

Re Crandall

IN THE MATTER OF:

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

and

Robert Adrian Crandall

2016 IIROC 18

Investment Industry Regulatory Organization of Canada
Hearing Panel (New Brunswick District)

Heard: February 1 & 2, 2016
Written Decision: May 26, 2016

Hearing Panel:

Robert Monette, Chair, Elaine C. Phénix and Gilles Archambault

Appearances:

Melissa J. MacKewn, Enforcement Counsel for IIROC

Robert Adrian Crandall, appearing for himself

DECISION ON MERITS

Preamble

¶ 1 On April 23, 2015, Staff of the Investment Industry Regulatory Organization of Canada (IIROC) issued a Notice of Hearing concerning Robert Adrian Crandall (the Respondent).

¶ 2 The specific allegations of the Notice of Hearing were:

Count 1

Between July 2006 and June 2012, the Respondent engaged in excessive trading in the accounts of D.R. which was not within the bounds of good business practices and was unsuitable for D.R., contrary to IIROC Dealer Member Rule 1300.1 (o) and (q) (IDA Regulation 1300.1 (o) and (q) prior to June 1, 2008);

Count 2

Between July 2006 and June 2012, the Respondent engaged in unauthorized discretionary trading in the accounts of D.R., without the accounts first having been approved as discretionary accounts, contrary to Dealer Member Rule 1300.4 (IDA by-law 1300.4 prior to June 1, 2008);

Count 3

Between July 2007 and October 2010, the Respondent made unsuitable recommendations for the accounts of D.R., contrary to Dealer Member Rule 1300.1 (q) (IDA by-law 1300.1 (q) prior to June 1, 2008).

¶ 3 On May 22, 2015, via a conference call, the hearing on the merits was set to be held in Fredericton,

N.B., on October 21, 22 and 23, 2015.

¶ 4 Different preliminary motions were subsequently filed by the parties.

¶ 5 Thus, on July 14, 2015, the Panel heard a motion by the Respondent alleging among other arguments a contention based on an apprehension of bias and a motion by IIROC for directions regarding disclosure and the deemed undertaking rule.

¶ 6 A decision was rendered on September 2, 2015, dismissing the Respondent's motions and issuing directions for disclosure.¹

¶ 7 On October 7, 2015, the Panel heard a motion for postponement by the Respondent and a motion by IIROC for a testimony by video. The motions were allowed and a schedule of commitments was agreed by the parties. The hearing on the merits was set for February 1 and 2, 2016.²

¶ 8 On December 10, 2015, and January 14, 2016, conference calls confirmed that full disclosure was provided by IIROC.

¶ 9 On February 1 and 2, 2016, the disciplinary hearing was held by virtue of Dealer Member Rule 20 of IIROC.

¶ 10 Although some of the requirements provided by the Rules of Practice and Procedure were not fully observed³, the parties declared themselves ready to proceed. As was the case throughout the proceedings, the Respondent represented himself.

¶ 11 At the hearing, the Respondent elected not to testify; he cross-examined the witnesses called to testify by IIROC, called his own witness and following written arguments filed by IIROC after the close of evidence, he filed his own written arguments⁴.

The evidence and background

¶ 12 The evidence presented was both documentary and testimonial.

¶ 13 The documentary evidence of IIROC was extensive and consisted mainly of a compendium of 5 volumes⁵ (2,939 pages).

¶ 14 The contents of those volumes relate to different documents, records and tables either collected or prepared by the lead investigator in the present affair.

¶ 15 As to testimonial evidence, three witnesses were heard; the lead investigator in the present case, a former co-worker of the Respondent and the complainant.

¶ 16 As was noted previously, the Respondent did not testify at the hearing; his position was that he could not do so without his personal notes.

¶ 17 Following previous mentions by the Respondent that personal notes relating to his work could not be found in the documents disclosed, the Panel asked that new requisitions be made on that matter.

