

# Re Hoang

IN THE MATTER OF:

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

**and**

**David Hoang**

2012 IIROC 60

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

Heard: March 13, September 10, 11, 12, 13, 2012  
Decision: November 1, 2012

## **Hearing Panel:**

Catharine Esson, Chair; L. Karen Henderson, Member; J. Chris Lay, Member

## **Appearances:**

Barbara Lohmann, Enforcement Counsel for IIROC  
Sean Boyle and Alexandra Luchenko, for David Hoang

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## **DECISION ON THE MERITS**

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### **A. Introduction**

¶ 1 These are the reasons for judgment for the liability portion of a hearing held under IIROC Dealer Member Rule 20. In a Notice of Hearing dated January 9, 2012, IIROC alleged that:

- During the period February 23, 2009 to August 14, 2009 (the “Relevant Period”), David Hoang failed to comply with BC Interpretation Note 33-705 (“33-705”) which prescribes requirements for dealers which trade in securities of an OTC issuer (“OTC securities”), contrary to Dealer Member Rule 29.1;
- Mr. Hoang failed to respond truthfully or completely to questions during an interview of him in June, 2010, contrary to Dealer Member Rules 19.6 and 29.1; and
- Mr. Hoang failed to attend a second interview on or about March 30, 2011, contrary to Dealer Member Rule, 19.5.

¶ 2 Mr. Hoang was represented by counsel at the hearing but did not attend or call evidence.

### **I. Transcripts of Witness Interviews**

¶ 3 IIROC called Tim Ferguson, a senior investigator, at the hearing. During the course of the investigation, Mr. Ferguson had interviewed, among others, Mike Ponsford, a former registrant in the Calgary office of First Canada Capital Partners (“FCCP”) and Mr. R-G, a former employee of a US market maker. During Mr. Ferguson’s testimony, IIROC sought to introduce as exhibits the entire transcripts of the interviews of Mr. Ponsford and Mr. R-G. Mr. Hoang’s counsel objected to the introduction of these transcripts. We ruled against the introduction of the transcripts as exhibits, but advised the parties that IIROC could seek to introduce through Mr. Ferguson evidence of what these individuals told him. These are our reasons for that decision.

¶ 4 IIROC relied on its procedural rules and on previous decisions in which transcripts have been introduced. Rule 20.2 of IIROC’s Dealer Member Rules and Rule 1 of IIROC’s Rules of Practice and Procedure grant a hearing panel broad discretion on evidentiary issues and allow a hearing panel to waive any procedural requirements set out in the Rules.

¶ 5 However, the Rules of Practice and Procedure also address the introduction of evidence at disciplinary hearings more specifically. Rule 13 says in part:

13.1 Rights of Respondent

A Respondent is entitled at the hearing:

(d) to conduct cross-examination of witnesses;

13.3 Evidence by Witnesses

Subject to Rule 13.4, witnesses at a hearing shall provide oral testimony under oath or solemn affirmation.

13.4 Evidence by Sworn Statement

The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement, unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

¶ 6 IIROC argued that the word “witness” in these Rules is limited to a person who attends a hearing in person. IIROC relied on the decision of the presiding officer at a prehearing conference in *Re: Georgakopoulos*, 2008 IIROC 26, as authority for this. In *Re: Georgakopoulos*, the presiding officer relied upon the decision of the BC Securities Commission in *Re: Hauchecorne* (12/17/1999) to conclude that the word “witness” in Rule 13 referred only to a person who gave oral evidence. However, it does not appear that the Commission in *Re: Hauchecorne* was considering a provision equivalent to IIROC’s Rule 13.4. The presiding officer in *Re: Georgakopoulos* did not refer to Rule 13.4 specifically.

¶ 7 In our view, the word “witness” in Rule 13.4 must have a broader meaning that just a person who attends a hearing in person. Rule 13.4 addresses the very issue of whether the evidence of a witness must be given orally or can be given by written statement.

¶ 8 We conclude that IIROC’s rules establish that, as a general principle, evidence at a disciplinary hearing should be given by witnesses testifying at the hearing. Transcripts of sworn interviews may be introduced unless the respondent reasonably objects. Transcripts of unsworn interviews should not generally be allowed into evidence. These principles are subject to a panel’s general discretion to order otherwise in a specific case and to accept any sworn or unsworn evidence which is relevant.

¶ 9 IIROC referred to decisions in which transcripts have been allowed in BC Securities Commission and IIROC proceedings. These decisions are helpful for the general principles outlined in them. Each case must, however, be considered on its facts and in the context in which it occurred. For example, the rules governing the receipt of evidence in BC Securities Commission hearings are different from IIROC’s Rules. There may also be different standards of procedural fairness for respondents depending on what is at stake for them in the hearing (*OEX Electromagnetic Inc. v. BC (Securities Commission)* 1990 CanLII 262 (BCCA)).

¶ 10 *Georgakopoulos, supra*, was determined in the context of a prehearing conference where the presiding officer, who would not be on the hearing panel unless the parties agreed, concluded that he should only make an order excluding evidence from the hearing panel in the clearest of cases. That was a different context from the context of this hearing.

¶ 11 None of the decisions cited to us establish that transcripts should generally be allowed in IIROC proceedings. In any application to introduce transcripts the panel must balance the importance of the hearing proceeding without undue procedural difficulties against the respondent’s right to procedural fairness. Denying a party the right to cross-examine has the potential to affect a respondent’s right to procedural fairness.

¶ 12 IIROC was not able to locate Mr. Ponsford to secure his attendance at this hearing. If his evidence was to form part of this hearing, it would be hearsay evidence. While hearsay evidence is generally admitted in hearings such as this, where it is admitted over the objection of the respondent, we should seek to minimize the potential unfairness to the respondent.

¶ 13 If Mr. Ponsford's entire transcript was introduced, all the evidence in it would become evidence in this hearing. If the investigator testified to the specific matters he was told on which IIROC sought to rely, then only that evidence would be in the record for this hearing. In our view, the latter had less risk of unfairness and therefore was the preferable procedure. It would better serve Mr. Hoang's right to know the case against him because it would be clear to Mr. Hoang and the Panel during IIROC's case what evidence Mr. Hoang needed to address. Mr. Hoang would not be left in the position of having to respond to everything in the transcript. In addition, any issues regarding the admissibility or weight to be given to particular portions of the evidence could more effectively be addressed during the hearing.

¶ 14 Mr. Ponsford's transcript is about 100 pages long. It records an interview done in the context of an IIROC investigation into a number of individuals. It may contain evidence which is central to the allegations against Mr. Hoang, evidence which is relevant background and evidence which is irrelevant to the allegations against Mr. Hoang. It also may contain evidence which is corroborated and evidence which is uncorroborated in this proceeding. It may contain evidence Mr. Hoang could have refuted other than through cross-examination and evidence which could not be refuted except through cross-examination. It is reasonable to assume that Mr. Hoang's objection to the admissibility of the transcript was in fact more strongly directed at some evidence in the transcript than at other evidence in the transcript. Issues of the admissibility of and weight to be given to different parts of Mr. Ponsford's evidence could have been dealt with more effectively if IIROC sought to introduce only the specific evidence it was relying on, than if IIROC introduced the entire transcript.

¶ 15 The interview of Mr. R-G was unsworn. When he was asked at his interview whether he would attend the hearing, he said he would need to consult his compliance officer. He was not, however asked to attend this hearing. While Mr. R-G was outside of the subpoena power of IIROC, there is no evidence that IIROC could not contact him or that he would not have attended if asked to do so.

¶ 16 Mr. R-G's transcript raises the same issues about fairness as that of Mr. Ponsford, although likely to a lesser degree as we understand that the transcript was shorter and more focused than Mr. Ponsford's. It was a substantial factor in our consideration of this transcript that the witness was unsworn and there was no evidence the witness would not attend the hearing. Mr. R-G potentially had evidence which would have been central to at least Count 2. Before his evidence was introduced by unsworn statement, IIROC should have made reasonable efforts to make him available for cross-examination.

¶ 17 In our view, given these concerns, the preferable procedure in both cases was to have the investigator who interviewed these witnesses testify about those portions of the witnesses' testimony on which IIROC sought to rely. While the evidence would still be hearsay, Mr. Hoang and the Panel would know precisely which evidence IIROC was relying upon. Mr. Hoang could then decide whether he objected to that particular evidence and raise issues about its admissibility and the weight to ascribe to it. He could also call other evidence to meet it.

## **II. Reasonable Apprehension of Bias**

¶ 18 During this hearing, it came to our attention that the lawyer who had acted for Mr. Hoang during his interview and for another witness who had been interviewed during the investigation is an individual with whom both the Chair and one of the panelists have had working relationships. Disclosure was made to the parties who were invited to consider their positions. Counsel for both parties advised that they waived any claim of bias or reasonable apprehension of bias as a result of this matter.

