GSD on numerous occasions, he never informed his client of the fact that these were speculative financial products geared to provide daily results;

¶ 26 To the RESPONDENT, leveraged ETFs are financial products that present a high risk, but are not speculative. Furthermore, the RESPONDENT is of the opinion that they are suitable for all investors whose investment objectives range from “income” to “maximum growth”. To the RESPONDENT, clients who want to buy bonds are the only ones who should not buy leveraged ETFs. In fact, in his opinion, all clients who hold shares in their investment accounts, no matter what their type is, can trade in leveraged ETFs;

¶ 27 The RESPONDENT's understanding of the features of leveraged ETFs and how they work stems from his personal research, which includes reviewing the prospectuses, from a one-hour course that National Bank Financial offers its employees and which RESPONDENT attended, from discussing these financial products over a lunch he had with Mr. GC, a representative/salesperson for Horizons BetaPro products, and from a one-

day course on these same products with Horizons ETF University;

¶ 28 When the RESPONDENT recommended that his clients invest in leveraged ETFs, he referred to graphical tables that showed the return on the selected leveraged ETF over a holding period of approximately one year. A reading of the diagram shown on the table gives the impression that one can predict how leveraged ETFs will react if the holding period exceeds one day because it presents a near perfect correlation with an index;

¶ 29 The RESPONDENT based the recommendations he made to his clients on his own observation of the daily fluctuations in the leveraged ETFs compared to the market index, whereas these are leveraged financial products that are designed to provide daily investment results;

¶ 30 Reading the prospectuses for the leveraged ETFs traded in Mrs. GSD's account yields the following information:

1) September 28, 2007 Prospectus regarding ProShares Trust:

- (i) *The Funds do not seek to achieve their stated investment objective over a period of time greater than one day because mathematical compounding prevents the Funds from achieving such results.*
- (ii) *Aggressive Investment Technique Risk - The Funds use investment techniques that may be considered aggressive.*
- (iii) *Such instruments, particularly when used to create leverage, may expose the funds to potentially dramatic changes (losses or gains) in the value of the instruments and imperfect correlation between the value of the instruments and the security or index;*
- (iv) *The use of aggressive investment techniques also exposes the funds to risks different from or possibly greater than the risks associated with investing directly in securities contained in an index.*

2) January 11, 2008 Prospectus regarding the ETFs of Horizons BetaPro:

- (i) *Each ETF is designed to provide daily investment results that endeavour to correspond to a multiple or the inverse (opposite) multiple of the daily performance of a specified underlying index.*
- (ii) *Each investor should carefully consider whether their financial condition and/or retirement savings objectives permit them to buy Units of an ETF;*
- (iii) *Units of the ETFs can be highly speculative and can involve a high degree of risk, some not traditionally associated with mutual funds;*
- (iv) *No ETF by itself constitutes a balanced investment plan.*
- (v) *The ETFs are not intended for investors whose principal objective is current income or preservation of capital.*
- (vi) *An investor must be able to afford to lose a substantial portion or even all of the money they invest;*
- (vii) *The risk of loss in trading derivatives can be substantial.*

3) June 13, 2008 Prospectus regarding the ETFs of Horizons BetaPro :

This prospectus dated June 13, 2008 provides the same information as that of January 11, 2008.

**(Emphasis added by the STATEMENT authors)**

¶ 31 On June 11, 2009, IIROC published Guidance Note 09-0172 which specifically concerns leveraged and inverse Exchange-Traded Funds (ETFs), and reiterates the obligations of dealer members that sell this type of funds. Briefly, IIROC emphasizes the fact that leveraged ETFs are highly complex financial instruments that are typically unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets;

¶ 32 On June 15, 2009, National Bank Financial published a news release on the subject of leveraged and inverse exchange-traded funds (ETFs), which was titled “Flash conformité 93”. This news release emphasizes the following information:

- (i) It references Guidance Note 09-0172 published by IIROC;
- (ii) It states that leveraged and inverse ETFs are typically unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets;
- (iii) It mentions that ETFs raise particular problems with respect to the knowledge and complexity of these products;
- (iv) It suggests that investment advisors carefully evaluate the suitability of every product that they recommend to their clients;
- (v) It reminds advisors that all business records must accurately and impartially present the products’ features;
- (vi) It informs advisors that National Bank Financial has set up training regarding these products;
- (vii) It informs advisors of National Bank Financial’s position regarding the recommended client profile for trading in ETFs, namely:
  1. Investment objectives: maximum growth;
  2. Knowledge of investing: good or excellent;
  3. Concentration: marginal percentage of ETF assets.

