Re Biduk

IN THE MATTER OF:

The By-Laws of the Investment Dealers Association of Canada

and

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

and

Roger Michael Biduk

2013 IIROC 47

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

Heard: June 27, 2013
Decision: August 21, 2013

Hearing Panel:
The Honourable Benjamin J. Greenberg, Q.C., C. ARB., Chair, Mr. Michel Duchesne, Mr. Denis Marc Gagnon
Appearances:
Maître Sébastien Tisserand, (**the** "Enforcement Counsel") on behalf of IIROC and the IDA

UNANIMOUS DECISION ON THE SANCTIONS

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DEFINITIONS

¶ 1 Unless otherwise defined herein, the terms that have been defined in our UNANIMOUS DECISION ON THE MERITS dated April 23, 2013 shall have the same meaning when employed herein.

HISTORY OF THE PROCEEDINGS

¶ 2 It is useful to summarize the proceedings engaged in the present case, as well as, where applicable, the disposition of same.

¶ 3 At the time that the subject matter of the five complaints herein took place, the RESPONDENT was a Registered Representative ("**RR**") in the employ of UNION SECURITIES LTD. ("**UNION**"). Both UNION and the RESPONDENT were at all times relevant herein subject to the regulatory authority of, firstly, the IDA and then IIROC.

¶ 4 During the period from December 1, 2007 to August 20, 2008, four of the five Clients of the RESPONDENT described below filed a complaint against him.[1] The IDA processed and investigated those complaints until June 1, 2008, when the IDA and Market Regulation Services Inc. were merged to create IIROC. Thereafter, IIROC continued the investigation and the enforcement of those complaints against the RESPONDENT.

¶ 5 In order to protect the privacy of those five Clients of the RESPONDENT, each of them has been assigned a letter identification and will be referred to herein as "Client A", "Client B", "Client C", "Client D" and "Client E".

¶ 6 Upon the receipt of the complaints against the RESPONDENT, the Enforcement Department of the IDA commenced to investigate them and IIROC later continued those investigations. The IDA sought and received various information and documents from UNION.[2] After IIROC took over those complaints, the five Clients and the RESPONDENT were interviewed/interrogated under oath by Mr. Stéphane Gauthier, the investigator in the employ of IIROC who was assigned to this case.[3]

¶ 7 In addition to being carried out under oath, each interview/interrogation by Mr. Gauthier was effected in the presence of another IIROC investigator and was also videotaped and thereafter transcribed by an Official Court Reporter/Stenographer.

¶ 8 The interviews/interrogations of the RESPONDENT on July 7, 2009 and of Client B on January 19, 2010 were in the additional presence of IIROC investigator, Mr. Colin Lovegrove. Also present at the RESPONDENT's interview/interrogation was his then attorney, Maître Sébastien Caron. (See, respectively, Exhibits P-33 and P-145); those of Clients D and E together on February 24, 2009, of Client C on February 27, 2009 and of Client A on March 3, 2009 were all in the additional presence of IIROC investigator, Mr. Nicolas D'Astous (see, respectively, Exhibits P-79, P-64 and P-123).

¶ 9 After the investigations of those five complaints against the RESPONDENT were completed, the "Complex Track" disciplinary proceedings herein were instituted against the RESPONDENT by way of a "Notice of Hearing" dated February 9, 2012 signed for IIROC by Ms. Carmen Crépin, its Vice-President for the Province of Québec.

¶ 10 In addition to setting out in very extensive and elaborate detail the specific acts of which the RESPONDENT was accused, the Notice of Hearing advised him that a Preliminary Hearing would be held at 10:00 AM on February 28, 2012 at IIROC's Montreal Office, 5 Place Ville Marie, Suite 1550.

¶ 11 Moreover, on February 8, 2012, the Hearing Coordinator of IIROC sent the usual form of "Memorandum" to the Enforcement Counsel and the three Members of the Hearing Panel, informing them that the Preliminary Hearing would take place in the Boardroom at IIROC's said Montreal office on the date and at the time indicated in paragraph [10] above.