## **III. Standard of Proof**

¶ 19 IIROC bears the burden of proving the allegations against Mr. Hoang on a balance of probabilities. The evidence must be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test (*F.H. v.*

#### **IV. Analysis and Findings**

##### **A. Background**

¶ 20 Mr. Hoang was employed by FCCP from October, 2005 to February 23, 2011, initially as a back office assistant and later also as an assistant to Mark Wiltshire and Caroline Lenardon.

¶ 21 In June, 2008, the BC Securities Commission imposed through 33-705 conditions of registration on FCCP (and other dealers with offices in BC) that required, among other things, that FCCP make inquiries concerning beneficial ownership of OTC securities before selling those securities.

¶ 22 In response to 33-705, FCCP opened offices in Calgary, Alberta, and Leamington, Ontario, to allow its clients to place orders to sell OTC securities outside BC.

¶ 23 Mr. Wiltshire was registered in BC, Alberta and Ontario. A significant part of his business involved offshore clients trading OTC securities. Most of FCCP's business selling OTC securities was for Mr. Wiltshire's clients.

¶ 24 Mr. Wiltshire worked as an RR in BC prior to June, 2008. From approximately June, 2008 to February, 2009, Mr. Wiltshire worked in the Calgary office. In about February, 2009, he returned to work in BC. At about this time, Mr. Ponsford began working as an RR in the Calgary office. Chris Shepherd started working as an RR in the Calgary office in March or April, 2009. Mr. Ponsford and Mr. Shepherd had their own books of business, but Mr. Ponsford at least also performed tasks related to trades on behalf of Mr. Wiltshire's clients for part of the Relevant Period.

¶ 25 The Leamington office was open from February or March, 2009 to about August 17, 2009. One investment representative, Karen Dick, worked at this office which was located in her home. To avoid confusion in these reasons between Ms. Dick and Vanessa Dircks, FCCP's Chief Compliance Officer, we have referred to Ms. Dick as KD. KD was hired at Mr. Wiltshire's initiative to assist him.

¶ 26 Five employees worked out of the Cloverdale office during the Relevant Period: Mr. Wiltshire, Ms. Lenardon, Mr. Hoang, an administrative assistant and FCCP's CFO who split her time between the Vancouver and Cloverdale offices. Mr. Wiltshire was registered and worked full time, but was only at the Cloverdale office part of the time. Ms. Lenardon was registered and had a few clients of her own but primarily worked as an assistant to Mr. Wiltshire. Ms. Dircks, FCCP's Chief Compliance Officer, attended at the Cloverdale office from time to time.

¶ 27 Mr. Hoang became registered as an RR on February 13, 2009. He did not have a book of clients of his own. As of June, 2010, he considered Mr. Wiltshire, Ms. Lenardon or FCCP's CFO to be his supervisor. His salary was split between the firm on the one hand and Mr. Wiltshire and Ms. Lenardon on the other.

¶ 28 Ms. Lenardon trained Mr. Hoang as an assistant.

¶ 29 Mr. Hoang worked primarily in the Cloverdale office from February 2009 to late May or early June, 2010. On occasion he worked in the Vancouver office. He spent a week or two in February, 2009 at the Calgary office helping set up computers and dealing with other administrative matters.

¶ 30 Mr. Hoang transitioned over time from a purely administrative role to a role which combined administration and servicing clients. Mr. Hoang was gradually put in contact with Mr. Wiltshire's clients. During the Relevant Period, Mr. Hoang's activities included actively assisting others to resolve issues with trades and technology, assisting KD and Mr. Ponsford to become acquainted with office systems, and assisting with paperwork and information requests. He worked on the operational and administrative side when needed. Mr. Hoang testified that he would help out anyone in the office. At the same time, he was taking on at least some aspects of dealing with market makers and clients.

¶ 31 Mr. Hoang moved to the Calgary office of FCCP in late May or early June, 2010. FCCP was purchased by Global Maxfin on January 1, 2011. Mr. Hoang remained there until he voluntarily resigned on February 23,

2011. He has not worked in a registered capacity since that time.

¶ 32 Mr. Wiltshire was the broker of record for the accounts of the six offshore clients identified in the Notice of Hearing which are the subject of Count 1, being BS, BSO, CB, DGM, VPB and BSI. There were deliveries of OTC securities into each of these accounts and sales of OTC securities from these accounts during the period February 23, 2009 to August 14, 2009.

**B. Count 1 – Did Mr. Hoang fail to comply with BCIN 33-705?**

¶ 33 IIROC alleges in Count 1 that:

Between February 23, 2009 and August 14, 2009 (the "Relevant Period"), Mr. Hoang, while employed as a Registered Representative ("RR") at First Canada Capital Partners Inc. ("FCCP"), failed to comply with British Columbia Interpretation Note 33-705 ("33-705") made under the Securities Act, contrary to Dealer Member Rule 29.1.

**1. BC Interpretation Note 33-705**

¶ 34 Effective June, 13, 2008, the BC Securities Commission, through 33-705, imposed a condition of registration on firms with an office in BC that traded in OTC securities. The conditions required, among other things, that these firms manage the risks of trading OTC securities; monitor, record and report specific information relating to OTC securities and designate a person to manage and enforce the conditions. Most importantly for this case, during the Relevant Period, the BC Securities Commission imposed the following condition on registered investment dealers with an office in British Columbia:

Establishing beneficial ownership

4. You must not accept an order to sell securities of an OTC issuer deposited in an account at your firm until you make the inquiries necessary for you to form a reasonable belief that you know the identity of the beneficial owner of those securities....

¶ 35 33-705 said in part:

Identifying beneficial owners and related individuals

Conditions 4 and 5 require dealers to identify the beneficial owner of securities of an OTC issuer a client seeks to sell, and to determine that person's relationship with an issuer.

¶ 36 There was no comparable requirement to 33-705 in Alberta or Ontario.

¶ 37 On June, 4, 2008, Ms. Dircks issued a memo which stated in part:

3. FCCP Inc. and its sales persons shall not accept an order to sell securities of an OTC issuer deposited in an account at the firm until the necessary inquiries are made to form a reasonable belief that the identity of the beneficial owner has been established....

¶ 38 Ms. Dircks was identified in the memo as the person designated to manage and enforce these conditions. She did not recall giving any other written guidance on how to comply with 33-705.

¶ 39 On its face, the condition of registration in place during the Relevant Period and FCCP's memo appear to apply to all sales of OTC securities by firms with an office in BC, regardless of where the order was accepted. This was not, however, the interpretation advanced by the parties at this hearing.

¶ 40 The wording of the condition of registration was amended shortly after the Relevant Period to require that inquiries concerning beneficial ownership only needed to be made before an order to sell was accepted through a BC office.

¶ 41 The parties advised us that they were not aware of any previous decisions concerning 33-705.

¶ 42 Given the parties' positions in this hearing, we have concluded that 33-705 should be interpreted as requiring that FCCP make inquiries concerning beneficial ownership only if it intended to accept an order to sell OTC securities through an office in BC, not if it intended to accept an order to sell through an office

elsewhere.

## **2. Mr. Hoang's obligation under 33-705**

¶ 43 On its face, 33-705 imposed obligations of inquiry on the dealer, FCCP, which were triggered by its intention to accept an order from a client to sell OTC securities. As a registrant, Mr. Hoang was responsible to ensure that he complied with it for any orders for the sale of OTC securities he personally intended to accept. Mr. Hoang admitted throughout these proceedings that he was aware of the obligation created by 33-705.

¶ 44 The parties did not provide any authorities on what "accepting" an order means in this context.

¶ 45 As is described more fully below, Mr. Hoang admitted to receiving some instructions from clients to sell OTC securities which, if he accepted them, would be subject to 33-705. He testified that he did not accept the orders. Instead he referred them to Ms. Lenardon or to FCCP's Calgary or Leamington offices by asking the client to contact another registrant or asking another registrant to contact the client. Mr. Hoang did not inquire about the beneficial ownership of the securities.

¶ 46 We have concluded that the distinction between receiving and accepting an order is valid. If Mr. Hoang received instructions for a trade but asked the client to contact another broker or asked another broker to contact the client, then he did not himself accept the order. IIROC did not argue otherwise. Rather, its position was that the evidence supports the conclusion that this did not occur – instead Mr. Hoang accepted orders himself and then took steps to make it appear the orders had been accepted in Alberta or Ontario.

¶ 47 In these Reasons, we have used the term "receiving an order" to refer to what Mr. Hoang testified he did: receiving a request from a client to do a trade but referring the client to another registrant. We have used the term "accepting an order" to refer to what IIROC allege Mr. Hoang did: receiving a request from a client to do a trade and causing the trade to be executed.

¶ 48 We recognize that there is not necessarily a bright line between "receiving" and "accepting" an order. There will be circumstances in which one could only determine whether a registrant's actions constitute receiving or accepting an order by examining the circumstances of the particular transaction. Similarly, a registrant could breach his or her obligations by knowingly participating in someone else's breach of 33-705. Again, however, this would depend on the circumstances of the particular transaction.