¶ 33 On July 3 and December 3, 2009, National Bank Financial made changes to its “Flash conformité 93” which it circulated to all of its advisors. These changes include a reminder of the duty to Know-Your-Client, for advisors who recommend leveraged and inverse ETFs;

¶ 34 On October 27, 2009, the RESPONDENT received a letter of warning from National Bank Financial. In the letter, NBF claims that RESPONDENT’s business practice contravenes current NBF policy on trading leveraged and inverse ETFs. In support of this allegation, NBF notes that several of the RESPONDENT’s clients hold leveraged and inverse ETFs, whereas their investor profile does not meet the recommended standards for such holdings. As internal measures, NBF imposed the two (2) following conditions on the RESPONDENT:

- (i) He must submit a plan for restructuring his clients’ portfolio within thirty (30) days;
- (ii) He must take the “Best Management Practices” training given by National Bank Financial.

¶ 35 Despite the October 27, 2009 warning letter and the fact that Mrs. GSD’s investor profile did not coincide with NBF policy, the RESPONDENT maintained the purchased ETF products, confident that the financial market would inevitably rebound;

¶ 36 From June 2009 to December 2011, RESPONDENT kept the leveraged ETF products in Mrs. GSD’s account, even though her investor profile did not match the NBF’s recommended standards for holding such products;

¶ 37 On January 14, 2011, the RESPONDENT received a second letter of warning from National Bank

Financial, to the effect that RESPONDENT’s business practices still contravened NBF policy regarding the trading of leveraged and inverse ETFs. On this score, NBF emphasized to RESPONDENT that even though the latter had liquidated the positions held in “BetaPro”, he had replaced these positions with investments in “Ultra Proshares” which featured leveraging and daily rebalancing. For the second time, National Bank Financial imposed internal measures on the RESPONDENT, namely:

- (i) Have a net asset inflow of 2.5 million;
- (ii) When opening options accounts, not have more than 5% of the assets in this type of investment;
- (iii) Reduce to less than 5% the assets invested in vehicles that are inconsistent with the “Flash conformité 93”, including for instance, BetaPro and ProShares (all investment vehicles that include daily rebalancing and/or leveraging);
- (iv) All clients who hold this type of investment and who do not have the required profile as stipulated in the “Flash conformité 93”, must be contacted to liquidate their positions;
- (v) No profile changes will be accepted for these clients.

¶ 38 In spite of the publication of IROC Guidance Note 09-0172, the release of the “Flash conformité 93” news release by National Bank Financial, the amendments made to “Flash conformité 93” on July 3 and December 3, 2009, as well as the two letters of warning that NBF sent to the RESPONDENT, the latter never questioned the suitability of the investments executed in Mrs. GSD’s portfolio, even though all of these documents were an opportunity for him to do so;

¶ 39 Not only were the investments in leveraged ETFs that RESPONDENT carried out in Mrs. GSD’s portfolio unsuitable for her, she also found herself with a high concentration of leveraged ETFs in her LIF account;

¶ 40 According to the authors of the STATEMENT, the following table illustrates the concentration of leveraged ETFs found in Mrs. GSD’s LIF account, as well as the total value of the investments in this account for the period from September 30, 2008 to November 30, 2011 :