¶ 12 The affidavits sworn by Maître Tisserand and his assistant, both dated February 16, 2012 and, as well, the certificate of Bailiff Robert Charles Lortie dated February 14, 2012, all of which were filed with the Hearing Panel, offered mute testimony of the difficulties experienced by the Enforcement Counsel in his efforts to serve the proceedings herein to the RESPONDENT.

¶ 13 In the result, by way of a further "Memorandum" on February 21, 2012, the Preliminary Hearing before

[1] Three of them addressed their complaints to UNION and the fourth one to the *Autorité des Marchés Financiers* ("**AMF**"). See Exhibits P-49, 67, 81, 91 and 103. UNION referred to the IDA the complaints of the three Clients that had been addressed to it.
[2] See Exhibits P-8, P-10 and P-94.
[3] As well, Client A was interviewed/interrogated together with her husband, even though he was at no time a client of the RESPONDENT.

the Hearing Panel herein was re-set for and took place on March 20, 2012, however in the absence of the RESPONDENT. At the Hearing, the Enforcement Counsel satisfied us that the RESPONDENT had received due Notice and surely was aware that the Preliminary Hearing in his case was re-scheduled to be held on March 20, 2012.

¶ 14 At the Preliminary Hearing which took place on March 20, 2012, we set in motion the fixing of the dates of the Merits Hearing and, as the transcript of the Preliminary Hearing clearly reveals, we "bent over backwards" and went to extraordinary lengths in order to:

(a) assure ourselves that the RESPONDENT would have clear and adequate Notice of the date, time and place of the Merits Hearing; and

(b) offer to him every encouragement possible to attend at and participate in the Merits Hearing;

all to no avail.

¶ 15 For example, we directed the Enforcement Counsel to arrange to have the Notice of the Merits Hearing sent to the RESPONDENT by regular mail to his known address, since it had been observed in previous instances that the RESPONDENT had evaded registered mail. As well, although the Procedures and Regulations of IIROC do not require or provide for it, we directed the Enforcement Counsel to also send to the RESPONDENT a copy of the transcript of the Preliminary Hearing, at which the Chairman of the Hearing Panel made the effort to speak in English for the eventual comprehension by the then absent RESPONDENT, as in the past he had complained that he could not understand the proceedings as he could neither speak nor read French.

¶ 16 At page 14 of the Notice of Hearing we find the following paragraphs:

> *"**RESPONSE TO NOTICE OF HEARING***
>
> ***TAKE FURTHER NOTICE** that Respondent must serve upon IIROC Staff a Response to the Notice of Hearing in accordance with Rule 7 of the Rules of Practice and Procedure, within twenty (20) days (for a Standard Track disciplinary proceeding) or within thirty (30) days (for a Complex Track disciplinary proceeding) from the effective date of service of the Notice of Hearing.*
>
> ***FAILURE TO RESPOND OR ATTEND HEARING***
>
> ***TAKE FURTHER NOTICE** that, if Respondent fails to serve a Response or attend the hearing, the Hearing Panel may, pursuant to Rules 7, 2 and 13.5:*
>
> *(a) proceed with the hearing as set out in the Notice of Hearing, without further notice to Respondent;*
>
> *(b) accept as proven the facts and contraventions alleged by Staff of IIROC in the Notice of Hearing; and*
>
> *(c) order penalties and costs against Respondent pursuant to Dealer Member Rule 20.33, 20.34 and 20.49."*

¶ 17 However, in spite of all our efforts in that regard, when the Merits Hearing was held on October 16 and 17, 2012, it was again in the absence of the RESPONDENT.[4]

¶ 18 Moreover, at no time until this day has the RESPONDENT complied with the first of the two paragraphs of the Notice of Hearing that are cited *in extenso* at paragraph [16] above.

¶ 19 As the RESPONDENT had not produced a Response or entered a Plea, the Hearing Panel proceeded at

[4] As for the propriety and justification for holding a Hearing in the absence of a respondent, see at paragraphs [47] to [49] below.

the Merits Hearing on the basis that the RESPONDENT was presumed to have denied all the allegations made against him and to have pleaded "not-guilty" to both counts.

