Re Bortolin

IN THE MATTER OF:

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

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Sandy Joseph Bortolin

2012 IIROC 13

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

Heard: February 28, 29, and March 1, 2012
Decision: Thursday, March 15, 2012
(63 paras.)

Hearing Panel:
Martin L. Friedland, C.C., Q.C. (Chair), Mary Savona, Colleen F. Wright
Appearances:
Susan Kushneryk, IIROC Enforcement Counsel
Sandy Joseph Bortolin did not appear nor was he represented by counsel

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DECISION AND REASONS

THE ALLEGATIONS

¶ 1 On November 2, 2011, a Notice of Hearing was issued by the Investment Industry Regulatory Organization of Canada ("IIROC") alleging that over at least a five-year period the Respondent, Sandy Joseph Bortolin (the "Respondent" or "Mr. Bortolin"), breached IIROC Dealer Member Rule 29.1 as well the Investment Dealers Association of Canada ("IDA") By-law 29.1. The IDA is the predecessor organization, which became IIROC in 2008. The rules of each body cover the relevant time period set out in the allegations.

¶ 2 The IDA By-law and the IIROC Rule are almost precisely the same. IIROC Rule 29.1 states:

> "Dealer Members and each ...Registered Representative, Investment Representative and employee of a Dealer Member
>
> (i) shall observe high standards of ethics and conduct in the transaction of their business,
>
> (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and
>
> (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board."

¶ 3 The alleged IIROC contraventions are set out in the Notice of Hearing as follows:

> "From as early as 2003 and continuing until 2008, the Respondent, contrary to IDA By-law 29.1 and IIROC Dealer Member Rule 29.1:
>
> (a) carried on outside business activities without the knowledge or approval of his Member Firm;
>
> (b) engaged in personal financial dealings with his clients without the knowledge or approval of his Member Firm;
>
> (c) facilitated suspicious transactions; and
>
> (d) misled Staff in their investigation of his activities, hampering the investigation."

¶ 4 The specific conduct described in the previous paragraph is alleged to violate the standards of conduct mentioned in Rule 29.1. Violations of Rule 29.1 have been held in a number of IIROC cases pertaining to similar specific conduct. The conduct has also been commented on in various IIROC and IDA documents. Some relevant cases and documents will be set out later in these reasons.

A BRIEF LOOK AT THE FACTS OF THE CASE

¶ 5 Five thick volumes of documents and transcripts were presented to the Panel by IIROC Staff. The story is complex, involving off-shore accounts, insider trading, and money laundering. Two witnesses – Jamie Stuart, a lawyer with the RCMP, and Bert Noguera, Senior Investigator for IIROC – gave evidence under oath, explaining the documents they had knowledge of and the interviews that they had personally attended.

¶ 6 The Respondent had been in the securities business for 28 years. He became a registrant of IIROC in 2008, having been registered before that with the IDA. He was first registered with the IDA in 1983. For most of his career, including the years 1992 to 2000 and 2002 to 2009, he was with BMO Nesbitt Burns Inc. ("Nesbitt Burns"). He was terminated for cause by Nesbitt Burns in 2009. The Respondent worked for another IIROC member, Cannacord Capital Corporation, for over a year and a half after he was terminated. He resigned from that firm in late 2011.

¶ 7 In addition to his work as a Registered Representative for Nesbitt Burns, the Respondent carried on securities trading and other activities in the Bahamas for over ten years for himself and his clients. These Bahamian activities were never disclosed to Nesbitt Burns. In his annual disclosure forms that were required by Nesbitt Burns, the Respondent acknowledged that he had read Nesbitt Burns' "Code of Business Conduct and Ethics." He also acknowledged in the annual disclosure that he did not engage in any outside business activities or hold any discretionary, employee or related accounts outside of Nesbitt Burns.