## **3. The Evidence Generally**

¶ 49 As is apparent from the remainder of these Reasons, there were important areas where there was not clear, convincing and cogent evidence of what occurred and where, as a result, we have not made any finding of what occurred. This has affected the outcome of these proceedings.

¶ 50 IIROC called Mr. Ferguson and Ms. Dircks as witnesses at the hearing. Numerous individuals who may have had important evidence were not called, including Mr. Wiltshire, Ms. Lenardon, KD and the individuals who placed sell orders on behalf of clients. We were not advised of any efforts to include evidence from these individuals as part of this hearing. We recognize that IIROC could not compel the attendance of many of them. We have not been asked to draw any inferences from the fact these witnesses were not called, and we have not done so. Nonetheless, their absence likely contributed to the lack of clear, compelling and convincing evidence on important points.

¶ 51 The individuals who serviced Mr. Wiltshire's client accounts had many methods available to them for communicating with each other and with third parties, such as the clients and market makers. Without intending to exhaustively list the available options, we note that the instant messages in evidence from the month of March, 2009 alone evidence that Mr. Hoang and KD were communicating or potentially communicating with each other in all of the following ways:

- By instant message;
- By Blackberry PIN;
- By Blackberry text;

- By email;
- By phone call. There is reference in the instant messages to Mr. Hoang and KD speaking by phone. We do not know whether Mr. Hoang used his Blackberry, an office landline, another phone or some combination of these. KD at times used her Blackberry, which appears to have been her office number. She also, however, gave Mr. Hoang her home number so that he could speak with her on the phone while she worked on her Blackberry; and
- By MSN messenger (this may or may not be the same method of communication evidenced by the instant messages referred to above).

¶ 52 There was also evidence of other registrants using some or all of these methods of communication. FCCP had a policy prohibiting employees from conducting critical business functions via email or instant message. The evidence before us suggests it was not followed or enforced.

¶ 53 IIROC introduced in evidence instant messages between Mr. Hoang and Mr. Ponsford and between Mr. Hoang and KD. These messages came from the server at the Cloverdale office. IIROC did not tender instant messages involving any other individuals or provide evidence of what other individuals' communications were recorded on the server or would have been expected to have been recorded on the server, if in fact they occurred. There was no evidence of what device was used to create these instant messages. It appears that, in the case of KD at least, these messages were not transmitted by the Blackberry she was provided by FCCP as, in a March 10 instant message, Mr. Hoang advised KD that her time stamp and Blackberry were on their way to her.

¶ 54 IIROC also introduced phone records for the Leamington office phone. There were no records in evidence for the other phone lines or the other methods of communications the individuals in question had available to them. This has generally precluded us from drawing reliable inferences about whether a communication occurred on the basis that there was no record of the communication in the evidence which was tendered.

¶ 55 Mr. Hoang was one of a number of people who serviced the accounts of Mr. Wiltshire. There was very little evidence tendered about how this group of people functioned and, particularly, about how the Cloverdale office operated. We are mindful of the danger of overinflating Mr. Hoang's role simply because most of the evidence in this hearing related to him. There is no evidentiary basis for us to conclude that that Mr. Hoang was the center of the operation.

¶ 56 We can conclude from the instant messages and the trade tickets in evidence some of the functions Mr. Hoang, Mr. Ponsford and KD individually performed, at least for some specific transactions. We must be cautious about extrapolating from the limited evidence available that these individuals always did the same functions or that, because an individual did one function for a transaction, that person must also have done other functions relating to the same transaction.

¶ 57 This is particularly important, given that the Relevant Period was a time of transition for those who serviced Mr. Wiltshire's clients generally and for Mr. Hoang particularly. Within a short period of time, Mr. Wiltshire moved back to BC, new brokers were hired in Calgary, KD was hired, the Leamington office was opened, and Mr. Hoang became a registered representative. It would not be surprising if office systems and procedures developed and changed during the Relevant Period.

¶ 58 In the absence of clear, convincing and cogent evidence of how the office ran generally or how the various individuals worked together, we have not been able to piece together what was happening in this office, beyond the limited specific findings we can make from the available evidence. It would be inappropriate for us to wade into any issues which may seem to arise on the limited evidence we have about whether these offices were compliant with the various rules imposed upon them, other than as the evidence relates to the allegations against Mr. Hoang.

#### **4. Mr. Hoang's testimony regarding the orders**

¶ 59 Mr. Hoang admitted at his interview that during the period covered by that interview, January, 2008 to June, 2010, he at times received orders to sell OTC securities from some offshore clients of Mr. Wiltshire. The scope of the interview, which was conducted in the context of an investigation into someone else's conduct, was focused on the trading for a somewhat different set of clients and a significantly longer time period than the allegation in Count 1. In order to properly assess Mr. Hoang's evidence, therefore, it is important to determine the extent to which his evidence related to the clients and the time period covered by Count 1. This is particularly important because Mr. Hoang's role at the firm was evolving.

¶ 60 The interview focused on six specific clients. Questions were generally directed to the accounts for those clients. Only three of these: BS, BSO, and CB, are among the six clients referred to in the Notice of Hearing. Except to the extent he was specifically asked about the

other three accounts which are the subject of this Notice of Hearing, we cannot conclude that the evidence he gave at his interview applies to those clients.

¶ 61 Mr. Hoang testified at his interview that he received orders to sell OTC securities on his Blackberry from RK for the BS, BSO and CB accounts. He testified that he referred these to another registrant, either by asking RK to contact the other registrant or by contacting the other registrant himself and asking that person to contact RK.

¶ 62 Mr. Hoang did not recall when he started to receive orders from RK. We conclude from his evidence that he was put in touch with clients gradually over time and that he likely started to receive orders from RK during the time KD was employed in the Leamington office.

¶ 63 We cannot determine from Mr. Hoang's evidence how many orders or which orders Mr. Hoang received from RK. There is no evidence RK placed all of the orders on behalf of BS, BSO and CB. There is also no evidence that Mr. Hoang received orders on behalf of all three of these clients during the Relevant Period.

¶ 64 Mr. Hoang testified that he did not think he was the primary point of contact for RK. Other evidence in this hearing is consistent with this. There were a number of registrants who could have received orders from RK during the Relevant Period. There is no basis to conclude that Mr. Hoang generally received these orders. Mr. Hoang was a junior assistant during the Relevant Period. While his role was evolving to include dealing with clients, there is no evidence this was a substantial part of his work. To the extent one can glean it from the evidence, it appears that other types of work occupied a substantial part of his time.

¶ 65 There were numerous other registrants who could have received sell orders for OTC securities from offshore clients generally or RK particularly: Mr. Wiltshire, Ms. Lenardon, Mr. Ponsford, Mr. Shepherd, and KD. Although Ms. Dircks testified that she thought one or both of Ms. Lenardon and Mr. Hoang were the primary contacts for Mr. Wiltshire's clients, she admitted she did not know this. Her belief appears to be based on the fact these two individuals were Mr. Wiltshire's assistants. We have not put weight on this evidence.

¶ 66 There was very little evidence of what Mr. Wiltshire and Ms. Lenardon did. The clients in question were Mr. Wiltshire's clients. He had spent the six months prior to the Relevant Period conducting his business from Calgary. There was no evidence before us that he did not continue to receive orders from his clients during the Relevant Period. Similarly, there is no evidence before us that Ms. Lenardon did not receive orders from Mr. Wiltshire's clients.

¶ 67 There was also very little evidence of the nature or extent of Mr. Ponsford's and Mr. Shepherd's relationship to Mr. Wiltshire's clients, although there was evidence that they received orders from RK. Mr. Hoang testified to this. Mr. Ponsford referred in instant messages to tickets for transactions by client BS as being for him. This suggests that Mr. Ponsford had a relationship with at least this client.

¶ 68 We conclude that Mr. Hoang was not the only point of contact for RK and there were others who likely had contact with RK during the Relevant Period.

¶ 69 We cannot determine how many orders Mr. Hoang received from RK for a number of reasons, including that we do not know when Mr. Hoang began receiving orders from RK, we do not know how many orders RK

placed and we do not know how many of those orders Mr. Hoang received. It is as likely on the evidence before us that Mr. Hoang received only a few orders from RK as that he received a larger number of orders.

¶ 70 IIROC has introduced spreadsheets which were described to us as identifying the new sell orders from the clients. We have concluded that these spreadsheets overstate the number of new orders received from BS, BSO and CB during the Relevant Period by including as new orders some fills of existing orders and internal allocations of fills through inventory accounts. These spreadsheets do not establish the number of new sell orders from the clients.

¶ 71 It would not be a defense that Mr. Hoang only received a few orders, if he accepted any of those orders. If in fact he received only a few orders, however, it is more plausible that he put RK in touch with another registrant to accept the orders he received.