¶ 20 Consequently, the Enforcement Counsel was called upon at the Merits Hearing to prove IIROC's Case against the RESPONDENT.

¶ 21 After having deliberated on the Merits stage of the proceedings herein, on April 23, 2013, the Hearing Panel issued its UNANIMOUS DECISION ON THE MERITS, wherein the RESPONDENT was declared to be guilty on both counts that IIROC had brought against him.

¶ 22 Those two counts read as follows:

> *"1. Between February 2006 and May 2008, the Respondent failed to know many of his clients, and to define their investment objectives and risk tolerance according to the personal and financial circumstances of each client, contrary to IDA Regulation 1300.1 (a);*
>
> *2. Between February 2006 and May 2008, the Respondent failed to exercise due diligence by recommending to many of his clients a high-risk trading strategy that was inappropriate to his clients' personal and financial circumstances, contrary to IDA Regulation 1300.1 (q)."*

THE SANCTIONS HEARING

¶ 23 After the UNANIMOUS DECISION ON THE MERITS herein was issued on April 23, 2013, again in order to encourage the RESPONDENT to attend at and participate in the Sanctions Hearing, similar efforts were made to inform the RESPONDENT of our said DECISION and of the Sanctions Hearing that was firstly scheduled to take place on June 13, 2013 at IIROC's Montreal Office.

¶ 24 Because of certain technical difficulties, on June 12, 2013 the Sanctions Hearing scheduled for June 13, 2013 was cancelled and, in concert with the three Members of the Hearing Panel, on June 13, 2013 IIROC's Hearing Coordinator re-scheduled the Sanctions Hearing to take place on June 27, 2013 at IIROC's Montreal Office.

¶ 25 At 10:00 AM on June 27, 2013, the three Members of the Hearing Panel, Enforcement Counsel for IIROC and the Court Stenographer attended at IIROC's Montreal Office but, true to form, the RESPONDENT was again absent.

¶ 26 At the Sanctions Hearing, Enforcement Counsel for IIROC satisfied the Members of the Hearing Panel that the RESPONDENT had received a copy of our UNANIMOUS DECISION ON THE MERITS of April 23, 2013 and that he had also received due Notice of and was surely aware that the Sanctions Hearing in his case had originally been scheduled to take place on June 13, 2013 and then re-rescheduled to June 27, 2013.[5]

¶ 27 At that June 27, 2013 Hearing, as had been the case for the Merits Hearing that had taken place on October 26 and 27, 2012, the Members of the Hearing Panel again decided to proceed with the Sanctions Hearing in the absence of the RESPONDENT.

¶ 28 At the Sanctions Hearing Maître Sébastien Tisserand, the Enforcement Counsel for IIROC, did not present any witnesses but produced three Exhibits, S-1, S-2 and S-3,[6] and then made oral submissions in argument. At the conclusion of his oral argument, we took the matter *en délibéré.*

DISCUSSION

¶ 29 Enforcement counsel presented IIROC's requests and suggestions as to the SANCTIONS to be imposed upon the RESPONSENT, as follows:

a. A fine of $125,000 covering both Counts brought against him;

[5] See Exhibit S-2.
[6] See references to same at footnotes 5 above and 7 below and at paragraph [44] below.

b. Disgorgement of the commissions of approximately $25,000 that the RESPONDENT had earned from the stock market transactions that he had effected for his Clients A, B, C, D and E;

c. A suspension of approval for five years;

d. To pay to IIROC the sum of $25,000 on account of its costs (which in fact substantially exceeded that amount)[7];

e. If the RESPONDENT were to seek approval after the expiration of his five-year suspension, that he be required to pass the exam in the "Conduct and Practices Handbook Course"; and

f. If the RESPONDENT were to meet all of the above elements and resume his activities as an employee of a "Member" that is subject to regulation by IIROC, that he operate during 12 months under strict supervision and then during a further 12 months under close supervision.