¶ 8 IIROC Staff presented undisputed evidence to us that Mr. Bortolin had, in fact, numerous personal and corporate accounts in the Bahamas in his own name, as well as an account in his wife's name over which he had power of attorney. He also executed orders and directed the movement of funds for client accounts in the Bahamas, and received fees for at least one of these accounts. The accounts were in code names or numbers. These accounts only came to light when the Securities Exchange Commission ("SEC") in the United States was conducting an investigation into insider trading that involved a client of the Respondent. The information was given to the SEC by the Bahamian authorities, and was then shared with the Ontario Securities Commission ("OSC"). It was used in various court and regulatory proceedings in Canada and the United States in relation to insider trading prosecutions against Mr. Stan Grmovsek, who, as described below, was a client of the Respondent.

¶ 9 The insider trading case involved two Canadian lawyers who used insider knowledge to buy or sell shares in a large number of cases where a merger or acquisition or other event that had not yet been made public was about to take place and which would likely affect the price of the shares after the event became public. The lawyer who obtained the confidential information worked for several major law firms in Toronto and New York. He committed suicide the day before the trial was to start. As far as we are aware, Mr. Bortolin did not have any dealings with that lawyer.

¶ 10 The Respondent, however, did have extensive dealings with the person who received and acted on the

confidential insider information, Stan Grmovsek. Mr. Grmovsek pleaded guilty in Canada and the United States to charges of fraud, insider trading, and laundering proceeds of crime and received a sentence of 39 months to be served in Canada. He was subsequently disbarred. The judge accepted the agreed statement of facts and the suggested penalty. Mr. Grmovsek and the other lawyer cooperated fully with the authorities in Canada and the United States. The trial judge in Canada, Justice R.G. Bigelow, stated:

> "This is also, frankly, in my experience, the most unique case that I have seen in the 16 years that I have been on the bench of cooperation by accused persons in the process of an investigation. It appears clear to me on all of the facts that from the time of the first suspicions that were raised, [the two accused] assisted in the investigation enormously."

¶ 11 Mr. Grmovsek gave evidence voluntarily to the OSC in a two-day interview in July 2009 in which the SEC and the RCMP took part. Mr. Grmovsek explained in detail his relationship with the Respondent. There is no reason to doubt that Mr Grmovsek was attempting to give accurate details of what had taken place. The documentary evidence supports what he stated.

¶ 12 Mr. Grmovsek met the Respondent in 1999 while the Respondent was employed at Nesbitt Burns and formed a business relationship with him. Mr. Grmovsek already had an account in the Bahamas, which had been set up by another lawyer. The lawyer could not, however, borrow the stock needed for a short sale that Mr. Grmovsek wanted to make and Mr. Grmovsek was referred to the Respondent. The Respondent was also familiar with off-shore accounts in the Bahamas, having previously set up accounts there for himself, his wife and several of his clients.

¶ 13 In July 2000 an account was opened by Mr. Grmovsek in the Respondent's bank in the Bahamas, Darier Hentsch Private Bank & Trust Ltd ("Darier Hentsch"). At the time, the Respondent was employed by Darier Hentsch Canada. Money was transferred from Mr. Grmovsek's other account in the Bahamas. The new account went through a number of changes in name. It was later switched, on the direction of the Respondent, to another bank, Bank Leu. The Respondent exercised a power of attorney over this account, although all of the trades and activity in the account were done by the Respondent on Mr. Grmovsek's instructions. Many of the trades involved stocks that were the subject of the insider trading prosecution. At the time of the 2009 OSC interview, there was over half a million dollars in the Bank Leu account. Mr. Grmovsek was asked at the OSC interview:

> Q. So where did the idea to set this up come from again?
>
> A. In this particular account, at this particular location, I was advised by a broker.
>
> Q. What broker are you referring to?
>
> A. Sandy Bortolin at BMO Nesbitt Burns. He had a relationship with this company, I believe, and he's basically set it up.
>
> Q. What type of balance is in that account?
>
> A. Last I knew, I knew there was about five or six hundred thousand U.S. in cash and there were securities in it, but I've had no access to it for over a year...I had never had – the reason I haven't had access to it is that I would always go through Sandy Bortolin as a conduit, so I would never call these people directly, never get statements. So even if I wanted an update, what's there now, I wouldn't know how to get it.