¶ 18 The last enquiry by IIROC confirms that no such documents were found, as appears from an exchange of letters dating back to January 2014.⁶

¶ 19 Through disclosure, a great deal of material was obtained and produced to the Respondent. The Panel

¹ Re Crandall 2015 IIROC 30

² Re Crandall 2015 IIROC 35

³ More particularly, the respondent did not file a Response to the Notice of Hearing.

⁴ The document was filed May 17 2016

⁵ Exhibit 3

⁶ Exhibit 1, letter January 13, 2016, from IIROC and letter January 27, 2016, from National Bank Financial Inc.

notes that even a diligent search by the Respondent and his ex-employers has failed to locate the personal notes. Without the notes, it would be impossible for the Panel to establish their possible relevancy.

Witness Yu. Chen. (Y.C.) The lead investigator

¶ 20 Y.C. holds a B.A. degree with a major in economics. He has been employed as an investigator by IIROC since 2012. He was promoted to a senior investigator in the summer of 2015.

¶ 21 Y.C. was the lead investigator in the present case and as such conducted interviews with both the Respondent and the witness D.R. The transcript from the interview of D.R.⁷ and extracts from the transcript of the sworn interview of the Respondent⁸, accompanied by a lawyer at the time, were filed.

¶ 22 As a general principle, evidence at a disciplinary hearing should be given by witnesses testifying at the hearing but since both witnesses were present at the hearing, the panel considers that the transcript of the interview of D.R. and extracts from the transcript of the interview of the Respondent, may be admitted as evidence.

¶ 23 Y.C. made sure that the previous employers of the Respondent did provide all the documentation to assist his investigation; information such as client files, New Client Application Form (NCAF) and updates, client account and monthly statements were obtained.

¶ 24 Y.C. compiled and prepared most of the diagrams, tables and charts found in the compendium. He testified as to the relevancy of his charts in establishing the proof of the allegations. Y.C. confirms that the sources of the documents were disclosed to the Respondent. The great majority of the information filed was not contested.

¶ 25 The Panel is satisfied that the investigator's evidence regarding the accounts in dispute was accurate and reliable. If there were inconsistencies in some of the data, these were not material.

¶ 26 In our section Analysis, we will refer more significantly to this documentary evidence

The Respondent

¶ 27 The Respondent has been approved and worked as an Investment Advisor or Registered Representative with various Dealer Member firms since 1983. He had a disciplinary proceeding and action in 1994⁹.

¶ 28 In July 2006, the Respondent moved from Union Securities Ltd. (Union) to Wellington West Capital Inc. (WWCI). Effective July 15, 2011, WWCI was acquired by National Bank Financial (NBF) for which the Respondent worked until June 2012. He moved to Jones, Gable & Company Ltd. until February 2015.

¶ 29 The Respondent is not currently employed by a Dealer Member firm and is presently an ex-officio member of IIROC's New-Brunswick District Council, having completed a 10-year term in May 2014.

¶ 30 At all material times in this matter, the Respondent was an experienced and knowledgeable individual in the fields of stock and capital market investing.

S.D. The co-worker

¶ 31 The respondent called as a witness S.D.

¶ 32 From 2003 to 2005 and a second period from May 2007 up until July 2009, S.D. was a co-worker of the respondent.

¶ 33 During those periods, S.D. talked to D.R. on the phone on a few occasions, but never about investment recommendations or trade decisions. In 2006 on a visit to Montreal, he met D.R. with the Respondent regarding

⁷ Exhibit 5, tab. 5

⁸ Transcript p. 267

⁹ Transcript p. 24

her portfolio but he does not recall specifically the subject of the discussion¹⁰.

¶ 34 The testimony of S.D. focuses on D.R.'s financial knowledge. To the witness, D.R. seemed very experienced as a business woman and relatively well documented on financial affairs. She wanted tax advantages and write offs.

¶ 35 In cross-examination the witness admits that he was never an investment advisor to D.R., nor in a position to give her advice or perform a Know Your Client (KYC) assessment. S.D. was not present when D.R. completed a NCAF in 2006 or when the said form was updated in 2008 and he was never present or aware of discussions and instructions taking place regarding specific securities being sold or bought¹¹.

