

Re Rudensky

IN THE MATTER OF:

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

and

Andrew Paul Rudensky

2018 IIROC 38

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

Heard: October 2, 2018 in Toronto, Ontario
Decision: October 17, 2018

Hearing Panel:

Paul Moore Q.C., Chair, Charles Macfarlane and Stuart Livingston

Appearance:

Sally Kwon and Rob Delfrate, Enforcement Counsel

Kevin Richard and Martin Mendelzon, for Andrew Paul Rudensky

DECISION ON PENALTY

Background

¶ 1 Our Decision on the Merits in this matter was issued on July 23, 2018. It may be accessed at [2018 IIROC 28](#).

¶ 2 On October 2, 2018 we heard oral argument and considered the parties' written submissions as to penalty.

¶ 3 Words and terms used in this Decision on Penalty are used with the same meanings they have in the Decision on the Merits.

Consequences

¶ 4 The Respondent's misconduct must have consequences for him.

¶ 5 As an IIROC hearing panel stated in 2012,

“The investment industry by necessity operates in an atmosphere of trust. Trust between the Approved Person and his or her client, trust between the Approved Person and his or her employer, and trust between the Approved Person and IIROC Staff. Where an Approved Person breaches any of these trust relationships, serious consequences should follow.”

Re Scoten, 2012 IIROC 67 at para 2

¶ 6 Another IIROC hearing panel stated in 2010,

“The respondent's deceitfulness towards his member firm strikes at the heart of the principles of trust and full disclosure upon which the investment industry is built. As stated in *Re Furevick*, [2007] I.D.A.C.D. No. 30, at para 6:

‘That the respondent lied to his employer is a serious matter. We note that the whole industry is built on trust, and that if an employer cannot have confidence in its employees, it undermines the ability of the firm to ensure that its business is handled in a proper and ethical manner.’ ”

Re Wong, 2010 IIROC 50 at para 32

¶ 7 The Respondent’s misconduct and lack of honesty harmed market integrity and the reputation of the marketplace. He breached the fundamental principle of trust in the business.

¶ 8 As articulated in Section 13.4 of NI 31-103, conflicts of interest can be existing or potential. Because firms are required to address existing or potential conflicts of interest, it is essential that a registrant’s answers to their queries are true and complete. This is particularly the case where a registrant solely possesses information about existing or potential conflicts of interest. The failure to provide true and complete disclosure prevents a firm from being able to fulfil its obligation to respond to existing or potential conflicts of interest, thereby exposing the firm to potential damages.

¶ 9 RS was a sophisticated client not in need of the protection intended to be afforded under IIROC Rule 43. For this reason, we concluded in our Decision on the Merits that the violation alleged in Allegation #1 was technical.

¶ 10 But although technical, the violation of Rule 43 was still serious because, together with the violation alleged in Allegation #2, it was deliberate, deceitful and intentional and circumvented the management of conflicts by RGMP who had the duty and obligation to oversee and manage conflicts of interest in the interest of itself and all its clients.

¶ 11 RGMP was not given the opportunity to review, approve, or (for whatever its reasons might have been to decide that the transactions in question were not in its, its other clients, or anyone else’s best interest) to disallow the Respondent’s participation in the Brookfield loan and the new issue of Brookfield shares to the Respondent.

Staff’s Submission

¶ 12 Staff submitted that the following sanctions were warranted in this case:

- a two year suspension starting on the date of the Hearing Panel’s sanction decision;
- a fine of \$25,923 representing disgorgement of the net profits gained by the Respondent from his impugned personal financial dealings with RS;
- a fine of \$25,000 in relation to the Rule 43 contravention;
- a fine of \$30,000 in relation to the Rule 29.1 contravention; and
- a requirement to rewrite and pass the Conduct and Practices Handbook course prior to any re-registration with IIROC.

¶ 13 Staff submitted a detailed bill of costs showing its total costs, up to the penalty hearing, as \$50,000. It applied a 30% discount and sought an order for costs for \$35,000.

¶ 14 Staff argued that its proposed sanctions were consistent with the IIROC Sanction Guidelines and previous securities industry disciplinary decisions. They would deter future misconduct by the Respondent, deter others from engaging in similar misconduct, improve overall compliance by investment industry participants, and foster public confidence in the securities industry. The sanctions would also highlight the importance of honesty by registrants in all of their dealings.

¶ 15 Staff suggested that the fines be apportioned for each allegation to send a message for each type of misconduct.