¶ 14 IIROC Staff is not alleging in its submission to us that the Respondent knew about the insider trading activity or traded himself on that knowledge. Evidence was not presented to us on whether any of the Respondent's trades copied those of Mr. Grmovsek. Rather, IIROC Staff argues that the Respondent facilitated Mr. Grmovsek's insider trading. The Respondent – Staff argues – should have been suspicious about what was taking place and failed in his duty to question it or to report the activity to Nesbitt Burns. At the OSC hearing, Mr. Grmovsek was asked:

> Q. Okay. We'll get into it, but did Sandy Bortolin know about any of the activities that we're here to talk about today?
>
> A. He knows about the trades. Are you saying does he know that they're inside trades?

Q. Yes.

A. Never discussed it directly. Now, you'd say, well, maybe he could figure it out, but that's – you know, I'm not going to put that on him. But he never said, "Hey, that's an inside trade," or, "Oh, by the way..." Nothing like that. So I don't want to impugn him that way. Like, you might say after a time it's pretty obvious, but never discussed it ever."

¶ 15 Amongst the other accounts that the Respondent helped set up in the Bahamas was an account in the name of a Canadian husband and wife [RC and NC, the "Cs"]. Again, code names and numbers were used. As with Grmovsek's account, the Respondent exercised a power of attorney over the transactions, although it was a limited power of attorney.

MONEY LAUNDERING

¶ 16 A Scheme was devised to launder funds that involved the Grmovsek account and the Cs' account in the Bahamas. The obvious inference is that it was the Respondent who assisted in developing the scheme because the evidence shows that Grmovsek and the Cs did not know each other. Mr. Grmovsek says in his interview with the OSC that he did not know the other party to the scheme.

¶ 17 Mr. Grmovsek wanted to launder money he obtained from his illegal insider trading. He would often resort to gambling to do so. He would, for example, bet simultaneously on both sides of a sports event. Obviously he had to win one of the bets and so would get his money back, less the house "take" on the transaction. There is an e-mail in the material from Mr. Grmovsek to Mr. Bortolin dated April 12, 2007. Mr. Grmovsek said that he would be in Las Vegas for a party for a friend and the Respondent asked if he needed a partner. Mr. Grmovsek suggested that he should come later in the year. He would show the Respondent "how to offset bets at two casinos on the same game so that you can later mail a winning ticket back to vegas for a cheque mailed back to you for deposit...."

¶ 18 We are convinced by the evidence that the Respondent had clients who had been paid in cash who wanted to dispose of their cash. At the same time, Mr. Grmovsek needed cash to maintain his lifestyle.

¶ 19 Here is the scheme that was worked out. Mr. Grmovsek would receive cash in an envelope from the Respondent and Mr. Grmovsek would authorize the Respondent to arrange a transfer of funds from Mr. Grmovsek's Bahamian account to another account in the Bahamas. IIROC Staff produced records of 13 such transactions authorized by Mr. Grmovsek and executed by the Respondent between Mr. Grmovsek's Bahamian account to that of the Cs. Two of the transactions were each for $30,000 and eleven were each for $49,000, for a total of $599,000 Canadian.

¶ 20 Mr. Grmovsek would usually meet the Respondent at the Nesbitt Burns office to receive the cash. He would be notified by Mr. Bortolin that the money was ready to be picked up. One e-mail – dated June 25, 2007 – under the subject "shoes," states simply: "Want to have lunch tomorrow?" Another was under the subject "ties". Mr. Grmovsek explained how it worked in his statement to the OSC:

> "I know when we did wire transfers, for example, Sandy would say, 'I have a client who has some cash, do you need some cash,' as an example. I'm just doing an example. He'd say he would want $50,000 wired to some location, and Sandy, I'd go to his office, he would give me let's say $48,000 in cash, he'd take a little piece of it, and I would just sign a piece of paper saying 'Please wire the $50,000 U.S. to the attached pursuant to Sandy's instructions.' And I'd sign that. I never saw where it went, so if it went to Switzerland, if that's what you're talking about, I never saw the second sheet of paper ever, if that's what you're referencing."