¶ 72 Mr. Hoang also testified that he believed at the time of the interview that he had received sell orders for OTC BB stocks for the client BSI. He did not testify when this occurred or which office he contacted relating to these orders. As the period of time being examined at that interview extended well beyond the Relevant Period and Mr. Hoang's role was evolving during this time, this does not establish that Mr. Hoang received sell orders for OTC securities for BSI's account during the Relevant Period.

¶ 73 Mr. Hoang was not asked at his interview whether he received orders from DGM or VPB.

¶ 74 We therefore conclude that the evidence establishes that Mr. Hoang received at least a few orders from RK on behalf of one or more of the clients BS, BSO and CB during the Relevant Period but does not establish that he received orders from BSI, VPB or DGM during the Relevant Period.

¶ 75 As noted above, Mr. Hoang testified at his interview that he did not accept orders to sell OTC securities from RK (or any of the clients about whom he was asked).

¶ 76 We recognize that while Mr. Hoang was not the subject of the investigation for which he was interviewed, he had an interest in its outcome. Mr. Wiltshire, for whom he worked, was being investigated. In addition, as Mr. Hoang continued to work in the industry, he had an interest in IIROC not concluding he had violated 33-705.

¶ 77 That being said, Mr. Hoang's testimony on the evolution of his role in the office and on whether he accepted orders is clear, although his testimony was vague with respect to details such as the timing of his taking on the additional responsibilities of communicating directly with clients about trades. We note that some dates which were suggested to Mr. Hoang during the interview as being correct were not in accordance with the evidence at this hearing. This included the month the Leamington office opened, the year Mr. Hoang went to Calgary to help set up the Calgary office and the month Mr. Wiltshire went to work in the Calgary office. This may have contributed to Mr. Hoang's uncertainty at the interview about dates and timing.

## **5. Did Mr. Hoang accept orders?**

¶ 78 There was no direct evidence of Mr. Hoang receiving or accepting orders from clients for sales of OTC securities during the Relevant Period, other than Mr. Hoang's testimony which we have referred to above. IIROC relied on the following evidence in support of its argument that, in fact, Mr. Hoang accepted orders:

- Instant messages between Mr. Hoang and Mr. Ponsford and between Mr. Hoang and KD during the Relevant Period;
- Evidence relating to Ms. Dircks' audit of the Leamington office, including her discussion with KD at that time, her discussion with Mr. Hoang following the audit and her conclusion that 33-705 had been breached; and
- Evidence of who contacted the market maker respecting a July 17, 2009 trade.

¶ 79 Much of IIROC's case focussed on instances of Mr. Hoang asking Mr. Ponsford or KD to time stamp trade tickets for him. There is ample evidence of this occurring in the instant messages and Ms. Dircks' testimony. IIROC argues that we should conclude from this that Mr. Hoang was accepting orders in BC from

clients and then causing trade tickets for those orders to be completed and time stamped in Ontario and Alberta to make it appear that the orders from the clients were accepted in those other provinces.

¶ 80 The trade ticket time stamping practice seems unusual and even suspicious. However, we are not satisfied on the evidence that the time stamps in fact reflected new orders from clients or that the purpose of the time stamping practice was to hide the fact that Mr. Hoang was accepting orders in BC in contravention of 33-705. For the reasons set out below, we have concluded that there is not clear, convincing and cogent evidence on which we can conclude that Mr. Hoang was accepting orders to sell OTC securities during the Relevant Period.

## **6. The Instant Messages and the Time Stamping of Trade Tickets**

¶ 81 IIROC tendered in evidence instant messages between Mr. Hoang and Mr. Ponsford for the period of February 24 to July 16, 2009 and between Mr. Hoang and KD for the period of March 6 to June 12, 2009.

¶ 82 These messages only record part of the ongoing communications between these individuals. We have noted above the variety of ways in which the parties to these instant messages were communicating with each other. At times, the instant messages record only part of a particular conversation. We have little evidence of the other communications between these parties.

¶ 83 We have reviewed the instant messages in light of the other evidence from this time period. The messages establish that at times different functions for the same transaction were carried out in different locations and by different people. There are messages which appear to relate to the execution of an order through the market maker and messages which appear to relate to entering information concerning an order into the computer system. There are, however, no specific messages for which we can conclude that the message relates to Mr. Hoang accepting (or even receiving) an order to sell OTC securities from one of the clients named in the Notice of Hearing during the Relevant Period.

¶ 84 It is clear from the messages that, at times, Mr. Hoang was transmitting information from others in the office. For example, on March 5 the following exchange occurred:

Ponsford – “waiting for tickets”

Hoang – “ok caroline jsut [sic] gave them to me”

¶ 85 IIROC argued that Mr. Hoang requested that Mr. Ponsford and KD time stamp trade tickets to make it appear that orders accepted in BC were, in fact, accepted elsewhere.

¶ 86 This theory would be more compelling if the time stamps on the trade tickets in evidence, or at least substantial numbers of them, purported to record the taking of a new order from the client. However, we cannot conclude this was the purpose of the time stamps on these trade tickets.

¶ 87 In many instances, the orders from clients appear to have been for sales of large numbers of securities. They were executed over a number of days or weeks, with multiple fills and, in some cases, price changes. From the evidence before us, we conclude that Mr. Hoang, among other things, played a role in this by communicating to Mr. Ponsford and KD requests to record fill portions of the order and that his requests to time stamp trade tickets were related to this process.

¶ 88 Mr. Ferguson noted in his testimony that it is typical to see more than one time stamp on a trade ticket where there are numerous fills and changes to the order. That practice does not appear to have been followed for the trade tickets in evidence. With one exception, the trade tickets in evidence each have only one time stamp.

¶ 89 It is clear that many of the tickets in evidence record only the fill of an existing order because, for example, there is an earlier ticket showing another fill of the same order. Others appear to relate to a new order (or at least one for which there is no earlier ticket in evidence) but also record the fill of that order. There is no indication on the tickets that the time stamp relates to the time of the order rather than the time of the fill. There are also many tickets which record allocations of fills between inventory and client accounts.

¶ 90 Ms. Dircks testified that it was FCCP’s policy that the person who took an order from the client was to

initial the trade ticket. She did not, however, testify that she relied on the initials on the trade tickets in question to determine where orders were accepted or that the policy was followed in practice. There are no initials on any of the trade tickets in evidence for sales by Mr. Wiltshire's clients which were time stamped before June, 2009. Virtually all of the tickets from June, 2009 forward bear KD's initials. We cannot conclude that the trade ticket initialing policy was followed or relied upon by Ms. Dircks to determine who accepted the order.

¶ 91 There are instant messages which support the conclusion that the tickets were being stamped to record the fills of orders. In an April 28 exchange between Mr. Hoang and KD, KD said she needed to leave early and asked if the tickets could be done early. Mr. Hoang said:

it depends on the trades..if we get complete the orders we can..but if the orders are still open we cant incase [sic] we get filled near the close.

and:

sorry I mean if we get filled near the close I will do them

¶ 92 On March 16, the following exchange occurred between Mr. Ponsford and Ms. Hoang:

MP - sld 15000 AAAE leaves 62m

DH – thank-you, may you please stamp me a ticket

MP- sure thing

¶ 93 The trade tickets from July and August, 2009 further illustrate that the time stamps related to fills. Although there are no instant messages in evidence for this period, all of the trade tickets from Leamington are in evidence. We conclude from our review of these tickets that they relate to the fills of orders and to internal allocations of fills from an inventory account to client accounts. While some may relate to the first or only fill of an order, there are none for which we can conclude that the time stamp relates specifically to the acceptance of the order from the client, rather than the fill.

¶ 94 The evidence from the market maker concerning a sale of MNAP shares through the market maker on July 17, 2009 also supports the conclusion that the time stamps on the trade tickets related to the fills of orders, not the client's original order. This transaction is discussed in more detail in relation to Count 2. A representative of the market maker advised Mr. Ferguson that the original order placed with the market maker was for a sale of 10,000 shares and that this was subsequently changed to an order for a sale of 50,000 shares. The only FCCP trade ticket in evidence relating to this trade shows the fill of 50,000 shares, seemingly at an average price. It does not show the original order to sell 10,000 shares. Mr. Ferguson testified that he did not locate any other FCCP trade ticket relating to this transaction. The ticket which is in evidence was stamped hours after the order was given to the market maker. This further reinforces that the tickets were being stamped to record the fills or the allocation of fills, not the order acceptance.

¶ 95 The distinction between the original client order on one hand and the fill of an existing order or internal allocations of fills against inventory on the other is significant to 33-705. Mr. Ferguson implicitly acknowledged this in the preparation of the spreadsheet intended to show the number of orders covered by the allegation in Count 1. In preparing the spreadsheet he distinguished between new orders and fills of orders, and counted only the new orders. While we disagree about the number of new orders evidenced by the tickets referenced in this schedule, we agree that the significant event for 33-705 is the new order from a client, not the steps taken to fill the order.