Respondent’s submission

¶ 16 The Respondent submitted that the following sanctions were warranted based on the Panel’s findings:

- no fine relating to Allegation #1, or in the alternative a fine of \$5,000;
- a reprimand relating to Allegation #1;
- a fine of \$10,000 relating to Allegation #2;
- a requirement that the Respondent rewrite and pass the Conduct and Practices Handbook course prior to any reregistration with IIROC; and
- no costs award, or in the alternative a costs award not exceeding \$24,500.

¶ 17 The Respondent argued that in situations where there was “purely” a technical breach “only”, it was appropriate that no sanction is required to protect the public interest.

¶ 18 However, this argument is not relevant in our case because the breach of Rule 43, although technical, was not “purely” or “only” technical as argued by the Respondent. It was also deliberate, intentional, and deceitful and deprived RGMP of its ability to manage or supervise or disallow the personal financial dealings with RS.

¶ 19 The Respondent argued that we had found that the Respondent contravened Rule 29.1 by failing to provide a full and complete answer to RGMP’s inquiry about the source of his funds and argued that the requirement to provide a full and complete answer to every question asked by a branch manager is not one which has been considered in previous decisions, and therefore the penalty should be less severe than in cases where the registered representative made expressly false statements to its dealer member.

¶ 20 However, we did not find that the contravention was that the Respondent failed to give a full and complete answer, but rather he gave a deliberately false and misleading answer. It is true that we also found as a fact that the representation was not a full and complete answer to RGMP’s inquiry. (Had it been so, then likely it would not have been false and RGMP would not have been misled.) Our finding was not that the failure to give a full and complete answer was “deemed” to be false and misleading, as the Respondent argued we had found, but that the representation was in fact false and misleading.

¶ 21 The Respondent argued that the contraventions did not warrant a suspension or prohibition as they did not involve any fraudulent or reckless misconduct.

¶ 22 We disagree. A suspension or prohibition is warranted. The Respondent’s conduct was intentional. He lied. He was deliberately deceptive. He deprived RGMP of its ability to manage a conflict of interest and to oversee, and perhaps veto, personal financial dealings of the Respondent with a client. He benefited by his misconduct. Although there was no evidence of client harm and RS was not in need of the protection of Rule 43, the conduct was egregious.

¶ 23 The situation before us is different from the situations in the precedent cases presented by the Respondent. Ours was not a case of a serious mistake by the Respondent, as in Carolann Steinhoff and Investment Industry Regulatory Organization of Canada, 2013 BCSCCOM 308 and 2014 BCSCCOM 23, where the British Columbia Securities Commission found that “[t]here is no basis to conclude that she acted dishonestly or for an improper motive, or has ever done so.” Ours is a case of lying, deception and egregious conduct by a registered representative regarding his Dealer Member.

¶ 24 The Respondent argued in the alternative that if we imposed a two year suspension as requested by staff, it should start to run from when the Respondent was no longer registered, namely from February 2016. However, this would be a meaningless suspension as two years from that date have already passed.

¶ 25 The Respondent argued that because he had no prior disciplinary record and his conduct did not cause harm to clients or the reputation of the industry, an order for disgorgement would not be appropriate.

¶ 26 However, the Respondent’s dishonesty was detrimental to the reputation of the industry. Furthermore, allowing the Respondent to keep financial benefits that accrued because of his misconduct would not provide the necessary deterrent message.

¶ 27 The Respondent further argued that the long and shorting transactions were not themselves wrongful and

that the financial benefits to the Respondent came from those transactions and not from the Brookfield loan, and that disgorgement should only apply to profits from wrongful conduct.

¶ 28 However, the shorting transactions were financed from the Brookfield loan and the profits from the long and shorting transactions were relevant aspects of the profit sharing arrangement terms of the Brookfield loan, which constituted the personal financial dealings with a client under Allegation #1. The Respondent's share of his net profits from the long and shorting transactions were financial benefits that he received as a consequence of personal financial dealings with a client not in compliance with the requirements of Rule 43 and should be disgorged.

¶ 29 The Respondent argued that we found that RGMP's failure to ask follow-up questions in order to be satisfied with the Respondent's answers was not at issue in this case and therefore could not be considered in assessing the Respondent's conduct (emphasis added). However, we did not say this. We said that the failure of RGMP to follow-up (i.e. RGMP's conduct) was not in issue before us. However, it was corroborative of our conclusion that RGMP was in fact misled by the Respondent's conduct.