¶ 21 The above statement suggests that similar transactions occurred through Swiss banks, but no documentary evidence was put before us concerning Swiss banks. At another point Mr. Grmovsek was asked:

Q. Did it ever concern you...that, you know, that sort of arrangement was a pretty obvious money laundering enterprise?...

A. I assumed he had a client in Toronto...who had a lot of cash on hand that also had off-shore structures, and this is the way they would get rid of – lose some of their cash they didn't want to hold onto. I needed cash,

and they would just fund their own off-shore structure from mine, from structure to structure.

¶ 22 There were many visits to the Respondent's office. So many that in 2006 – at the Respondent's request – Mr. Grmovsek set up a trading account domestically with Nesbitt Burns as a pretext for his visits. He told the OSC:

> "Later on, I set up a domestic brokerage account at BMO Nesbitt Burns, and he suggested I do that just so it would explain why I'm coming to his office so much. I'm a client who has a regular account there, because before I was coming there without any account above board, and then he set that up. So I funded it with 100,000 or something like that. And that was it."

¶ 23 The Respondent was interviewed by IIROC investigators, with his lawyer present. He was asked about giving these substantial cash payments to Mr. Grmovsek. The Respondent's answers were typical of answers he gave with respect to other allegations.

> Q. So do you ever remember providing Mr. Grmovsek with envelopes or purses or whatever the receptacle is with amounts of cash in it?
>
> A. No.
>
> Q. You're denying that?
>
> A. No recollection.
>
> Q. You're denying it or you don't remember?
>
> A. I don't remember.
>
> Q. So you're not denying it?
>
> A. I don't, I don't remember. I don't know.

¶ 24 We are convinced that Mr. Grmovsek received 13 payments totally $599,000, less the amounts taken by the Respondent. We do not know how the Respondent obtained the cash which was given to Mr. Grmovsek. The Respondent denies or cannot remember obtaining the cash that Mr. Grmovsek says he received. Mr. Grmovsek says he does not know where it came from. Nevertheless, it is not difficult to infer that the persons who received the almost equivalent sums in their Bahamas' account were directly or indirectly responsible for supplying the cash in Canada.

¶ 25 What did Mr Bortolin get from this arrangement? He got substantial fees from Mr. Grmovsek for setting up his account and for other services. The documents show that approximately $75,000 was transferred from Mr. Grmovsek's account in the Bahamas to Mr. Bortolin's account there. There were payments of $10,000 US in April 2004, $12,000 in January 2005, $13,795 in January 2005, and quarterly payments in the amount of $3,000 starting in 2005. In his interview with IIROC, Mr. Bortolin acknowledged receiving these sums. According to Mr. Grmovsek's statement, Mr. Bortolin also skimmed off some of the cash he was giving to Mr. Grmovsek. He also received referral fees from Bank Leu, which were paid by deposit into the Respondent's account in the Bahamas.

¶ 26 The only rational inference that one can draw from all this evidence is that the Respondent was involved in deliberate money laundering. We so find.

THE RESPONDENT`S LACK OF COOPERATION

¶ 27 Mr. Bortolin repeatedly misled IIROC Staff in their investigation of the above matters. As we saw above, he could not remember whether he gave Mr. Grmovsek over half a million dollars in cash in envelopes. In his interview with IIROC investigators in March 2009 he did not admit receiving any compensation from Mr. Grmovsek with respect to the above transactions. Nor did he admit that he or his wife held accounts in the Bahamas. The Respondent stated that the transactions he carried out for Mr. Grmovsek in the Bahamas were simply done to assist his client. "I was giving him customer service, basically," Mr. Bortolin told the investigators.