¶ 30 It is quite proper and appropriate for counsel for IIROC (and, when applicable, for counsel to a represented respondent) to make recommendations on sanctions to a hearing panel. Yet, although we must consider the recommendations of counsel, we are not bound by any such recommendation. We must exercise our own discretion and judgment. We can impose more than or less than counsel suggest in each segment of the Sanctions.

¶ 31 In the field of criminal law, here is what the Québec Court of Appeal has ruled in that regard[8]:

> *"Is there any need to repeat here the remarks of the majority of the judges of our Court…. In R. v. Mouffe, on November 4, 1971 (unpublished) "Counsel for the Crown evidently has the right to suggest a sentence, but it is the privilege of the Court to either accept or reject the suggestion."* (Translated from the original French.)

¶ 32 We have considered the Sanction recommendations submitted by Counsel for IIROC.

¶ 33 Moreover, regarding the quality of appropriateness that every sanction imposed in an IIROC disciplinary proceeding ought to have, we can borrow again from the criminal law the following still-cited *dictum* of Justice Marchand of the Québec Court of Appeal in *R.* v. *Lemire et Gosselin*[9]*:*

> *"One can say that a sentence has that quality of appropriateness when it is both proportional to the objective gravity of the offense and to its subjective gravity for the offender and that, moreover, it provides the necessary curative correction and protective exemplarity. The objective gravity is described in the code; the subjective gravity of an act can vary according to the degree of the intelligence and the determination of the offender's will."* (Translated from the original French.)

¶ 34 Therefore, generally speaking any sanction imposed in the context of an IIROC disciplinary proceeding should have several factors as its goal. There is the rehabilitation of the offender, the consideration of the objective gravity of the infraction as well as its subjective gravity, its subjective deterrence in respect of the offender as well as its objective deterrence in respect of others who might be tempted to follow his example. We have considered, weighed and gauged all of those factors.

¶ 35 We have also considered all of the relevant factors in the RESPONDENT's subjective context. With

[7] See Exhibit S-3, in which are detailed the total costs of $117,389.05 incurred up to September 14, 2012. Thus, that amount did not take into account the costs incurred by IIROC for the Merits Hearing of October 16 and 17, 2012 nor for the Sanctions Hearing. It also did not reflect the fees paid by IIROC to the Members of the Hearing Panel throughout these proceedings.
[8] In *R.* v. *Fleury*, (1971) 23 C.R.N.S., 164, pages 168 and 169.
[9] 1 (1948) 5 C.R., 181.

regard to his previous convictions, we wrote the following at paragraph [25] of our UNANIMOUS DECISIOIN ON THE MERITS of April 23, 2013:

> *"On June 6, 2006, the RESPONDENT was found guilty on 3 counts by the disciplinary committee of the Chambre de la Sécurité Financière in their File No. CD00-0565. Those counts were:*
>
> *A. Having effected a trade that was not in the investor's interest, by converting RRSP investments to investments that did not reflect the financial circumstances and investment objectives of his Clients;*
>
> *B. Having forged or induced a third party to forge his Client's signature; and*
>
> *C. Having failed to cooperate and to reply promptly to correspondence from the syndic."*

¶ 36 Moreover, like Counsel for IIROC, we are of the opinion that he has shown little or no remorse and/or contrition.

¶ 37 In addition to being a "forger", throughout the events in this case and up until now, RESPONDENT has demonstrated and still demonstrates a warped view of the securities industry. This stems from the fact that, to this day, it would appear that he does not realize the consequences of the actions of which he has been found guilty in this matter, and that he does not recognize the harm caused by his actions described above.

¶ 38 We understand that our principal duty in this matter is to promote the integrity of the stock market and to protect investors. This leads us to conclude in favour of IIROC's commendations.