<b>MRS. GSD’S LIF ACCOUNT – CONCENTRATION OF LEVERAGED ETFs (IN %)</b>			
<b>Date</b>	<b>Total value of LIF account</b>	<b>Value of leveraged ETFs</b>	<b>% of leveraged ETFs in the account</b>
30-sept-08	\$100,588.02	\$15,309.90	<b>15.22%</b>
31-dec-08	\$63,050.64	\$23,754.54	<b>37.68%</b>
31-March-09	\$52,681.33	\$22,192.76	<b>42.13%</b>
30-June-09	\$62,297.92	\$30,860.50	<b>49.54%</b>
30-Sept-09	\$67,335.50	\$36,971.89	<b>54.91%</b>
31-Dec-09	\$64,843.19	\$38,095.39	<b>58.75%</b>
31-March-10	\$62,911.57	\$32,792.14	<b>52.12%</b>
30-June-10	\$51,916.81	\$13,810.96	<b>26.60%</b>
30-Sept-10	\$49,772.69	\$13,899.56	<b>27.93%</b>
31-Dec-10	\$49,322.81	\$16,443.70	<b>33.34%</b>
31-March-11	\$46,030.56	\$17,241.61	<b>37.46%</b>

<b>MRS. GSD'S LIF ACCOUNT – CONCENTRATION OF LEVERAGED ETFs (IN %)</b>			
<b>Date</b>	<b>Total value of LIF account</b>	<b>Value of leveraged ETFs</b>	<b>% of leveraged ETFs in the account</b>
30-June-11	\$40,493.25	\$16,190.50	<b>39.98%</b>
30-Sept-11	\$29,296.71	\$11,340.12	<b>38.71%</b>
30-Nov-11	\$28,845.28	\$13,076.94	<b>45.33%</b>

¶ 41 Between September 30, 2008 and November 30, 2011, Mrs. GSD withdrew an approximate sum of \$55,155 from her LIF account;

¶ 42 Mrs. GSD suffered a monetary loss of \$18,058.81 as a result of her investments in leveraged ETFs, which represents approximately 35% of the total value that she invested in leveraged ETFs;

¶ 43 Again, according to the authors of the STATEMENT, the following table presents Mrs. GSD's gains and losses in connection with buy or sell transactions involving leveraged ETF products in her LIF account :

<b>GAINS AND LOSSES IN CONNECTION WITH LEVERAGED ETFs IN MRS. GSD'S ACCOUNT</b>			
<b>Type of leveraged ETF</b>	<b>Investment value (\$)</b>	<b>Value at sale (\$)</b>	<b>Gain/(Loss) (\$)</b>
PROSHARES TR ULTRA FINLS	15,930.15	5,760.00	(10,170.15)
ULTRA S&P 500 PROSHARES	9,234.21	6,749.62	(2,484.59)
HB S&P/TSX 60 BULL+A ETF	11,059.20	13,794.30	2,735.10
HB S&P/TSX CP EG BULL ETF	6,959.67	6,780.00	(179.67)
HB NYMEX CRUDE OIL BULL+A	9,163.50	1 204.00	(7,959.50)
<b>Total:</b>	<b>52,346.73</b>	<b>34,287.92</b>	<b>(18,058.81)</b>

¶ 44 On December 22, 2011, the RESPONDENT ceased to be the representative with unrestricted practice assigned to Mrs. GSD's investment accounts;

¶ 45 On January 27, 2012, Mrs. GSD sent a letter of complaint to National Bank Financial, to the effect that the RESPONDENT had not respected her wish to have a safe portfolio, in consideration of her age, her limited income and her status as a retired person, despite numerous discussions on this subject. She noted that she would have liked to be informed of the level of risk presented by the trades in her LIF account and added that she would never have authorized the purchase of leveraged ETF, had she been properly informed;

¶ 46 On March 22, 2013, the Autorité des marchés financiers (AMF) closed Mrs. GSD's file, given the settlement signed with National Bank Financial;

¶ 47 On August 27, 2013, Staff met with Mrs. GSD and learned that she would never have authorized the

purchase of leveraged ETF if she had known that these financial products were so risky;

¶ 48 On November 7, 2013, Staff met with RESPONDENT and questioned him specifically about the features and risks inherent in leveraged ETFs. On that occasion, Staff learned, notably, that:

- (i) To the RESPONDENT, leveraged ETFs constitute financial products that present a high risk, but they are not speculative since they are based on an index. According to him, a trading strategy based on the index principle, like that of buy and sell transactions involving leveraged ETFs, is less risky than a trading strategy based on corporate securities;
- (ii) To the RESPONDENT, when he sells the corporate equity securities that make up his clients' portfolio in order to purchase leveraged financial products, he is reducing his clients' risk;
- (iii) The RESPONDENT disagrees with the statement that leveraged ETFs are designed to provide daily investment results, as the prospectus recommends. According to him, the aim of this statement is to generate commissions for the investment representatives with whom the clients hold these products. The RESPONDENT is of the opinion, rather, that leveraged ETFs are financial products designed to provide investment results in the medium term, namely over a holding period of approximately three (3) years;
- (iv) The RESPONDENT is of the opinion that there is a correlation between a leveraged ETF product and the market index, even if the leveraged product is held for a period of more than a year;
- (v) To the RESPONDENT, the instability of the financial markets in 2008 and following, could only improve. Consequently, the RESPONDENT recommended that his clients hang on to their leveraged ETF securities.

¶ 49 On December 18, 2013, Staff met with Mr. JP, a regional manager at National Bank Financial, for the North Shore Montréal region. Mr. JP alleged to the following facts:

- (i) Beginning March 1, 2009, Mr. JP acted as the RESPONDENT's branch manager;
- (ii) The RESPONDENT took the mandatory training on leveraged ETFs, but confided to Mr. JP that he knew more about these products than the instructor hired by National Bank Financial to train the employees;
- (iii) Mr. JP discussed leveraged ETFs with the RESPONDENT a few times, notably after taking the training imposed by National Bank Financial. The RESPONDENT told him then that he was of the opinion that leveraged ETF products are financial products that can be kept long-term in a client's account and that they are suitable for all types of investors. RESPONDENT's position regarding leveraged ETFs roused Mr. JP's interest because it differed from that of National Bank Financial;
- (iv) On July 3, 2009, Mr. JP received an internal report from Mr. LB on all the "BetaPro" positions managed by all the investment advisors under the latter's supervision. The report shows that the RESPONDENT was the biggest seller of "BetaPro" positions for the North Shore Montréal region;
- (v) On October 27, 2009, RESPONDENT was the only investment advisor to receive a warning letter regarding the inappropriate use of leveraged ETFs.

¶ 50 Mrs. GSD kept the leveraged ETF products recommended by the RESPONDENT for a period of one to three years.

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### **III. MISSION OF THE HEARING PANEL**

¶ 51 Our mission is not that of an appeal body. We are not required to consider whether, having heard the case in an adversarial proceeding in the first instance, we would have ruled or not as the Parties agreed in their SETTLEMENT AGREEMENT regarding the RESPONDENT's guilt.

¶ 52 Rule 20.36 (1) states:

***“Hearing Panel Powers***

(1) *Upon conclusion of a settlement hearing, the Hearing Panel may either:*

- (a) *accept the Settlement Agreement; or*
- (b) *reject the Settlement Agreement.”*

¶ 53 Consequently, here is what the Hearing Panel decreed in *Re: Graydon Elliot Capital Corporation*:<sup>1</sup>

*“The Panel accepts that its role under the By-laws in reviewing a Settlement Agreement is not the same as its role considering penalty following a hearing on the merits. As has been said in a number of cases, in considering a Settlement Agreement, the Panel should not simply substitute its discretion to that of Staff in negotiating the settlement. The Panel must be cognizant of the importance of the settlement process, and it should not interfere lightly in a negotiated settlement. We acknowledge that the settlement process is one of negotiation and compromise and the penalty imposed may be somewhat different than one imposed following a hearing where similar findings are made and the Panel determines the penalty.”*

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**IV. COMPLAINANT'S POSITION RESPECTING THE PENALTIES TO BE IMPOSED BY THE HEARING PANEL**

¶ 54 Through Me Francis Larin, we are informed that COMPLAINANT is of the opinion that, considering all the facts in the matter, namely the age of the RESPONDENT, the mitigating circumstances, as well as the aggravating ones, and the case-law in the matter, the Hearing Panel should impose the following penalty on the RESPONDENT:

- A. A fine of \$30,000, which would include the commissions earned, which were minor (under \$1000);
- B. Costs to IIROC, in an amount ranging from \$5,000 to \$10,000;
- C. Since the RESPONDENT has not been registered with IIROC for nearly 5 years, it will not be necessary to order a prohibition against reapproval; and
- D. In the event of RESPONDENT's reapproval with IIROC, that he be ordered to retake and pass the Conduct and Practices Handbook Course, as well as undergo six months of strict supervision.