¶ 28 In a follow-up letter, IIROC Staff asked Mr Bortolin, amongst other things, to identify off-shore bank and brokerage accounts held by him, over which he had or has control or authority, of immediate family members including those held jointly, and in a corporate name where he had or has a beneficial interest or was or is involved as a director or officer. By letter from his counsel, Mr. Bortolin advised Staff that he "has no off shore brokerage accounts, nor has he control or authority over any" and that "[n]o immediate members of his family have off shore brokerage accounts nor do they have any interest in any corporation which does." This was not correct. The evidence shows that Mr. Bortolin and/or his wife had an interest in a number of Bahamian accounts.

¶ 29 Mr. Bortolin did not file a reply to the allegations, as he was required to do. Nor did he appear personally or by counsel at the Hearing. Counsel was therefore not able to question him about any of the matters under investigation or about other activities of a similar nature in the Bahamas or other jurisdictions that had not been disclosed by Mr. Bortolin.

¶ 30 The evidence shows, for example, that there were a number of transfers amounting to about $150,000 from Mr. Bortolin's or his wife's accounts in the Bahamas to the Cs' account there. Did these transfers follow the same pattern of transfers from Mr. Grmovsek`s account to the Cs' account? Did Mr. Bortolin personally receive cash in Toronto in exchange? He was asked by IIROC Staff at a further interview in August 2010 whether he had any personal dealings with the Cs, apart from their Nesbitt Burns account in Canada. Mr. Bortolin replied: "Not that I'm aware of."

¶ 31 We find that Mr. Bortolin repeatedly and deliberately misled IIROC Staff and failed to cooperate fully in the investigation of the allegations.

THE ALLEGED CONTRAVENTIONS

¶ 32 IIROC counsel has clearly proved the contraventions set out in the Notice of Hearing. We will deal with each one in turn.

Outside Business Activities

¶ 33 The Respondent "carried on outside business activities without the knowledge or approval of his Member Firm." Both "knowledge and approval" are required. The Member neither had knowledge of the Respondent's outside business activities nor approved them. Outside business activities without the knowledge and approval of the Member are not permitted by IIROC or by the Member. There is no evidence that Nesbitt Burns knew about these extensive outside business activities engaged in by the Respondent over many years.

¶ 34 Disclosure and approval are necessary in such circumstances in order to allow the Member to supervise and control a Registered Representative's activities. Not to do so can create conflicts of interest for the Registered Representative and lead to the type of improper activity found in this case. The policy also helps protect the integrity of the securities market as well as the reputation of the Member.

¶ 35 The policy against such outside business activities without knowledge and approval of the Member firm can be found in the *Conduct and Practices Handbook*, a handbook used widely within the industry that provides guidance on various ethical and conduct issues. It can also be found in such guidance documents as Member Regulation Notice 0434, issued in November 2006, which provides that Dealer Members must be aware of all other business activities engaged in by their approved persons and must have in place policies and procedures requiring approved persons to disclose all other business activities to the Dealer Member and obtain the Dealer Member's approval. The Notice also provides that Dealers, "by virtue of their membership in the Association, are bound to conduct *all* securities-related activity on their books – *except where expressly permitted* by the Association to do otherwise." (Member Regulation Notice 0434 was specifically adopted by IIROC.) A number of IIROC hearing panels have held that such engagement in outside business activities without the Member's knowledge and approval is a breach of Rule 29.1: see *Deck* [2007] I.D.A.C.D. No. 19 and *Rail* [2008] IIROC No. 4.

¶ 36 Nesbitt Burns' policy with respect to outside business activities is clearly stated. The 2004 BMO Financial Group document, *FirstPrinciples: Our Code of Business Conduct and Ethics*, states, for example,

under the heading “Conflicts of Interest:”

> “Where we engage in outside business activities – such as taking a second job, participating in external activities that are intended for profit (e.g. running our own business), accepting a directorship or generally doing anything for which we are compensated by someone or some organization other than BMO – we must discuss any plans or offers for outside business activities with our manager and adhere to the approval procedures outlined in the applicable Enterprise policies, so that the potential for any conflicts can be assessed and dealt with appropriately. Typically, outside business activities which compete with any aspect of BMO’s business will be prohibited.”