¶ 96 We cannot determine on the evidence what the reason was for Mr. Hoang asking Mr. Ponsford and KD to time stamp tickets for the fills of orders and internal allocations of fills. The following instant message from May 8, 2009, particularly, raises the concern that the reason Mr. Hoang asked Mr. Ponsford to stamp tickets at this time at least was related to 33-705:

Hoang – hi mike, could you stamp us some tix:

1 buy

3 sells?

Ponsford – yup

Ponsford – you know buys are ok though right

Hoang – thank-you, yes but we are doing a cross and think it may be better just [sic] to have both tix with the same person

¶ 97 The evidence does not establish what transactions this passage related to or that Mr. Hoang had accepted client orders with respect to it. IIROC has included in the evidence reference to three tickets which were time stamped while this message exchange was occurring. Two are for clients of Mr. Ponsford and one is for a client not named in the Notice of Hearing. There are also tickets in evidence stamped over two hours later which record a cross.

¶ 98 Regardless of what transactions it relates to, however, this exchange is consistent with the purpose of Mr. Hoang’s request that Mr. Ponsford stamp tickets having been related to 33-705 as buy transactions would not be subject to 33-705. There are other messages, however, particularly with KD, which are consistent with the time stamping practice having had purposes other than avoiding the requirements of 33-705. There are, for example, other instances in which Mr. Hoang requested that buy tickets be stamped. There is no indication these buys were all for crosses.

¶ 99 There are messages which are inconsistent with the theory that KD time stamped the tickets to make it appear that Mr. Hoang was not involved with the orders. For example, on March 17, Mr. Hoang advised KD that, for that day, he and Ms. Lenardon would do their own tickets. In the April 28 exchange referred to above in which KD asked if the tickets could be done early, Mr. Hoang says that “if we get near the close I will do them”. There is no apparent concern that the tickets could not be done in BC.

¶ 100 On May 26, Mr. Ponsford offered to write a fill he had worked on. Mr. Hoang said he would have KD write it. It is not clear why, if Mr. Ponsford had the information on the fill, it would be transmitted to KD to write up the ticket. However, it is unlikely it would be to avoid 33-705 as neither the Calgary office, where Mr. Ponsford was, nor the Leamington office, where KD was, were subject to 33-705.

**a) Messages highlighted in IIROC’s Argument as being supportive of Ms. Dircks’ conclusion that 33-705 was breached.**

¶ 101 IIROC has highlighted a number of messages which they assert support Ms. Dircks’ conclusion (discussed below) that 33-705 was breached. The conclusions IIROC has asked that we reach on these messages depend, to some extent, on being able to correlate specific messages to specific trades. We have concluded that, unless there is something in the message itself that indicates what trade it related to, we cannot correlate the messages to particular trades in the way IIROC has suggested.

¶ 102 Mr. Ferguson prepared a schedule of the instant messages between Mr. Hoang and Mr. Ponsford and the instant messages between Mr. Hoang and KD. Mr. Ferguson testified that for potentially relevant messages, he searched for trade tickets for the date of the message which related to the clients and transactions at issue in these proceedings and included those in his schedule. He did not include all tickets for trades by Mr. Wiltshire’s clients on the days in question. There are instances in which the schedule includes some trades which were not by the clients in question or were not for sales of OTC securities. However, from reviewing the monthly statements, it is evident that there are also trades by the clients in question which do not appear on the schedule and for which tickets have not been included. In addition, there are very few tickets identified for trades by clients other than the six referred to in the Notice of Hearing.

¶ 103 Because the schedule does not include all tickets to which the messages could have referred, we cannot conclude that there is generally a correlation between the messages and the tickets IIROC has included in the schedule. In many cases, it appears from information on the ticket (such as the time stamp) that it is unlikely a particular ticket included in the schedule is the one referred to in the message.

¶ 104 We have set out below in italics some of the messages IIROC highlighted in its argument as being supportive of Ms. Dircks’ conclusion that 33-705 had been violated. None of these messages evidence Mr. Hoang accepting orders. Following each message relied on by IIROC, we have identified some of the other

reasons why we have determined that the message does not in fact support IIROC's argument.

1. *"There is a message on April 28, 2009 ... where Mr. Hoang asked [KD] how many tickets she stamped 'for us' today and [KD] replied '4'. There are corresponding trade tickets for Leamington for that date."*

The message relates to 4 tickets. IIROC has identified six tickets stamped that day. Only two of these had been stamped by the time of this conversation. One of these is for a movement of stock from an inventory account to a client account. Without evidence that there are four, and only four, tickets which this conversation could refer to or some other explanation, we cannot conclude that this conversation relates to any particular tickets or that it refers to tickets for new client orders or for sales of OTC securities by the clients in question.

2. *"On April 29, [KD] asked Mr. Hoang if she should time stamp a sell ticket. Mr. Hoang replied yes and asked her to 'pls sell another 6,000 @ 0.40 same stock'."*

These messages are part of a conversation between Mr. Hoang and KD early in the morning on April 29 about selling the security CMIN. KD initially reported that "those 10K filled" "CMIN". As part of the same conversation and within the same minute Mr. Hoang asked "please sell another 6000 @ 0.40 same stock". KD then reported "5000 filled cmin" "1000 left". We conclude that it is more likely that Mr. Hoang was requesting that KD contact the market maker to sell an additional 6000 shares as part of the process of filling a larger pre-existing open order, than that Mr. Hoang was relaying to KD a new client sell order.

3. *"On May 12, 2009, Mr. Hoang asked [KD] to 'stamp me 3 sells'. There are Leamington sell trade tickets for May 12."*

The evidence does not establish that this is a request to stamp tickets for new client orders to sell OTC securities. IIROC has identified five tickets which could relate to this message. Only one of these was time stamped at the time KD indicated the tickets were "done". This is for a fill of a sale from the client to an inventory account. We cannot determine from the evidence available to us whether this ticket reflects a new client order. The remaining four tickets IIROC identified are time stamped two to four hours after KD said the tickets are done. It is unlikely those tickets relate to this message. There were additional sales by CB in its Canadian DAP account on this date which IIROC did not identify as potentially relating to this message. There is no evidence whether FCCP had tickets for other clients these messages could have related to.

4. *"On June 10, 2009, Mr. Hoang asked KD if she 'still had those 2 tix from yesterday?'. KD replied 'Sure do' and Mr. Hoang replied 'ok perfect I will get you to write up two tix later on in the day from yesterday'."*

IIROC has identified five tickets to which this passage could relate. One cannot determine which of these the passage relates to or whether it relates to other transactions IIROC has not highlighted and to which 33-705 did not apply. One of the tickets IIROC has highlighted reflects a sell from an inventory account to a market maker and another, with the same time stamp, reflects a sale from a client account to that inventory account. Two of the tickets represent a cross of stock from client BSI (ticket marked unsolicited) to a pro personally (ticket marked solicited). There is no evidence Mr. Hoang arranged this transaction. A fifth ticket is for the sale of stock from the account of DGM, a client for which there is no evidence Mr. Hoang received orders. From the evidence available to us, it appears there were sales of two other securities by client CB on June 10 which this passage could have related to. There is no evidence that 33-705 would have applied to those sales by CB or that there were not other transactions for other clients these messages could have referred to.

5. *"On March 5, 2009, Ponsford asked Hoang if it was you [David] or C that has tickets for me? Hoang replied that he did not as 'I only did CDN stuff today' IIROC argued that this was evidence that the ticket time stamping and writing process was to deal with the fact that Hoang was not in compliance with 33-705."*

This passage is capable of supporting the conclusion that, at least in early March, Mr. Hoang did not ordinarily request that Mr. Ponsford stamp tickets for Canadian transactions. There may have been

reasons other than to address 33-705 that tickets would not have been stamped in this way for “CDN stuff”, such as that Canadian transactions would not be executed through US market makers. However, even if we had concluded that this passage was evidence that Mr. Hoang believed the ticket stamping process was designed in reaction to 33-705, it would not be evidence that Mr. Hoang was not in compliance with 33-705.

¶ 105 We have reviewed all of the instant messages along with the other available evidence from this time period. While we have concerns about the time stamping practice, the evidence does not establish that the practice was intended to hide the fact that orders were being accepted in BC. It also does not establish that Mr. Hoang accepted the order for any particular sale by one of the clients referred to in the Notice of Hearing or that he was accepting these orders generally. We do not accept IIROC’s argument that the instant messages support Ms. Dircks’ conclusion that 33-705 was being breached.

## **7. Ms. Dircks’ testimony**

¶ 106 Ms. Dircks testified at the hearing. She was, during the Relevant Period, the Chief Compliance Officer for FCCP. She was also, at least in June, 2008, the person designated to manage and enforce FCCP’s compliance with 33-705.