¶ 36 The witness has no personal experience of consulting with D.R. on financial products. He could not relate one concrete fact that would induce the Panel to qualify D.R.'s financial knowledge. S.D.'s testimony was more pertinent in regards to D.R.'s personality in her business endeavours.

¶ 37 The Panel finds that S.D.'s testimony was not helpful in identifying the scope of D.R.'s financial knowledge.

Witness D.R.

¶ 38 IIROC called D.R. as a witness; she is the complainant in the present case.

¶ 39 Considering her age and state of health, her testimony was a bit laborious but did reflect a position she had already explained in a prior interview with IIROC staff.¹²

¶ 40 D.R. was born in 1920 and has been the owner of a theatrical supplies store for over 60 years. She spent almost four months every winter in Cuba.

¶ 41 D.R. met the Respondent through her late husband and became a client in or about 1992. Before his death in 2008, D.R.'s husband was the one in contact with the Respondent regarding investment decisions, as D.R. considers her investment knowledge is limited in those matters.¹³

¶ 42 In 2006, when the Respondent moved to WWCI, D.R. followed him and completed a NCAF (the "2006 NCAF") for the transfer of her two accounts. The 2006 NCAF, particularly the investment objectives and risk tolerance, was not discussed with the Respondent.¹⁴

¶ 43 D.R. does not have any recollection that the Respondent gave her any financial explanations at the opening of her accounts in 2006 or at the update of her NCAF in 2008 (the "2008 NCAF") when a significantly higher risk tolerance was recorded.¹⁵ On both occasions D.R.'s financial knowledge was qualified as *good*.

¶ 44 D.R. corroborates the fact that she made some withdrawals from her accounts and was looking for possibilities to save some tax money; the money from her accounts was expected to be used for retirement.¹⁶

¶ 45 D.R.'s testimony establishes that the transactions were rarely of her own initiative and authorization. There were very few calls between the Respondent and D.R. regarding trades or communications on exchange-traded funds or other investment products.

¶ 46 D.R. had complete confidence in the Respondent and expected him to act in her best interest as she did with her own customers.¹⁷

¹⁰ Transcript p. 253

¹¹ Transcript p. 246 SS

¹² Exhibit 5, tab. 5

¹³ Transcript p. 73, Exhibit 5, Tab.5 p. 15, 24.

¹⁴ Transcript p.72

¹⁵ Transcript pp. 79-80

¹⁶ Transcript p.72

¹⁷ Transcript p.73, Exhibit 5, Tab. 5 p.11

¶ 47 D.R.'s testimony is relating probable facts. It would not be uncommon for an investor to let a trusted advisor manage her affairs without question, especially when that investor must attend to her commercial endeavour.

¶ 48 The Panel finds that D.R. was a credible witness and that the essential elements of her testimony were not challenged by documentary or testimonial evidence; to the contrary, as will be examined further, documentary evidence supports D.R.'s declaration.

D.R.'s Accounts

¶ 49 The period between July 31, 2006, and June 30, 2012, will be referred to as the "Relevant Period": D.R. was 86 to 92 years of age during that Relevant Period

¶ 50 In 2006, when D.R.'s accounts were transferred to WWCI, two new accounts were opened: a personal account (the "Personal Account") and an account in the name of her holding company (the "Holdco Account").

¶ 51 From the information and raw data obtained from the firms gathered in the statements of the client accounts, the investigator calculated the following numbers.

¶ 52 On July 31, 2006, the combined market value of the Personal Account and the Holdco Account (the "Accounts") was \$685,728. On June 30, 2012, when the Respondent ceased acting as D.R.'s advisor, the combined market value of the Accounts was \$119,289.80.

¶ 53 The market value of the Personal Account was \$486,431 on July 31, 2006. On June 30, 2012, the market value of the Personal Account was \$119,200.¹⁸

¶ 54 During the Relevant Period, D.R. withdrew \$223,600 from the Personal Account¹⁹ and the Personal Account was charged commissions of \$240,292²⁰. Accordingly, while profits in the amount of \$96,661 were achieved in the Personal Account during the Relevant Period, all such profits were stripped out of the Personal Account in the form of commissions.