¶ 37 An accompanying BMO document states that the *FirstPrinciples* Code is formally established as a corporate policy of the entire BMO organization and goes on to state: ‘Every director, officer, and employee, of BMO is to be provided with a copy of, or online access to, the Code and will be required to certify each year that they have read, are aware of, understand and have complied with the Code.” There were modest changes in the document in subsequent years, but essentially it was similar to the 2004 document. The Respondent dutifully responded each year that he had read, was aware of, understood, and complied with the Code.

¶ 38 The Respondent admits that he knew that his non-disclosure of his off-shore activities was against Nesbitt Burns and IIROC policy. He also admits that he did not disclose any of the Bahamas activities to Nesbitt Burns.

¶ 39 Failure to disclose is a breach of Rule 29.1. The first two subsections of Rule 29.1 are particularly applicable and it is arguable that the third subsection is applicable as well. The Rule states that the Registered Representative:

> (i) shall observe high standards of ethics and conduct in the transaction of their business,
>
> (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and
>
> (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

¶ 40 At the present time it is necessary for IIROC Staff to use Rule 29.1 in disciplinary cases involving failure to disclose outside business activities because there are no specific IIROC Rules dealing directly with the issue. However, proposed IIROC amendments to the Dealer Member Rules (Rule 18.14), that are now before the Canadian Securities Administrators (“CSA”) for approval, will specifically cover “outside business activities”. (See IIROC Rules Notice 10-0155 and Rules Notice 11-0150.)

¶ 41 The proposed amendments – the 2011 Notice states – “codify IIROC expectations that Registered Representatives and Investment Representatives must disclose all outside business activities to their Dealer Member and obtain the approval of the Dealer Member before engaging in any outside business activities.” This statement that the amendments codify IIROC expectations supports IIROC’s contention at this hearing that there is a clear policy against engaging in outside activities without first disclosing the activity and seeking the Member’s approval. Disclosure and approval is necessary in order for a Member Firm to monitor compliance with Rule 29.1.

¶ 42 We have no hesitation in finding that Mr. Bortolin improperly engaged in outside business activities without disclosing the activity to the Member and obtaining the Member’s approval and therefore was in violation of Rule 29.1.

Personal Financial Dealings

¶ 43 IIROC and Nesbitt Burns also prohibit personal financial dealings with clients by Registered Representatives. As with outside business activities, an amendment to IIROC Rule 18.14 is now before the CSA for approval of a specific rule dealing with the subject. Again, the 2011 Notice states that the new rule codifies IIROC’s expectations about disclosure of personal financial dealings.

¶ 44 The prohibition against personal financial dealings with clients can be found in the *Conduct and*

Practices Handbook, which provides guidance on various ethical and conduct issues. The IIROC Notice of May 2010, Number 10-0155, for example, states that "any personal financial dealing with a client creates an unacceptable conflict of interest between the Dealer Member's employee or agent and the client." The prohibition has been upheld by several IIROC panels: see *White* [2010] IIROC No. 25 and *Deck* [2007] I.D.A.C.D No. 19.

¶ 45 The Respondent engaged in improper personal dealings in transferring significant amounts of money – about $150,000 – from his own account or his wife's account to the Cs. Given the Respondent's denial that he had any business dealings with the Cs outside of Nesbitt Burns, and the failure to provide any explanation for the transfers, it is reasonable to conclude that the transfers were likely for purposes of money laundering.

¶ 46 We find that the Respondent breached at least the first two subsections of Rule 29.1 through his personal financial dealings with clients.

Suspicious Transactions

¶ 47 There were two significant suspicious sets of transactions: the insider trading done through Mr. Grmovsek's accounts in the Bahamas; and the possible money laundering through the transfer of cash to Mr. Grmovsek in Toronto coupled with transfers from Mr. Grmovsek's account in the Bahamas to the Cs account in the Bahamas.