¶ 107 Ms. Dircks conducted an audit of the Leamington office on August 4, 2009. She testified that during that audit she observed KD time stamping four trade tickets upon receiving a message from Mr. Hoang and that:

At that point in time I asked her why she was doing that and what had been happening. And she informed me that she would time stamp the tickets on orders from David or Caroline Lenardon and at the end of the day would fill out the tickets as per the fills that was received, and these would all be sell tickets.

¶ 108 She was asked what her reaction was to what she saw:

I was shocked. I immediately told her that she wasn't allowed to do that, and I proceeded to ask her whether -- what the circumstances involved or what was common procedure. And she advised me that that was the way David and Caroline had told her to do it and that had been going on pretty much since she was hired. She may have -- I asked her if she'd ever talked to any clients. She told me she may have talked to a couple of clients when she first started to receive orders, but then subsequent to that, that David and Caroline just told her to time stamp tickets, initial them and fill in the orders and then send them to me that day by fax and then by courier overnight.

¶ 109 Ms. Dircks told KD that day that this was a violation of 33-705 and it had to cease right away. On August 6, KD initialed trade tickets for sales of the same securities by the same clients as the August 4 trade tickets. There were 33 trade tickets in evidence from the Leamington branch time stamped from August 4 to August 14 and initialed by KD.

¶ 110 Ms. Dircks spoke to Mr. Wiltshire sometime during the week following August 4. She testified that he told her he knew nothing about it. She also spoke to Ms. Lenardon. It is not clear when she spoke to Ms. Lenardon or what Ms. Lenardon told her. Ms. Dircks also pulled all of the Leamington tickets she had received for July and reviewed them. She testified that this review reinforced her view that there was “a violation of the Act”. She verbally advised two board members of her findings on August 14.

¶ 111 She spoke to Mr. Hoang about her concerns once, on August 15. She described her meeting with Mr. Hoang as follows:

And I asked him -- or I informed him about what I found out. I asked him how long it had been going on for, who else was involved in it and who else knew about it. He indicated to me at that point in time that it was a decision that was made based on the fact that when Karen started, it was very difficult to get in touch with her -- clients or themselves -- and that they pretty much made that decision so that they could execute the orders. So they would take the orders in Cloverdale and just have her do that. And it just seemed the -- the easier way to do it....

¶ 112 In an email to a board member the same day, Ms. Dircks said “Karen has not had any contact with clients and all orders have been received by either Mark, Caroline or David in Cloverdale”. The Leamington branch was closed on August 17, 2009.

¶ 113 Ms. Dircks testimony, if we accepted it as being reliable, would suggest that KD either did not contact clients at all about orders (as Ms. Dircks wrote in her August 15 email) or only contacted a few clients for a period of time and then ceased to do so (which is more consistent with what Ms. Dircks testified KD and Mr. Hoang told her).

¶ 114 However, we have concluded that we cannot rely on Ms. Dircks’ testimony regarding her discussions with KD and Mr. Hoang or the conclusions expressed in her August 15 email. We do not find that Ms. Dircks was intentionally untruthful in her testimony. However, for the reasons set out below, we have concluded that her testimony was not reliable.

¶ 115 It does not appear that Ms. Dircks distinguished in her analysis, in her discussions or in her testimony between communications and time stamping of tickets relating to new client orders on the one hand and communications and time stamping of tickets relating to other aspects of the transactions on the other hand. While Ms. Dircks may have had good reason to be concerned about the time stamping she observed on August 4, in our view she could not properly assess whether this evidenced a breach of 33-705 or accurately obtain evidence from Mr. Hoang and KD about it without acknowledging this distinction.

¶ 116 Ms. Dircks testified that KD told her that KD time stamped tickets and then completed them to record the fills which were received. This accords with what it appears KD was doing from the messages and the trade tickets – time stamping tickets to record fills, including trades against inventory accounts. While Ms. Dircks testified that KD told her that Mr. Hoang and Ms. Lenardon told KD to fill in the “orders” on the tickets, we have concluded that, read in context and given our concerns about Ms. Dircks’ testimony, this does not establish that these tickets were intended to reflect the new orders from clients rather than the fills.

¶ 117 The concern about Ms. Dircks’ observations and testimony is reinforced by reviewing the August 4 tickets. Ms. Dircks testified that the three tickets time stamped August 4 which are in evidence were tickets KD time stamped during the audit visit. From our review of the Leamington tickets we conclude as follows:

- One August 4 ticket recorded a sale from account 68HABIB to two different market makers, and included reference to a client. Mr. Ferguson identified account 68HABIB as an inventory account. This ticket is marked as an open order and was partially filled.
- Another August 4 ticket recorded an offsetting allocation of that sell out of the inventory account, 68HABIB, to the client account. This is marked as an open order and was partially filled.
- There were also sell order tickets time stamped August 3 for the same security and same client reference, following the same pattern as these trades with the inventory account, which were partially filled, and which were marked as open orders.
- The third ticket August 4 recorded a fill on a sell order for a security which was marked as an open order. This security had had open order tickets and various partial fills dating back to July 27;

¶ 118 There is only one time stamp on each of these tickets. There is no basis on the face of the tickets to determine if the time stamp relates to the time of an original client order, a change to the order, a fill or something else. It does not appear that Ms. Dircks considered the nature of the “orders” to which these tickets related in her appraisal of what she had seen on August 4 or in reaching her conclusion on that date that 33-705 had been breached.

¶ 119 Ms. Dircks testified that after her August 4 meeting she pulled all of the Leamington tickets she had received for July. This would not have been the first time Ms. Dircks had seen these tickets. She and two other individuals received the tickets in Vancouver and reviewed them weekly. As we have noted, most of these tickets record either fills of existing open orders or trades against an inventory account. For the remaining

tickets, there is no basis on the face of the tickets to conclude that the time stamps record the order being received as opposed to the first fill of an order. There is no evidence Ms. Dircks distinguished between these situations in her review of these tickets.

¶ 120 In her testimony in these proceedings, Ms. Dircks referred to her conclusion during her investigation that where two or more tickets were time stamped at the same time it was evidence that there was a violation of the Act. She referred to three examples of this from the collection of trade tickets from Leamington: three tickets which are time stamped July 1, three tickets which are time stamped July 2, and two tickets which are time stamped July 6 (for a total of 8 tickets). For all three dates, two tickets stamped with the same date and time represent a sale from the inventory account and an offsetting trade of the same shares to the client account out of inventory. Ms. Dircks appears to have interpreted these inventory transactions as being part of two separate orders from the same client. Again, there is no evidence she considered whether these tickets represented new client orders to sell, or allocations of existing inventory fills back to client accounts, or fills on existing open orders.

¶ 121 Ms. Dircks' evidence of her conversation with Mr. Hoang is vague with respect to what she told him were her concerns. It is not clear what Ms. Dircks told Mr. Hoang she had found out in Leamington or what Mr. Hoang would have understood were Ms. Dircks concerns. Ms. Dircks testified she told Mr. Hoang that there had been a violation of the conditions of registration, but it is not clear she outlined what the violation was. She did not recall referring to 33-705.

¶ 122 As with the earlier discussion with KD, we cannot conclude that Ms. Dircks distinguished in her conversation with Mr. Hoang, or in her evidence relating to this conversation, between accepting orders from clients and doing other things relating to those orders. It leaves open the very real possibility that Mr. Hoang would not have understood her concern, or that he and Ms. Dircks misunderstood each other. This could explain why, as both Mr. Hoang and Ms. Dircks testified, Mr. Hoang did not say very much.

¶ 123 We are also not satisfied that Ms. Dircks' August 15 email was accurate. In addition to our concern about whether she accurately assessed what was occurring, the statement in her email that "Karen has not had any contact with clients" is not supported by her evidence of what both KD and Mr. Hoang told her. Her evidence of what they told her is more consistent with the conclusion that KD had initially had some contact with clients but that this changed because KD was hard to get hold of.

¶ 124 We have other concerns about Ms. Dircks' testimony. For example, she testified that she concluded on August 4 that the transactions for which KD time stamped tickets violated 33-705. There is, however, no evidence that she or anyone else contacted the clients to determine the beneficial ownership of the shares being sold on August 4 or took any other actions regarding these transactions. No action appears to have been taken until August 14, ten days later, to ensure that 33-705 was being complied with, other than telling KD on August 4 not to time stamp and write any more tickets on instructions from Mr. Hoang and Ms. Lenardon. Tickets continued to be written by KD during that period. If in fact it was clear to Ms. Dircks on August 4 that the time stamping practice was a violation of 33-705, we find it troubling that there was not more done before August 14 to ensure that the apparent violation did not continue.