¶ 30 Similarly, the Respondent argued that we found that staff's decision not to allege misconduct with respect to the earlier Cenovus loan or that RGMP allowed the AK guarantee fell within the scope of staff's prosecutorial discretion and could also not form relevant considerations in the Respondent's case (emphasis added). That is true regarding staff's prosecutorial discretion, but we did not suggest that in assessing the Respondent's conduct we did not consider all the evidence to be relevant except where we expressly indicated our non-reliance.

¶ 31 The Respondent agreed with staff that any fine should be apportioned to Allegation #1 and Allegation #2.

¶ 32 The Respondent argued that if there are fines, there should be no costs awarded, but that if costs are awarded, they and the fines when considered together should not be excessive.

¶ 33 The Respondent argued that the costs being sought by staff were excessive. He cited cases suggesting that care should be exercised in awarding costs so that the fear of incurring an award of very large costs does not have the effect of inhibiting a respondent from defending himself.

¶ 34 The Respondent argued that staff's claim for costs for 77 hours of its investigator's time at \$149 per hour for preparation and attendance at the hearing was excessive and disproportionate. The Respondent also argued that staff should not be able to claim costs for the 21 hours that the investigator spent testifying and attending the hearing. Accordingly, staff's total costs should not exceed \$35,000 before applying its discount of 30%, which brings the amount down to \$24,500.

IIROC Sanction Guidelines

¶ 35 The IIROC Sanction Guidelines set out, among others, the following general principles that provide a framework as well as key factors that we considered in determining appropriate sanctions.

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

¶ 36 The Respondent's misconduct in this case was intentional. He engaged in personal financial dealings with RS, who he knew was a client of RGMP. He intentionally hid from his employer the involvement of RS in the Brookfield loan. He communicated with RS and RS's assistant using his personal cell phone (and personal email address) instead of his business phone (and RGMP email address).

¶ 37 We found that the Respondent's representation to his firm that the funds to finance his short sales were the result of a loan collateralized on his condo was false and misleading and that the Respondent made this misrepresentation with the intent to mislead RGMP. The representation was another step in the Respondent's deception.

Whether the respondent attempted to conceal his or her misconduct or to lull into inactivity, mislead, deceive or intimidate a client, regulatory authorities or, in the case of an individual respondent, the

member firm with which he or she is/was associated.

¶ 38 The Respondent made a false and misleading representation to RGMP in order to conceal his personal financial dealings with RS and successfully lulled RGMP into inactivity (failure to make further inquiries or to review and to manage the conflict of interest).

¶ 39 Even after leaving RGMP, the Respondent concealed the true nature of his personal financial dealings from his subsequent employer, Beacon.

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

¶ 40 The Respondent borrowed \$3,000,000 from RS to facilitate his US\$7,474,291.64 million short sale and then shared the profits from his short sale with RS. This was by far the largest sum of money he had ever borrowed.

Extent of harm to clients or other market participants.

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

¶ 41 While RS was a sophisticated client who did not suffer harm from the Respondent's misconduct, the Brookfield loan nevertheless created conflicts of interest with RGMP and with the Respondent – conflicts that RGMP was unable to identify and respond to as a result of the Respondent's deception. The Respondent's misconduct and lack of honesty harmed market integrity and the reputation of the marketplace.

¶ 42 The Respondent's misconduct was intentionally deceptive to avoid discovery by his employer. Although his misconduct caused no harm to clients, it exposed RGMP to potential harm and had the effect of compromising the integrity and reputation of the securities industry.

Sanctions should ensure that a respondent does not financially benefit as a result of the misconduct.

¶ 43 The financial benefit the Respondent received from the long and shorting transaction connected with the personal financial dealings relating to the Brookfield loan was USD\$21,415. This is equivalent to \$25,923 in Canadian dollars based on the exchange rate on April 27, 2015.

The Respondent's relevant disciplinary history.

¶ 44 The Respondent had been registered for approximately eight years prior to the Brookfield loan and had no disciplinary history. While the existence of a disciplinary history should be treated as an aggravating factor, the absence of one need not be treated as a mitigating factor as registrants are expected to conduct themselves in accordance with IIROC Rules.