¶ 48 Insider trading is illegal under the Ontario Securities Act, is a specific offence under the Criminal Code (s. 382.1) and, as in the Grmovsek case itself, can come under the fraud provision of the Code. It is a subject of concern in IIROC material as well as Nesbitt Burns documents. Everyone involved in corporate securities knows that it is improper conduct.

¶ 49 Money laundering is also an offence under the Criminal Code (section 462.31) and is dealt with in OSC, IIROC and Nesbitt Burns materials. IIROC published a 31 page guide, *Deterring Money Laundering Activity*, in 2002. (Recently replaced by a 74 page guide, *Anti-Money Laundering Compliance Guide*, 2010). Again, everyone in the securities industry knows that it is improper conduct. The Canadian Securities Institute's *Conduct and Practices Handbook Course* (2008) conveniently explains money laundering as follows:

> "Money laundering is a process in which the proceeds of crime are converted into legitimate funds using complex transactions, usually through financial institutions. By obscuring the origin of the money, criminals can use the funds without raising any suspicion about its legitimacy. When a criminal activity generates substantial profits, the individual or the group involved must find a way to control the funds without attracting attention to the underlying activity or to the persons involved. This is done by disguising the sources, changing the form, or moving the funds to a place where they are less likely to attract attention. Dealer members are in an ideal position to assist in curbing criminal and terrorist activities. Identifying clients and transactions that raise red flags or fail the 'smell test' and reporting this information to the appropriate authorities can limit access to what has traditionally been a major piece in the money laundering puzzle."

¶ 50 IIROC counsel argued persuasively that there is a gatekeeper obligation of IIROC registrants to be vigilant in respect of potentially suspicious activity. Two IIROC cases, in particular, are cited, *Trenholm* [2009] IIROC No. 40, and *Georgakopoulas* [2009] IIROC No. 25. The panel in *Trenholm* stated that "[a] registrant must satisfy himself that there are reasonably legitimate reasons for a transaction." The panel was satisfied that the Respondent in *Trenholm* failed to take appropriate steps in connection with suspicious activity despite his stated lack of knowledge of the suspicious activity, stating: "The Respondent either tacitly participated in the questionable activity in the related accounts or he was totally oblivious to questionable activity when any reasonable registrant would have been put on inquiry."

¶ 51 Similarly, in *Georgakopoulas* the panel cited the Canadian Securities Institute's *Conduct and Practices Handbook* that "Registrants should be concerned not only about their own trading practices, but also about any unusual or suspicious trades by clients." The panel stated that "the obligation on the Respondent, as gatekeeper, was to identify possible improper or illegal market activity at an early stage. He was required to make a reasoned judgment, on the basis of the information that was available to him." (See also *Freedman* [2005]

I.D.A.C.D. No. 37 and *Bergeron* [2008] IIROC No. 8.)

¶ 52 Mr. Bortolin may not have known that Mr. Grmovsek was engaging in insider trading, but as an experienced registrant he should have known that the trading activity was suspicious. He must have been suspicious. His obligation was to report the suspicious activity to his firm. Instead of doing so, Mr. Bortolin facilitated Mr. Grmovsek's insider trading activity through the Bahamian accounts, which Mr. Bortolin did not disclose to his firm.

¶ 53 We find that Mr. Bortolin's facilitation of Mr. Grmovsek's insider activity through the Bahamas accounts was a violation of Rule 29.1 because Mr. Bortolin did not report the existence of the accounts to Nesbitt Burns and because he ought to have been suspicious that the accounts were being used for improper purposes. According to Mr. Grmovsek, Mr. Bortolin never inquired about the nature of Mr. Grmovsek's trading throughout their ten year association. If this was so, it would amount to "wilful blindness" which is more culpable than failing to report what can reasonably be characterized as suspicious activity. It can be considered as serious as actual knowledge. In a recent Supreme Court of Canada case, a unanimous court stated that "[t]he doctrine of wilful blindness imputes knowledge to an accused whose suspicion is aroused to the point where he or she sees the need for further inquires, but *deliberately chooses* not to make those inquiries." (*R. v. Briscoe* [2010] 1 S.C.R. 411.)