¶ 55 The market value of the Holdco Account was \$199,297 as of July 31, 2006. As of June 30, 2012, the market value of the Holdco Account was \$89.80.²¹

¶ 56 During the Relevant Period, D.R. withdrew \$144,785 from the Holdco Account²² and the Holdco Account was charged commissions of \$45,200.²³ Accordingly, the reduction in the market value of the Holdco Account during the Relevant Period was attributable to withdrawals, commissions and trading losses in the amount of \$9,319.

¶ 57 The investigator established that the Profit and Loss Analysis (net of withdrawals, deposits and transfers in and out) for the Personal account reflects a loss of \$143,630.52, as for the Holdco Account the loss is \$54,519.67; the combined loss totals \$198,150.²⁴

The Burden of Proof

¶ 58 It is well established that disciplinary law is *sui generis* law. In matters of procedural nature it will rely on criminal (i.e., disclosure policy) and civil law.

¶ 59 Regarding the burden of proof in matters of disciplinary law, a Panel will apply solely the concept established in civil law. The burden of proof in penal law, proof beyond all reasonable doubt, has no

¹⁸ Transcript pp. 33-34, Exhibit 3, vol. 1 Tabs. 8 and 10.

¹⁹ Exhibit 3, vol. 2 Tab. 35

²⁰ Exhibit 3 vol. 1 Tab. 25

²¹ Transcript pp. 34-35, Exhibit 3, vol. 1 Tabs. 9 and 11.

²² Exhibit 3 vol. 2 Tab. 35

²³ Exhibit 3 vol. 2 Tab. 26

²⁴ Exhibit 3, Vol 2 Tab. 35

application.

¶ 60 The burden that applies to IIROC is the one used in civil law, namely that of the balance of probabilities as was decided by the Supreme Court of Canada in *F.H v McDougall*.²⁵

¶ 61 The evidence presented and the preponderance of the proof must be sufficiently clear, convincing and cogent to satisfy the test.²⁶

The Analysis

¶ 62 It falls to IIROC to prove the allegations made against the Respondent on a balance of probabilities.

¶ 63 In the present case, IIROC submits that the Respondent has engaged in improper practices that would be contrary to the Dealer Member Rules. The role of the Panel will be to determine if IIROC did meet the burden of proof.

Count 1: Excessive trading

¶ 64 IIROC alleges that over a period of five years and 11 months –July 2006 to June 2012- the Respondent engaged in a pattern of excessive trading which resulted in all the profits achieved in D.R.’s Accounts being stripped out by way of commissions.

¶ 65 The proposition is that excessive trading results from motivation to generate commissions as opposed to operating within the bounds of good business practice.

The Facts

¶ 66 For the relevant period, the Respondent conducted 777 transactions (the “Transactions”) -i.e. filled buy or sell orders- in the Accounts in respect of approximately 719 different orders.²⁷

¶ 67 Over 95% of these Transactions were marked as solicited. The commission rate charged for the majority of these Transactions ranged from 1%-3%, resulting in gross commissions of \$285,492 being charged to the Accounts.

¶ 68 The principal evidence is to the effect that no explicit discussion took place between D.R. and the Respondent on the subject of the commissions, nor did the Respondent exercise his discretion regarding a reduced commission for some or all of the Transactions.²⁸

¶ 69 The investigator established that a flat fee of 2% would have resulted in gross commissions in the amount of \$43,949.90 rather than the \$285,492.74 actually charged.²⁹

¶ 70 Further, during the Relevant Period, the Respondent made \$7,220,047 worth of purchases in the Accounts and \$7,390,543 worth of sales from the Accounts. As set out previously, the Accounts showed a decrease in combined market value from \$685,728 as of July 31, 2006, to \$119,289.80 as of June 30, 2012, when the Respondent ceased acting as D.R.’s advisor.³⁰

¶ 71 The investigator also established, through an analysis of a group of 75 securities traded to nil during the relevant period that as a result of the commissions charged on the transactions there was either little or no economic benefit, materially reduced economic benefit or exacerbated loss to the Accounts.³¹

¶ 72 In addition, the investigator demonstrated that when the Leveraged Exchange Traded Funds (LETF) /

²⁵ *F.H v McDougall* (2008) S.C.J. No. 54, paras. 40 to 49.