Decision On Sanctions

¶ 45 We order that

- i. the Respondent be suspended from registration with IIROC for two years commencing on the date of our Decision on the Merits, namely July 23, 2018;
- ii. the Respondent pay a fine of \$5,000 for the contravention of Rule 43;
- iii. the Respondent pay a fine of \$25,000 for the contravention of Rule 29.1;
- iv. the Respondent pay a fine of \$25,923 representing disgorgement of the net profits he gained from his personal financial dealings with RS; and
- v. the Respondent rewrite and pass the Conduct and Practices Handbook course prior to any reregistration with IIROC.

¶ 46 We also order that the Respondent pay IIROC a costs award of \$24,500.

Analysis

¶ 47 We considered the precedent cases submitted to us by staff and the Respondent regarding sanctions. The sanctions we are ordering are within the range of reasonableness when compared to the cases.

- ¶ 48 We also considered the IROC Sanction Guidelines. The sanctions are consistent with the suggestions in the guidelines.
- ¶ 49 The hearing panel in *Re Wong*, 2010 IROC 50 stated:
“To achieve both general and specific deterrence, the penalties imposed must be appropriately unpleasant to the respondent taking into account the respondent’s specific misconduct, and must also be in line with industry expectations.”
- ¶ 50 We are satisfied that the sanctions will provide a sufficient deterrent to the Respondent from engaging in similar misconduct in the future and will be sufficient to deter other registrants from engaging in similar misconduct.
- ¶ 51 They are in accordance with industry expectations and will encourage public confidence in the investment industry and IROC’s regulation of the capital markets.
- ¶ 52 The guidelines suggest that a suspension of registration should be considered where, among other things, contraventions involve fraudulent, willful and/or reckless misconduct, and/or harm to the integrity of a marketplace or the securities industry as a whole.
- ¶ 53 The investing public must be confident that registrants are, at the very least, honest. Dishonest conduct should be dealt with severely.
- ¶ 54 A two year suspension is consistent with similar regulatory decisions and is warranted given the intentional and dishonest nature of the Respondent’s misconduct.
- ¶ 55 A suspension usually has a significant financial impact on a respondent, disrupting or destroying his or her book of business, and making it difficult when it ends for the person to get back into the business.
- ¶ 56 However, where a respondent is already out of the business, as the Respondent has been since February 2016, a suspension alone, while protective of the public, may not have a sufficient financial impact on a respondent to provide a sufficient deterrent for his or her misconduct. In our situation a significant fine is also necessary.
- ¶ 57 Both staff and the Respondent suggested that we apportion any fine in addition to the disgorgement fine to the misconduct under Allegation #1 and under Allegation #2.
- ¶ 58 We have done so reluctantly because the same motivation and many of the same facts were behind the misconduct under both Allegations.
- ¶ 59 In apportioning \$5,000 to Allegation #1, we have given some recognition to the fact that the violation under Allegation #1 was technical and that no client suffered loss.
- ¶ 60 In apportioning \$25,000 to Allegation #2 we have taken into account the deception and dishonesty involved.
- ¶ 61 However, notwithstanding the apportionment, we are satisfied that \$30,000 for Allegations #1 and #2, plus \$25, 923 for disgorgement and \$24,500 for costs, in aggregate, together with our suspension order, are appropriate to achieve the objectives of deterrence.
- ¶ 62 The fines of \$30,000 for Allegations #1 and #2 are approximately one times the amount of the financial benefit. The fines and the costs award of \$24,500 together are approximately two times the amount of the financial benefit.
- ¶ 63 In making these calculations, we did not include the fine of \$25,923 for the disgorgement of the financial benefit as this fine simply returns the Respondent to the financial position he would have been in absent the misconduct, and insures that the Respondent retains no financial benefit consequent upon his misconduct.

Costs

¶ 64 We found staff's bill of costs to be reasonable. We did not agree with the Respondent's submission that the charges for the 77 hours and the 21 hours for staff investigator's preparation and attendance at the hearing should be disregarded.

¶ 65 We noted that staff applied a 30% discount to its costs of \$50,000 and only claimed \$35,000.

¶ 66 We reduced the costs award to \$24,500, being the amount suggested by the Respondent, which reflects slightly more than a 50% discount from \$50,000.

¶ 67 We did this to keep the aggregate financial impact on the Respondent of the fines and costs to an amount not in excess of the amount we considered appropriate to provide an effective deterrent.

Dated at Toronto, Ontario this 17th day of October, 2018.

Paul Moore

Charles Macfarlane

Stuart Livingston

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