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**V. RESPONDENT'S POSITION RESPECTING THE PENALTIES TO BE IMPOSED BY THE HEARING PANEL**

¶ 55 Through Me Marie-Noël Rochon, we are informed that RESPONDENT is of the opinion that the Hearing Panel should impose the following penalties on him:

- A. A fine ranging between \$10,000 and \$20,000;
- B. A contribution to IIROC's costs in the order of \$3000-\$5000; and

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<sup>1</sup> [2007] IDAC No. 43, paragraph 9.

- C. In the event of RESPONDENT's reapproval with IIROC, RESPONDENT agrees with Complainant's recommendations regarding the Conduct and Practices Handbook Course and supervision;

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## **VI. ANALYSIS AND DISCUSSION**

- ¶ 56 With respect to the personal research alleged by the RESPONDENT, as well as the courses he attended, as stated in paragraph 27 above, a one-hour course cannot teach you much; neither does a conversation over dinner with an ETF representative/salesperson who is neither objective nor impartial. Neither does one learn much, objectively speaking, from a one-day course sponsored by the "Horizons BetaPro ETF University", which also is neither objective nor impartial, nor is it even a "University".
- ¶ 57 The penalties imposed in a case such as this must reconcile the needs of protecting the investing public with those of the IIROC membership. They must also strive to protect the integrity of the securities industry and the securities market and act as a deterrent against any repetition of the misconduct in question.
- ¶ 58 The Hearing Panel Members were all surprised at the total amount of \$142,348.65 in costs incurred by IIROC in this matter;
- ¶ 59 Our questions to the investigator in this regard revealed that the investigation conducted by IIROC did not cover only the period mentioned in the count cited in paragraph 1 above;
- ¶ 60 In fact, the entire 13 or so years of the client-advisor relationship between Mrs. GSD and the RESPONDENT were investigated.
- ¶ 61 What's more, when we questioned the investigator, Colin Lovegrove, he acknowledged that his investigation pertained not only to the relationship between Mrs. GSD and the RESPONDENT, but to the RESPONDENT's business relationships with all of his clients.
- ¶ 62 Apart from what was revealed regarding the relationship between Mrs. GDS and the RESPONDENT, nothing inappropriate was observed in the RESPONDENT's dealings with all his other clients.
- ¶ 63 Therefore, we estimate that a large proportion of the costs incurred by IIROC pertained to the RESPONDENT's other clients beside Mrs. GDS and that this must be taken into account when we assess the amount of the costs incurred that RESPONDENT will be ordered to repay to IIROC.
- ¶ 64 Moreover, we note that, after the notices, news releases and warnings referenced in paragraphs 31, 32, 33, 34 and 37 above, RESPONDENT ceased to negotiate buy transactions for Mrs. GSD's LIF account<sup>2</sup>. It is nevertheless accurate that he spread the sell transactions in Mrs. GSD's LIF account over 32 months, from March 24, 2009 (the date of the last buy transaction) to November 30, 2011 (the date of the last sell transaction).
- ¶ 65 Still, slowness in selling the ETFs during said period was certainly better than continuing to buy them.
- ¶ 66 As well, we should keep in mind the circumstances of the financial crisis that began in 2008, which may have deterred the RESPONDENT from selling Mrs. GSD's ETF portfolio all at once.
- ¶ 67 As for the concentration of leveraged ETF in Mrs. GSD's LIF account<sup>3</sup>, we must remember that the total amount of \$55,155 withdrawn by her between September 30, 2008 and November 30, 2011 would necessarily have had a mathematical impact on the percentages invoked in paragraph 40 above.

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<sup>2</sup> See the table in paragraph 21 above.

<sup>3</sup> As paragraph 40 above demonstrates.