²⁶ *Ibid*, para.46

²⁷ Exhibit 3 vol. 1 Tab. 24

²⁸ Transcript p. 79, p. 271

²⁹ Exhibit 3 Vol. 5 Tab. 116

³⁰ Exhibit 3 Vol 2 Tab. 28

³¹ Exhibit 3 Vol 2 Tabs. 32-33

Inverse Exchange Traded Funds (IETF) strategy was isolated, the same result occurred as the trading profits were erased by the commissions charged.³²

¶ 73 From the facts proven, it is evident to the Panel that all the benefits possibly achieved in D.R.'s Accounts were nullified by the excessive number and amount of the commissions deliberately charged by the Respondent.

¶ 74 The Panel considers that the facts presented by IIROC, on the first count, only concern the ground of excessive trading and not suitability, the latter one being predominant under the third count.

The Law

¶ 75 The allegations are describing conduct that would be contrary to Dealer Member Rule 1300.1 (o);
Business Conduct

(o) Each Dealer Member shall use due diligence to ensure that the acceptance of any order for any account is within the bounds of good business practice...

¶ 76 The allegation by IIROC of excessive trading is also identified as "... **churning** or a practice where a registered representative exercising control of the volume and trades that account excessively in view of the character of the account and the customer's objective..."³³.

¶ 77 The existence of churning does not rely on specific conditions but will depend on all the circumstances of a particular case.

¶ 78 In the present case, as described earlier, two major elements of evidence point to churning; those elements were not contradicted.

¶ 79 First, the high volume and frequency of trading was not appropriate in the Accounts of D.R. an elderly person whose primary objective was using that money for retirement.

¶ 80 Secondly, the economic result of the activities in D.R.'s Accounts is that any trading benefits were nullified by the number and the amount of the commissions charged. Foremost, the Respondent did not at any time review the Accounts with D.R. or obtain confirmation that she agreed with the manner by which the Accounts were handled.

¶ 81 It is the Panel's inference that by committing to this pattern of trading, the Respondent entered into unsuitable and improper trading practices, preferring his own interests to those of his client.

¶ 82 The Panel is satisfied, through documentary evidence and Y.C.'s testimony, that it was proven by IIROC that the Respondent did engage in excessive trading in the Accounts of D.R. which was not within the bounds of good business practice.

Count 2: Discretionary Trading

¶ 83 IIROC alleges that, for the period between July 2006 and June 2012, the Respondent did not obtain D.R.'s approval for the majority of the trades, as many took place when D.R. was out of the country.

¶ 84 Since the Accounts were not designated as discretionary, the Respondent did engage in unauthorized discretionary trading.

The Facts

¶ 85 D.R.'s Accounts were not designated as discretionary accounts.³⁴

¶ 86 It is explicit from the unchallenged documentary evidence, and from D.R.'s testimony that the Respondent did not obtain her consent for the vast majority of the transactions conducted in the Accounts

³² Exhibit 3 Vol 5 Tab. 117

³³ *Ryder v. Osler*, (1985) 49 O.R. (2d), 1985 CanLII, 2044 (ONSC)

³⁴ Transcript, Chen, p 211-212

during the Relevant Period.³⁵

¶ 87 Two specific examples that corroborate this presumption were provided by the investigator.

¶ 88 In the first case, the investigator points to a period, from January 23 to April 24, 2009, while D.R. was in Cuba. During that period, the Respondent conducted 46 transactions in the Accounts on approximately 27 different trading days, with all but one of these orders being marked as solicited.