¶ 125 In addition to the specific concerns we have noted, we recognize that Ms. Dircks' perception and recollection of what occurred on and after August 4 may have been influenced by a concern about her own supervision. Ms. Dircks was, at least in June, 2008, the person at FCCP responsible for ensuring compliance with 33-705. She issued to FCCP's employees a policy on 33-705 which largely repeated the contents of the Interpretation Note. She believed that 85 to 90% of Mr. Wiltshire's business "constituted sellers that would involve [33-705]" and that the Calgary and Leamington offices were set up in response to 33-705. She knew Mr. Wiltshire worked primarily in BC and employed two assistants in BC. Despite knowing these facts, she did not include in the policy any guidance about how the brokers in various provinces dealing with Mr. Wiltshire's clients were expected to ensure they complied with and did not undermine 33-705. She could not recall any other policy relating to this.

¶ 126 KD was a new registrant and employee of FCCP during the Relevant Period. Ms. Dircks understood

that Mr. Wiltshire had chosen and hired KD to assist him. KD was working on her own as the only registrant in the Leamington office. KD did not receive any training from FCCP beyond the standard 30 day CSI IR training, which was conducted by Ms. Dircks and another individual. She did not, for example, receive training specifically directed at FCCP's policy and procedures manual or training aimed at ensuring she understood how 33-705 might impact her role within the firm or the business with which she was assisting Mr. Wiltshire.

¶ 127 Ms. Dircks' first visit to the Leamington office and her first meeting of KD was on August 4, five months after the office opened. Ms. Dircks identified an issue with how the tickets were being completed within a short time of being in the office. We conclude that she would have recognized from the outset that her supervision could be an issue. In the end, she was investigated in connection with her supervision at FCCP and interviewed in connection with this matter.

¶ 128 Even if we had accepted Ms. Dircks' testimony as reliable, it would not establish that Mr. Hoang accepted orders in Cloverdale or that orders he personally received in Cloverdale were not subsequently accepted in Leamington or Calgary. Ms. Dircks' testimony of what KD and Mr. Hoang told her is consistent with there having been a period of time when KD contacted clients to accept orders which were originally directed to Mr. Hoang (and does not address whether Mr. Ponsford contacted clients). We do not know which orders to sell OTC securities Mr. Hoang received. As we have discussed above, there may have been few such orders. Mr. Hoang may not have received any such orders after KD stopped contacting clients (if in fact this was what occurred).

¶ 129 If we had accepted Ms. Dircks' testimony as establishing that orders were received in Cloverdale and not referred to KD, it would lead to a question whether, even if Mr. Hoang did not accept orders in Cloverdale, he may have been aware that others in Cloverdale were doing so and assisting in this. This could, if it occurred, be a violation of Mr. Hoang's obligations. However, the evidence (even if we had accepted it) merely raises the question, it does not prove this occurred.

## **8. July 17, 2009 trade**

¶ 130 IIROC tendered evidence in connection with a sale of OTC securities on July 17 which it argued established that Mr. Hoang contacted a market maker. IIROC argued that this supported Ms. Dircks' conclusion that 33-705 had been breached. We have addressed this evidence in more detail in relation to Count 2. However, even if it established that Mr. Hoang placed this order with the market maker (which it does not), it would not establish that Mr. Hoang had accepted the order from the client or that Mr. Hoang breached 33-705.

### **C. Count 2**

¶ 131 IIROC alleges in Count 2 that:

On or about June 16, 2010, Hoang did not respond truthfully or completely to questions posed to him during the course of IIROC's investigation into the circumstances relating to Count 1, thereby concealing information reasonably required for IIROC's investigation, contrary to Dealer Member Rule 19.6 and engaging in conduct unbecoming and detrimental to the public interest, contrary to Dealer Member Rule 29.1.

¶ 132 We understand from the Notice of Hearing and IIROC's argument that this allegation relates to the following:

- Mr. Hoang's evidence that he referred orders to Mr. Ponsford and KD and did not himself accept orders to sell OTC securities;
- Mr. Hoang's evidence of his August 15 meeting with Ms. Dircks; and
- Mr. Hoang's evidence that he did not contact the market makers to place orders.

IIROC has alleged that Mr. Hoang did not respond truthfully or completely. It did not focus on the distinction between responding truthfully and completely. In considering this allegation, we have considered whether Mr.

Hoang's evidence was untrue, whether by omission or commission.

### **1. Mr. Hoang's evidence regarding the orders to sell OTC securities**

¶ 133 We concluded in relation to Count 1 that IIROC did not establish that Mr. Hoang accepted orders to sell OTC securities from the clients referred to in the Notice of Hearing during the Relevant Period. Mr. Hoang's evidence at the interview was not limited to these particular clients or to the Relevant Period. However, IIROC presented very little other evidence relating to transactions involving other clients or to the time period after the Relevant Period. The evidence does not establish that Mr. Hoang's interview evidence regarding whether he accepted orders to sell OTC securities was untruthful.

¶ 134 IIROC has argued that a March 24, 2009 message from Mr. Hoang to KD in which he said he had pinned KD with an order for RGLC is evidence that Mr. Hoang's statement at his interview that KD would have to contact the client to obtain particulars of orders was untrue. We disagree.

¶ 135 The interview question, read in context, referred only to sell orders by the specified offshore accounts. Mr. Ferguson began the series of questions in which it occurred by saying: "So let's talk about the orders. Did you receive sell orders from the offshore accounts?". Offshore accounts were defined at the interview to be six specific accounts. In our view, it was reasonable for Mr. Hoang to have concluded that, unless a question was specifically addressed to something else, it related only to sales of OTC securities by those clients.

¶ 136 Read in context, the message IIROC has highlighted appears to be a request that KD contact the market maker to buy 5000 shares of RGLC. The monthly statements of DGM (a client which was not within the scope of the interview but is within the scope of this Notice of Hearing) indicate that DGM was buying RGLC around this time. While we do not know if Mr. Hoang's request related to DGM's buying, this highlights the very real possibility that this message referred to a transaction which was not within the scope of the testimony given at the interview, either because it was not a sell order or because it was not from a client within the scope of the interview or both.

¶ 137 We conclude that the evidence does not establish that Mr. Hoang was untruthful in his evidence concerning whether he accepted orders.

### **2. Mr. Hoang's evidence of the August 15 meeting**

¶ 138 IIROC argues that there are a number of differences between Mr. Hoang's evidence and Ms. Dircks' evidence of their August 15 meeting. We have already outlined our concerns about Ms. Dircks' description of this meeting.

¶ 139 Mr. Hoang's evidence at the interview about this meeting suggests he recalled it being about the Leamington office. The fact that the Leamington office was closed two days later is consistent with that office having been the focus of the meeting. Mr. Hoang was vague on some details of what was discussed. He testified that he told Ms. Dircks she should discuss her concerns with Mr. Wiltshire. His evidence suggests he did not focus at the meeting on the details of what Ms. Dircks said and that he considered Ms. Dircks' concerns to be a matter better dealt with by Mr. Wiltshire.

¶ 140 There is no evidence that Mr. Hoang did recall the details which he testified he could not recall. Ms. Dircks, his compliance officer, was upset or angry during this meeting which was held on a weekend at Ms. Dircks' house. IIROC suggested that, because the meeting between Mr. Hoang and Ms. Dircks was significant, it is not believable that Mr. Hoang did not recall the details of it. We do not agree. As with a meeting in which one receives bad medical news, it does not necessarily follow that one recalls what has been said at a meeting simply because it was significant.

¶ 141 Mr. Hoang was a junior member of Mr. Wiltshire's team. We consider it likely that he was quiet and that he focused on trying to redirect Ms. Dircks' concerns for Mr. Wiltshire to deal with, rather than on what Ms. Dircks was saying. This is even more likely if it was not clear to Mr. Hoang exactly what Ms. Dircks' concern was or if the concerns Ms. Dircks described did not accord with what Mr. Hoang understood had occurred. The evidence does not establish that Mr. Hoang was untruthful in his testimony about the meeting.

¶ 142 One of the particular discrepancies IIROC has identified in its argument relates to whether Mr. Hoang made reference to Mr. Wiltshire during the meeting. Ms. Dircks testified he did not. Mr. Hoang testified that he told Ms. Dircks that she should discuss her concerns with Mr. Wiltshire. The meeting was about how Mr. Wiltshire's business was being conducted. It related to his clients. Mr. Hoang worked for Mr. Wiltshire. KD was Mr. Wiltshire's choice to work in the Leamington office. By the time Ms. Dircks wrote her email to a board member on the same day she spoke to Mr. Hoang, Ms. Dircks had concluded Mr. Wiltshire received sell orders from clients. We think it is more likely that Mr. Hoang tried to redirect Ms. Dircks' concerns to Mr. Wiltshire than that he did not refer to Mr. Wiltshire.

### **3. Mr. Hoang's evidence regarding entering orders and contacting market makers**

¶ 143 Mr. Hoang testified at his interview that he did not enter any OTC BB sell orders for the clients identified at the interview. From the context of this evidence, we conclude that he meant he did not enter orders to the market maker for the sales in question as he also testified that he did enter trade details into the ISM system. Mr. Hoang also testified he did not phone the market makers to place the sell orders which were the subject matter of the interview but that he contacted market makers with respect to other matters. IIROC argued that Mr. Hoang's evidence was not true.