¶ 68 Plus, there is the arrogance displayed by the RESPONDENT<sup>4</sup>. Thus, we have no proof that he acquiesced to his employer's demand that he submit, within 30 days of the warning letter described in paragraph 34 above, a restructuring plan for his clients' portfolios of leveraged and inverse ETF products.

¶ 69 In passing, we also wonder where the National Bank Financial compliance department was in all this. We are also surprised at the 15 months that elapsed between the first and second warnings which the latter sent to the RESPONDENT<sup>5</sup>.

¶ 70 Finally, we are astonished that it was only through our questions at the hearing last June 14 that the fact emerged that the RESPONDENT may have contributed to the settlement paid to Mrs. GSD referenced in paragraph 46 above, and which led the AMF to close its file on the complaint which Mrs. GSD lodged against the RESPONDENT.

¶ 71 As for the AGGRAVATING FACTORS, these are evident from the above-mentioned statement of the facts.

¶ 72 Regarding the MITIGATING FACTORS, these are also evident from the above-mentioned statement of the facts.

¶ 73 However, RESPONDENT's legal counsel has invoked as a MITIGATING FACTOR the fact that the RESPONDENT has no disciplinary history.

¶ 74 We know that there are two schools of jurisprudence regarding the absence of disciplinary history: namely that either it constitutes a mitigating factor or merely the absence of an aggravating factor.

¶ 75 Logic dictates that we align ourselves with the second assumption. If the existence of a prior disciplinary history constitutes an aggravating factor, the absence of one is not a mitigating factor, but rather the absence of an aggravating factor.

¶ 76 Thus, the penalty elements of a \$15,000 fine and a \$5,000 contribution to costs agree with the respective recommendations made by IIROC and the RESPONDENT and, moreover, fall within the bounds of what is a reasonable range and are consistent with the case-law in analogous matters<sup>6</sup>. The case-law shows, for similar types of offences, the assessment of fines and costs that are sometimes lower and sometimes higher than those we are about to assess in the matter at hand. Usually the real costs incurred by IIROC for this type of investigation and disciplinary proceedings by far exceed the amount of \$5,000.

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## **VII. FINAL DISPOSITION**

¶ 77 This UNANIMOUS DECISION on the RESPONDENT'S GUILT and on the PENALTIES IMPOSED ON THE RESPONDENT shall be signed by the members of the HEARING PANEL in multiple copies. Each of these signed copies shall be equally valid and authentic and shall avail for all legal purposes.

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## **VIII. CONCLUSIONS**

¶ 78 FOR ALL THESE REASONS:

WE, the members of the HEARING PANEL, APPROVE, ACCEPT and UPHOLD the SETTLEMENT AGREEMENT REACHED BY THE PARTIES in the form of the STATEMENT SIGNED on February

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<sup>4</sup> See paragraph 49(ii) above.

<sup>5</sup> See paragraphs 34 and 37 above.

<sup>6</sup> See: Jacques Turenne, 2013 IIROC 43; Stephen Moran, 2012 IIROC 64; Trevor Ian Gunderson, 2012, IIROC 66; and Wasseem Dirani, 2014 IIROC 09.

24, 2016 and March 11, 2016 regarding the RESPONDENT's GUILT, and FIND THE RESPONDENT GUILTY of the CHARGE against him and hereby IMPOSE THE FOLLOWING PENALTIES ON THE RESPONDENT:

- a) A FINE in the amount of \$15,000;
- b) The RESPONDENT agrees to PAY IIROC COSTS in the amount of \$5,000.
- c) In the event of RESPONDENT's reapproval with IIROC, he must RETAKE and PASS the CONDUCT AND PRACTICES HANDBOOK COURSE within 6 MONTHS of REAPPROVAL, and be under STRICT SUPERVISION FOR SIX MONTHS, followed by CLOSE SUPERVISION FOR ANOTHER SIX MONTHS;

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**IX. SIGNATURES PAGE**

Signed at Montréal (Québec), this July 13, 2016

Benjamin J. Greenberg

Q.C., CHARTERED ARBITRATOR, CHAIR OF THE HEARING PANEL

Lise Casgrain

MEMBER OF THE HEARING PANEL

François Demers

MEMBER OF THE HEARING PANEL

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