¶ 39 We have reviewed the applicable jurisprudence relating to the sanctions imposed by various IIROC hearing panels, with specific attention to the cases cited and commented upon by Maître Tisserand at the Sanctions Hearing, as well as in the Binder entitled "*RÉGLEMENTS ET AUTORITÉS*" and in his Memorandum entitled "IIROC's *NOTES & AUTHORITIES*", both of which he furnished to us prior to the Sanctions Hearing, namely:

A. Re. Gareau, 2011 IIROC 53 and 2011 IIROC 72, Tab 12;

B. Re. Harding, 2011 IIROC 65, Tab 13; and

C. Re. Wilson, 2011 IIROC 47, Tab 14.

¶ 40 Maître Tisserand also provided to us the "Disciplinary Sanctions Guidelines" of IIROC. Clearly, they are helpful to us, but they are not binding on us. They are simply what their title conveys: "Guidelines".

¶ 41 The determinatin of fit and proper sanctions involves a process of "weighing" and "blending". As the Chairman of the present Hearing Panel wrote in another context while exercising another function:

> *"[…] a fit and proper sentence is the result of a « wise blending » (le "savant dosage") of those considerations (deterrence, rehabilitation, and protection of society).*
>
> *In imposing the sentence herein, I have considered the objective gravity of the offences, the subjective gravity of those crimes in relation to each of the four accused, their respective ages and backgrounds, the absence or presence of any mitigating or aggravating circumstances, the salutary or exemplary effects of the sentence on each accused specifically and on others generally and, lastly, the possible rehabilitation of each accused."*[10]

¶ 42 One of the primary goals of the Sanctions to be imposed here is to serve as a general deterrent to others who might be tempted to emulate the acts perpetrated here by the Respondent.

¶ 43 Another, not unrelated, primary goal of the Sanctions to be imposed here is the general protection of

[10] *R.* v. *Maruska et als*, Quebec Superior Court, File no. : 500-27-007523-808, Sentence rendered on February 17, 1981.

society, with particular emphasis on the protection of the investing public.

¶ 44 The "Guidelines" provide a series of "key considerations when determining Sanctions". In our estimation, each and every one of them applies to the Respondent herein. They are:

A. Harm caused to Clients, Employer and/or the Securities Market:

There is no doubt that he caused serious harm to his Clients A, B, C, D and E, all of whom sustained major losses as a result of the investments recommended by him.

B. **Blameworthiness**:

He is highly blameworthy.

C. **Degree of Participation**:

The direct and only perpetrator.

D. **Extent to which the Respondent was Enriched by his Misconduct**:

Indeed he was.

E. **His Prior Disciplinary Record**:

See at paragraph [35] above.

F. **Acceptance of Responsibilities, Acknowledgement of Misconduct and Remorse**:

He has failed to acknowledge his misconduct herein and there is an apparent total absence of remorse.

G. **Credit for cooperation\negative consequences of failure to Cooperate**:

He failed to cooperate with IIROC's investigation and in regard to the Hearings herein.

H. **Voluntary Rehabilitative Efforts**:

There have been none of which we are aware. To the contrary, in Exhibit S-1, we see in part his recent effort to attract (a) lender(s) in regard to his current venture: “Best Cat and Dog Nutrition” at the ludicrous rate of return of 30% per annum plus 10% profit-sharing.[11]

I. **Planning and Organization**:

His offences involved some planning and organization.

J. **Multiple Incidents of Misconduct Over An Extended Period of Time**:

That was clearly the case.

K. **Significant Economic Loss to the Client and/or Member Firm**:

Here, his clients/victims suffered major economic losses at the end of the day; and

L. **Vulnerability of Victims**:

As explained in our UNANIMOUS DECISION ON THE MERITS of April 23, 2013, the RESPONDENT preyed on the vulnerability of his victims.

¶ 45 Since the Sanctions Hearing, the three Members of the Hearing Panel have deliberated together and have reached their unanimous DECISION herein.

¶ 46 We are unanimously convinced that the RESPONDENT is a serious offender; that because of his attitude in failing to attend at all his Hearings we can conclude that he is incorrigible and there is no question of tailoring the Sanctions herein in such a manner as to encourage his rehabilitation. His potential rehabilitation is not in issue here. For the protection of Members, the investing public and society in general, the segment of the

[11] See also from line 12 at page 43 to line 6 at page 44 of the Transcript of the Sanctions Hearing on June 27, 2013.