¶ 89 The evidence, from the investigator's documentary information (hotel records, phone charges, travel schedule, trade ticket...) is conclusive that D.R. and the Respondent did not communicate with each other on any of these trading days.³⁶

¶ 90 In the second case, the investigator examined the trade data of the Accounts for the period of December 2008 to December 2009. Again the investigator gathered documentary information; phone records and trade tickets were obtained for that period so that the trades were compared to the phone calls from Mr. Crandall's branch or to Mr. Crandall's branch.

¶ 91 The evidence is to the effect that 218 trades were conducted during the period mentioned and that the maximum total potential communications between the Respondent and D.R. was 44.³⁷

¶ 92 From our examination of this documentary evidence, the Panel can conclude that the Respondent did not communicate with D.R. in respect of all the trades in the Accounts.

The Law

¶ 93 The allegations are describing conduct that would be contrary to Dealer Member Rule 1300.4

1300.4. A Registered Representative may not exercise discretionary authority over a customer account unless:

- (a) the Dealer Member has designated a Supervisor or Supervisors to be responsible for discretionary accounts;
- (b) the customer has given prior written authorization in compliance with Rule 1300.5;
- (c) a Supervisor designated under subsection (a) has approved the account as a discretionary account and recorded that approval;
- (d) the Registered Representative authorized to effect discretionary trades for the account has actively dealt in, advised on or performed analysis for a period of two years with respect to all types of products which are to be traded on a discretionary basis; and
- (e) the account is maintained at the Dealer Member of the Registered Representative.

¶ 94 It is clear from our findings that for the majority of the trades the Respondent failed to obtain from D.R. specifics as to the four elements of a transaction; quantity, security, price and timing.³⁸ It was the Respondent's duty as a Registered Representative to ensure that the client did provide these elements.

¶ 95 The Respondent was thus exercising discretion in D.R.'s Accounts without those Accounts being qualified as discretionary, in conformity with the regulations.

¶ 96 The Panel is satisfied that IIROC has proven that the Respondent did engage in unauthorized discretionary trading in the Accounts of D.R. without the Accounts first having been approved as discretionary accounts.

³⁵ Transcripts, D.R. p. 73-74

³⁶ Exhibit 3, vol 1, Tab12,20, vol 3, Tab. 90

³⁷ Exhibit 3, vol 1 Tabs 14 -19, 23, vol 3 Tab. 90

³⁸ *Re Wenzel* (2005) A.S.C.D. No 153, para. 49

Count 3: Unsuitable Trades

¶ 97 IIROC alleges that for a period of over three years –between July 2007 and October 2010- the investments in D.R.’s Personal Account were unsuitable given her stated risk tolerance and investment objectives.

¶ 98 This was mainly as a result of frequently traded positions held in LETFs and IETFs which are considered high-risk securities.

The Facts

¶ 99 D.R.’s testimony is to the effect she did not review the 2006 NCAF with the Respondent, when the Accounts were transferred from Union to WWCI and there were no discussions on the subject of Investment Objectives and Risk Tolerance.

¶ 100 The 2006 NCAF for D.R.’s Personal Account identified D.R.’s risk tolerance and investment objectives to be:

lower risk, income-producing securities: 10%

moderate to higher risk, income-producing securities: 30%

moderate risk, growth-oriented securities: 30%

higher risk, speculative securities and trading strategies: 30%

¶ 101 At the instigation of the Respondent, the 2006 NCAF for the Personal Account was updated in November 2008³⁹ and among other changes, the 2008 NCAF identified a significantly higher tolerance for higher-risk.

¶ 102 Specifically, the risk tolerance and investment objectives identified in the 2008 NCAF for the Personal Account were:

low: 10%

medium: 40%

high: 50%

¶ 103 Again, D.R.’s testimony is that she did not review the 2008 NCAF with the Respondent and there were no discussions or explanations, specifically on the proposed changes to the investment objectives and risk tolerance.

¶ 104 Other than D.R. getting older and the recent loss of her husband, the evidence does not indicate that D.R.’s financial conditions changed over the period from 2006 to 2008 that would warrant such a modification to her risk tolerance.