¶ 144 IIROC relied on evidence it obtained during its investigation from BTIG, a market maker which filled an order for FCCP on July 17, 2009. BTIG provided its order ticket for a sale of 50,000 shares of MNAP. The order ticket shows four separate entries related to this sale. Three of these entries appear to have been recorded in close succession; the fourth appears to have been recorded about 20 minutes later. Mr. Ferguson testified that RW, the managing director of BTIG, told him that this order originally came to BTIG to sell 10,000 shares and was subsequently changed to an order to sell 50,000 shares.

¶ 145 The first two entries on the order ticket relating to this transaction contain nothing in the Order Notes section. The third and fourth entries include in the Order Notes section the name "David". The three other entries which are on the pages we were provided (which are not for trades by FCCP) contain nothing in the Order Notes section.

¶ 146 IIROC had also asked BTIG to provide any supplemental information or record of the trade which might identify the specific individual at FCCP who placed the order or conducted the trade. BTIG advised that there was nothing additional to the order ticket. Mr. Ferguson made notes of a subsequent conversation with RW. These notes state that "there is no record of who placed the order other than the institution".

¶ 147 IIROC also relied on the fact that there is no record in the Leamington office phone records of a call to the market maker on this date as supporting the conclusion that Mr. Hoang contacted the market maker. The absence of a record of the July 17 call from the Leamington office phone records proves only that KD did not call the market maker on her office phone. It does not prove that KD did not contact the market maker in some other way or that one of the other registrants did not contact the market maker.

¶ 148 Instant messages from March 24 and 25, 2009 evidence KD calling market makers to place orders on those days. The Leamington office phone records do not show any calls with market makers on those days. We conclude that at times KD contacted market makers by some method other than her office phone.

¶ 149 The notation "David" in the market maker's Order Notes could refer to David Hoang and could indicate he placed the order. It also could indicate Mr. Hoang contacted the market maker after the initial order was entered, that whoever contacted the market maker asked that the fill be confirmed to Mr. Hoang, or something else altogether. The evidence from BTIG suggests that RW did not interpret the notation in the Order Notes as indicating who placed the order. We find that the evidence does not establish that Mr. Hoang contacted the market maker to place this order.

¶ 150 While there is evidence in the instant messages of Mr. Hoang contacting market makers, we are unable to conclude that he entered to or phoned the market maker to place the sell orders which were the subject matter of the interview. The evidence does not establish that Mr. Hoang was untruthful about this.

#### ***D. Count 3***

¶ 151 IIROC alleges in Count 3 that:

On or about March 30, 2011, Hoang failed to attend and give additional information in respect of an investigation being conducted by IIROC, contrary to Dealer Member Rule 19.5.

¶ 152 Mr. Hoang was interviewed in June, 2010. By February, 2011, IIROC had obtained additional information on the basis of which Mr. Hoang became a subject of the investigation. IIROC sought to interview Mr. Hoang again.

¶ 153 Mr. Hoang was aware in February, 2011, that he was under investigation by IIROC and that IIROC wanted to speak with him. He had counsel and agreed to attend an interview scheduled for February 23, 2011. The interview was originally scheduled to be held in Calgary where Mr. Hoang worked. It was rescheduled to Vancouver at the last minute to accommodate Mr. Hoang.

¶ 154 Late in the evening on February 22, 2011, Mr. Hoang's counsel sent an email to Mr. Ferguson advising him that:

I have heard from Mr. Hoang and unfortunately he is unable to attend the interview tomorrow. Please feel free to contact him directly as I am no longer acting for him.

¶ 155 Upon receiving this email on the morning of February 23, 2011, Mr. Ferguson telephoned Mr. Hoang who was, at that time, in his office in Calgary. Mr. Hoang reiterated that he would not be attending the interview but, when pushed for a new interview date, said he would get back in touch with Mr. Ferguson. This call occurred shortly after 8:22 am PST.

¶ 156 Mr. Hoang quit Global Maxfin that day. The National Registration Database (NRD) form showing his termination records that various IIROC offices had received notice of the termination by 12:18 pm ET on February 23, 2011.

¶ 157 Mr. Ferguson sent a fax to Mr. Hoang at Global Maxfin at 11:43 PST time that day. Mr. Ferguson later spoke with a woman at Global Maxfin's office who told him she had seen Mr. Hoang that day. Although she was aware of the letter, she did not say that Mr. Hoang had received it. She told Mr. Ferguson she believed she had seen Mr. Hoang around noonish.

¶ 158 We conclude that Mr. Hoang had quit by 9:18 am PST time on February 23, 2011 and that he may not have received the letter sent to Global Maxfin's office at 11:43 PST that day.

¶ 159 Mr. Ferguson also sent a registered letter to Mr. Hoang's address on file with the NRD. That letter was signed for by the concierge at the building on February 25, 2011. This building was also the address on the NRD database for Mr. Ponsford. We do not know if they were both in fact living there and if anyone else may also have lived there. While a manager for the building advised Mr. Ferguson that the concierge would ordinarily take steps to deliver a package or put a notice that a package had been delivered in a suite, there was no evidence that the concierge actually followed this policy for the letters from IIROC or that Mr. Hoang actually received this letter.

¶ 160 On March 14, 2011, Mr. Ferguson sent a further letter to Mr. Hoang at the same address. This letter compelled Mr. Hoang to attend an interview on March 30, 2011. This letter was signed for by the concierge on March 15, 2011.

¶ 161 The March 14, 2011 letter was sent to the address IIROC had for Mr. Hoang about three weeks after Mr. Hoang quit Global Maxfin. There was no evidence whether Mr. Hoang remained in Calgary or remained in touch with Mr. Ponsford after quitting his job. Mr. Hoang had moved to Calgary in late May or early June, 2010. There is no evidence he had ties to Calgary beyond his job. Indeed, the evidence suggests his family ties were in BC.

¶ 162 Mr. Hoang did not attend the March 30, 2011 interview or contact IIROC again. However, approximately a year later, on the eve of the initial hearing date in this proceeding, counsel contacted IIROC on his behalf. Although the hearing did not actually commence on the merits for another 6 months, neither IIROC nor Mr. Hoang's counsel raised with the other the outstanding interview request.

¶ 163 We find that the evidence does not establish that Mr. Hoang received the March 14 letter or that Mr. Hoang was aware that IIROC had reset the interview for March 30.

¶ 164 Mr. Hoang is alleged to have failed to attend the March 30 interview. Given our finding that the evidence does not establish that he was aware the interview had been reset for this date, we must determine whether he had a duty to do something which, if he had fulfilled the duty, would have resulted in his being aware of the March 30 interview.

¶ 165 Rule 19.5 says, in part, that a registered representative may be required by IIROC to “attend and give information respecting any [investigation]” and that the registered representative “shall be obliged ...to attend, accordingly...”.

¶ 166 Previous decisions such as *Re: Morrison* (2009) IIROC 4, *Re: Bassett* [2005] IDACD No. 26 and *Re: Mirza* (June 19, 2007) have commented on the duty of registrants to cooperate during IIROC’s investigations. Counsel for Mr. Hoang agreed that a reasonable level of cooperation is necessary and important but argued that Mr. Hoang met that standard.

¶ 167 We agree that registrants must provide a reasonable degree of cooperation with IIROC’s efforts to interview them. What is reasonable will depend on the facts of the particular case. A former registrant would not ordinarily be required to remain in touch with IIROC in case IIROC wanted to interview him. In the particular circumstances of this case, however, we conclude that Mr. Hoang had a duty to remain in touch with IIROC to reschedule the interview. Mr. Hoang had unilaterally refused to attend the February 23 interview, which he had no right to do. He knew IIROC still wanted to interview him. Mr. Hoang said he would contact Mr. Ferguson about this. He then quit his job, making it more difficult for IIROC to get in touch with him.

¶ 168 Had Mr. Hoang contacted Mr. Ferguson as he had said he would, Mr. Hoang would have been aware of the March 30 interview. On this basis, we conclude that on or about March 30, 2011, Mr. Hoang failed to attend and give additional information in respect of an investigation being conducted by IIROC, contrary to Dealer Member Rule 19.5.

## **V. Summary of Findings**

¶ 169 We have not found that Mr. Hoang failed to comply with BC Interpretation Note 33-705. We also have not found that Mr. Hoang failed to respond truthfully or completely to questions put to him at his June 2010 interview. We have found that on or about March 30, 2011, Mr. Hoang failed to attend and give additional information in respect of an investigation being conducted by IIROC, contrary to Dealer Member Rule 19.5.

Dated at Vancouver, BC, this 1st day of November, 2012.

Catharine Esson, Chair

L. Karen Henderson, Member

J. Chris Lay, Member

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