Sanctions consisting of a suspension will be increased from what IIROC's counsel requested. As for the rest, other than the amount of the fine requested, which we will moderately reduce, the remaining Sanctions sought by counsel for IIROC will be imposed by us.

¶ 47 As we alluded to at paragraphs [99] and [100] of our UNANIMOUS DECISION ON THE MERITS of April 23, 2013, from the RESPONDENT's behaviour in failing to appear at all his Hearings herein, his strategy is clear to us. That strategy is: deny, deny, deny; delay, delay, delay and, "ostrich-like", evade, evade, evade; and hope that the problem will go away.

¶ 48 IIROC hearing panels have frequently sat and ruled in the absence of a respondent who was boycotting the proceedings.[12]

¶ 49 A respondent subjected to a disciplinary proceeding by IIROC cannot evade his professional and legal responsibilities by simply not showing up at the hearings.

CLOSING PROVISION

¶ 50 Each duplicate original of this DECISION, signed by the three Members of the Hearing Panel, is equally valid and authentic and may serve as such for all legal purposes.

THE CONCLUSIONS

¶ 51 FOR ALL THE FOREGOING REASONS:

We, the Members of the Hearing Panel, UNANIMOUSLY ISSUE the following **ORDER** to **IIROC** and **IMPOSE** the following **SANCTIONS** on the **RESPONDENT Roger Michael Biduk**:

A: We **ORDER IIROC** to **COMMUNICATE** this UNANIMOUS DECISION ON THE SANCTIONS to the RESPONDENT as soon as that can conveniently be effected; and

B: The **RESPONDENT** is hereby **SUSPENDED** from approval for the period of **TEN (10) YEARS** from the **PRESENT DATE;**

C: The **RESPONDENT** is hereby **ORDERED TO PAY the following amounts to IIROC** within 30 days from the date of this UNANIMOUS DECISION ON THE SANCTIONS:

(i) A **FINE of $100,000** covering both Counts brought against him herein;

(ii) **DISGORGEMENT of COMMISSIONS** in the amount of **$25,000**; and

(iii) **$25,000** on account of the **costs** incurred by IIROC in relation to the present proceedings;

D: If the **RESPONDENT** were to seek approval after the expiration of his ten-year **SUSPENSION**, he will be required to **PASS** the **EXAM** in the "**CONDUCT AND PRACTICES HANDBOOK COURSE"**; and

E: If the RESPONDENT were to meet all of the above elements and resume his activities as an employee of a "Member" that is subject to regulation by IIROC, he shall be subject to **STRICT SUPERVISION** during **12 months** and to **CLOSE SUPERVISION** during a further period of **12 months**.

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[12] See as an example the case of Brian Vaughn Wilson, IIROC No. 11-0242, 2011 IIROC 47, at paragraph 1, at Tab 14 of IIROC's "RÉGLEMENTATION ET AUTORITÉS" filed with us by Maître Tisserand, where we may read:
"Procedural Matters
1. Non-appearance of Respondent
¶ 1 On June 8th, the Respondent faxed a letter to counsel for IIROC which was made available to the panel members immediately prior to the set-date hearing on June 10, 2011. In this letter, the Respondent clearly stated that he would "not attend the hearing on June 10, 2011 nor will I be attending any other proceedings related to" this matter. In accordance with his letter, the Respondent did not appear at this hearing, but immediately prior thereto he provided to IIROC an affidavit to which was attached his letter of June 8, 2011 and a letter from his doctor which stated that she "did not recommend Mr. Wilson be exposed to any situation which subjects him to any undue stress or pressure." (Translated from the French version furnished to us by Maître Tisserand.)

THE SIGNATURES

AND WE HAVE SIGNED at Montréal, Québec on August 21, 2013:

"Benjamin J. Greenberg"

The Honourable Benjamin J. Greenberg, Q.C., C. ARB.,

Chairman of the Hearing Panel

"Michel Duchesne"

Mr. Michel Duchesne, Panel Member

"Denis Marc Gagnon"

Mr. Denis Marc Gagnon, Panel Member