¶ 105 IIROC also submitted to the Panel documentary evidence that illustrated the actual risk rating of D.R.’s Personal Account for a period of three years.⁴⁰

¶ 106 In performing this analysis, the investigator first assigned a risk rating to each of the securities held in the Personal Account; as to the high-risk securities (31) he relied mostly on the prospectus related to those securities and filed with the regulators, and in some cases on other publicly available information.⁴¹

¶ 107 As examples of the type of information obtained, the panel will refer to two particular investments.

¶ 108 D.R. held in her Personal Account shares of Horizon Betapro ETF. The prospectus of this ETF is quite

³⁹ Exhibit 2

⁴⁰ RE Sammy, 2016 IIROC 04, par.39 The methodology, used by the investigator, has been recognized by IIROC Hearing Panels,

⁴¹ Transcript, Chen p. 147

explicit as to the risk factor, “.....*Investing in Units of an ETF can be speculative can involve a high degree of risk and may only be suitable for persons who are able to assume the risk of losing their entire investment.....*” (Page 4)⁴². The same type of information is found in the prospectus of Silver Wheaton Corp. common shares “...*the corporation’s business is in an early stage of development and an investment in the Corporation’s securities is highly speculative ...*” (page 19).⁴³

¶ 109 After collecting the information, the investigator then calculated a weighted average to determine what percentage of the portfolio was held in low, medium and high-risk securities over the material time and compared the results to the risk tolerance identified in the 2006 NCAF.⁴⁴

¶ 110 For a good part of the specified period of time between July 2007 and October 2010, the investigator’s analysis demonstrated that, largely because of positions held in IETFs and LETFs, which are high-risk securities⁴⁵⁻⁴⁶, the investments in D.R.’s Personal Account exceeded D.R.’s stated risk tolerance on the 2006 NCAF. The Panel also notes that at the update of the 2008 NCAF, in July 2008, the Personal Account was already over the 50 percent stated high risk tolerance.⁴⁷

¶ 111 As illustrated by the information from the prospectus, the advice of IIROC’s Notice regarding suitability of the products and the collection of data by the investigator, the Panel finds that the undisputed weighted-average analysis of D.R.’s holdings is relevant.

¶ 112 The Panel also concludes from the unchallenged evidence that the risk tolerance objective was never sufficiently discussed between the Respondent and D.R.

¶ 113 In addition, the Panel also finds that for a period of three years-July 2007 to October 2010- the stated risk tolerance was not always respected in D.R.’s Personal Account and that there was no sufficient reason to modify the said risk tolerance during that period of time.

The Law

¶ 114 The allegations are describing conduct that would be contrary to Dealer Member Rule 1300.1 (q)

Suitability determination required when recommendation provided

- (q) Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such client based on factors including the client’s current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts’ current investment portfolio composition and risk level

¶ 115 It is admitted that the NCAF⁴⁸ is the important document in establishing a relationship between a registered representative and a client. A registered representative must acquire all information regarding, amongst others, a client’s financial knowledge, investment objectives and risk tolerance.

¶ 116 It was the Respondent’s responsibility to ensure that the financial decisions were in compliance with D.R.’s objectives and risk tolerance; that is the due diligence obligation required by the regulations.

¶ 117 In order to satisfy this obligation, the Respondent’s primary object was to determine that the risks associated with an investment product did match the risk profile of D.R.

⁴² Exhibit 3, Tab. 96

⁴³ Exhibit 3, Tab. 110

⁴⁴ Exhibit 3, Tab. 91

⁴⁵ Re Dyck 2012 IIROC 31

⁴⁶ IIROC Notice 09-0172, June 11, 2009; this qualification is consistent with the guidance note issued in 2009 by IIROC on those financial products.

⁴⁷ Exhibit 3, Tab.91

⁴⁸ Also referred to as the Know Your Client Rule.