¶ 54 We turn now to money laundering. We believe that Mr. Bortolin was actively involved in assisting in money laundering. Here, he was not just suspicious of the activity, he was a participant. Rather than acting as a gatekeeper, he promoted improper and fraudulent practices. He was one of those crashing the gate. Thus we have absolutely no difficulty in concluding he violated all the subsections of Rule 29.1.

Misleading IIROC Staff

¶ 55 The Respondent repeatedly misled IIROC Staff in their investigation and thereby hampered a full investigation of his activities. He misled Staff in relation to the nature and extent of the accounts he controlled in the Bahamas and the compensation he received for setting up and managing Mr. Grmovsek's account there. Misleading Staff is a violation of Rule 29.1.

¶ 56 A few days before this hearing began, the Respondent sent a brief e-mail to IIROC Staff to give to the Panel. In the statement he admitted that he had contravened IIROC and firm rules and stated "for this I am very sorry." We note that his statement of contrition was made subsequent to the Respondent receiving IIROC's five volumes of evidence. The only justification for his actions offered by the Respondent was that Nesbitt Burns was aware of his activities and that he did not feel it necessary to disclose accounts outside of Nesbitt Burns because he did not exercise discretion over the accounts. No evidence was offered to us by IIROC Staff that Nesbitt Burns was aware of his activities. On the contrary, evidence shows that the Respondent deliberately hid his activities from Nesbitt Burns, and that the Respondent exercised discretion over several related and client accounts in the Bahamas. The Respondent's late acknowledgment of wrongdoing does not influence our judgment on the issues one way or another.

PENALTY

¶ 57 The Respondent's conduct was egregious. It was conducted over a number of years. It was not a one-time error in judgment. Because the Respondent did not fully cooperate with the IIROC investigation, the full extent of his improper conduct cannot be determined. We have no doubt that the Respondent should be prohibited from conducting securities related business in any capacity for any member of IIROC and we so order.

¶ 58 What should the fine be? IIROC Staff have asked for a fine of $315,000 and a disgorgement of $77,795 in connection with fees that the Respondent received in connection with the Bahamian accounts.

¶ 59 We have decided that a fine of $500,000 is appropriate in the present case. This fine includes the sum requested for disgorgement. We are not dividing the overall fine into separate amounts as is sometimes done by panels because the conduct was all interrelated.

¶ 60 The fine is a substantial one because the misconduct is serious. Although no individual involved in this case suffered losses, Mr. Bortolin's conduct harmed the integrity of the Canadian securities markets and society generally. Money laundering facilitates illegal activity.

¶ 61 The capital markets are damaged by insider trading because its existence encourages a belief by many potential investors that they cannot get a fair deal in the capital markets and that it is insiders only who profit through their special access to information. It then becomes harder for entrepreneurs and others to raise capital, creating an obstacle to economic growth. The practice also financially harms the persons on the other side of trades by insiders who do not have the knowledge that the insider has. In almost all cases innocent persons never find out that they have been financially harmed in their purchases or sales of stocks.

¶ 62 Insider trading and money laundering are offences that are particularly difficult to detect, mainly because individuals are not aware that they have been hurt. When money is stolen, someone usually complains. But with insider trading and money laundering no-one is there to blow the whistle. It is therefore incumbent on securities dealers and other gatekeepers to be vigilant not to facilitate those activities. And that is why when a case of insider trading is proven, the penalty tends to be substantial as a deterrent to others.

¶ 63 As to costs, IIROC Enforcement Department has produced records showing that $116,314.50 reflects the staff hours and other costs in connection with this case and have suggested costs of $60,000. We order that the Respondent pay costs of $100,000.

Dated at Toronto this 15th day of March, 2012.

Martin L. Friedland, C.C., Q.C., Chair

Mary Savona

Colleen F. Wright