¶ 118 This obligation was not fulfilled by the Respondent. From the very first instance in 2006 and again in 2008, there was an absence of an exchange of information with D.R. concerning both 2006 NCAF and 2008 NCAF. Without information as to the risk tolerance and investment objectives, no client suitability assessment could be performed.⁴⁹

¶ 119 The Panel also questions the fact that a change was made in D.R.'s risk tolerance increasing it from 30% to 50%. There was no objective reasonable explanation for this increase, in view of an 88-year-old investor who had just lost her spouse, considered the educated investor of the couple.

¶ 120 This increase goes against a well established principle that risk tolerance is inversely proportional to the age of an investor. In order to act contrary to this principle, the Respondent should have had very well-documented proof that D.R. was willingly going against the general consensus⁵⁰. This is not the case here. The evidence is clear that D.R. was never properly informed of the risk in her accounts nor of the details of those high-risk funds.

¶ 121 It was the Respondent's onus to prove that he did fulfil his responsibility to the client. In as much as both the 2006 NCAF and 2008 NCAF appeared not to be suitable in terms of D.R.'s investment knowledge, financial resources and risk tolerance; this onus of proof was not met. It is indisputable for the Panel that the holding in D.R.'s Personal account did not reflect her investment objectives and risk tolerance.

¶ 122 The Respondent's theory, as pursued by his witness S.D. is to insist that the "flamboyant" personality of D.R. as a business woman leads ipso facto to an assumption that she should be a knowledgeable financial investor.

¶ 123 The Panel does not agree with this assumption. We are of the opinion that there is no correlation between commercial endeavour and financial knowledge. The two concepts relate to different domains and specificities, one does not include the other especially considering how sophisticated some financial products are, even to experts.

¶ 124 We do not accept the hypothesis that D.R. being a business woman was automatically considered a sophisticated financial investor nor do we assume that a sophisticated financial investor might be automatically prepared to accept a higher-risk.

¶ 125 The Panel is satisfied that IIROC has proven that the Respondent did make unsuitable recommendations for the personal account of D.R.

Conclusion

¶ 126 As defined in the case of *Re D.M. Graydon Osler, Wills, Bickle Ltd*: the essential aspect of the relationship between a broker and a client is based on trust and confidence.⁵¹

¶ 127 A client is entitled to trust that the broker will assume his client's interest first and to be confident that the broker will execute his mandate to the best of his abilities. This is even more important if a client has limited financial knowledge and relies mainly on the broker's experience.

¶ 128 This relationship is of such importance that the Supreme Court qualified it as fiduciary when the criteria mentioned above are identified.⁵²

¶ 129 The Panel acknowledges that D.R. relied on the Respondent's expertise; she did not have the competence to question the activities of the Respondent especially regarding high-risk securities.

¶ 130 The Panel concludes that the evidence clearly establishes that the allegations in the Notice of Hearing

⁴⁹ Conduct and Practice Handbook Course, 5-5

⁵⁰ *Idem*, Sammy, page 17

⁵¹ *Re Graydon* (1987) T.S.E.D.D. No. 20

⁵² *Hodgkinson vs Simms* (1994) 3S.C.R. 377 p. 419

were proven by IIROC; the Respondent did not execute his fiduciary duty and the regulations were not observed.

¶ 131 The Panel is satisfied that IIROC has proven count #1; the Respondent did engage in excessive trading in the accounts of D.R that was not within the bounds of good business practice, the whole contrary to Dealer Member Rule 1300.1 (o).

¶ 132 The Panel is satisfied that IIROC has proven count #2; the Respondent did engage in unauthorized discretionary trading in the accounts of D.R. without the accounts first having been approved as discretionary accounts, the whole contrary to Dealer Member Rule 1300.4.

¶ 133 The Panel is satisfied that IIROC has proven count #3; the Respondent did make unsuitable recommendations for the Personal account of D.R., the whole contrary to Dealer Member Rule 1300.1 (q).

¶ 134 Consequently, the Panel directs that a penalty hearing be scheduled.

Signed in Montreal on May 26, 2016.

Robert Monette

Elaine C. Phénix

Gilles Archambault

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