Re Wilson

IN THE MATTER OF:

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

and

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

and

Brian Vaughn Wilson

2011 IIROC 47

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

Hearing: July 26, 2011
Decision: July 26, 2011
(39 paras.)

Hearing Panel:
Mr. Frederick Webber (chair), Mr. Charlie Macfarlane and Mr. F. Michael Walsh
Appearances:
Ms Natalija Popovic, Enforcement Counsel

HEARING PANEL DECISION

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." This letter had also been previously provided to IIROC, poor health being one of the reasons cited by the Respondent for his refusal to attend the proceedings. The Respondent's letter went on for a number of pages largely denying the allegations in the Notice of Hearing (NOH). Presumably the affidavit was intended to be the Respondent's formal evidence. IIROC counsel submitted the Respondent's affidavit as an exhibit.

2. NOH as Conclusive

¶ 2 Rule 13.5 of the IIROC Rules of Practice and Procedure (ROP) provides that "Where a Respondent, having been served with a Notice of Hearing, fails to attend a disciplinary hearing, the Hearing Panel may

proceed in the absence of the Respondent and may accept as proven the facts and violations alleged by [IIROC] in the Notice of Hearing." Counsel for IIROC asked the Panel whether it preferred to proceed under Rule 13.5 or to hear evidence from an IIROC witness. The Panel decided that it wanted to hear from the witness. The Panel felt this would be fairer to the Respondent since it would give the Panel an opportunity to question the evidence of the IIROC witness and refer to the Respondent's affidavit, in the absence of the Respondent.

3. Document and Witness List Disclosure

¶ 3 Counsel for IIROC advised the Panel that full document disclosure as required by the ROP had been made by IIROC. However IIROC had failed to comply with the requirements of Rule 11.1 of the ROP in regard to the witness it intended to call. Rule 11.3 provides that "If a party fails to comply with Rule 11.1, the party may not call a witness at the hearing without the leave of the Hearing Panel and on such terms as the Hearing Panel considers appropriate." Based on the discretion given to the Panel by Rule 11.3 and also relying on the powers granted by Rule 1.5, in order to best reach a fair and reasonable decision, the Panel decided that it would hear the IIROC witness but limit the witness to matters in the documents disclosed to the Respondent.

4. Respondent's Health

¶ 4 The Respondent has repeatedly referred to his health issues as a reason for not participating in the proceedings. IIROC counsel submitted to the Panel that the Respondent's health issues relate only to his participation in the hearing and not to the conduct in question. The Panel agrees with the submission and decided that the Respondent's health would not prevent this hearing from proceeding.

5. Conflict of Interest

¶ 5 The Respondent's letter of June 8, 2011 alleged that he would not receive a fair and impartial hearing by IIROC because his former employer, BMO Nesbitt Burns, is a member of IIROC. The Panel agreed with the position of IIROC, that there is no such conflict of interest because BMO Nesbitt Burns is in the same relationship to IIROC as is the Respondent.

Alleged Contraventions

¶ 6 IIROC alleged that:

From or about February 2006 to May 2009, the Respondent, while a Registered Representative:

(i) Failed to use due diligence to ensure that recommendations were suitable for his client, contrary to IDA Regulation1300.1(q) and IIROC Rule 1300.1(q); and

(ii) Engaged in unauthorized trading in the account of his client, contrary to IDA By-law 29.1 and IIROC Rule 29.1.

(i) Unsuitable Recommendations

¶ 7 IIROC Rule 1300.1(q) and IDA Regulation 1300.1(q) both provide;

Each Dealer Member, when recommending to a customer the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance.

¶ 8 The sole witness for IIROC was Mr. Brian Connell-Tombs (the Witness) who was the IIROC investigator on this matter. The facts and conclusions set forth in this decision are based on his testimony, the documentation provided to the Panel by IIROC counsel, the Respondent's affidavit and questioning by the Panel.

¶ 9 In or about January 2006 the Respondent opened an account for Gizele Mitchell (GM). The Respondent was a close family friend of GM's former spouse and had been the Registered Representative (RR) for a joint account for GM and her then spouse. The account for GM was opened to receive the proceeds of a divorce settlement obtained by GM of approximately $640,000. GM was then in her mid-forties, had a high school

education and one year of university (studying French), retired from farming, otherwise unemployed or occasionally working part-time, with four dependent children. The Respondent was fully aware of these circumstances.

¶ 10 GM received the new Client Account Agreement form (NCI) in the mail with the information sections already filled in by the Respondent's assistant, with instructions where to sign. The Respondent did not meet with GM to review the information (before or after it was signed by GM) and did not otherwise discuss the information with her. This is apparent from the transcript of the IIROC Statement of GM dated January 10, 2010 included in the IIROC Compendium of Documents (GM Statement) and reviewed at this hearing by the Witness who conducted the interview of GM which resulted in the GM Statement. This is also confirmed by the Respondent in his letter of June 8, 2011 where he states:

> "In retrospect, it would appear I failed to properly review the new account documents when GM opened her account; however it was standard practice in our BMONB office for the office manager and support staff to complete such forms. I do acknowledge, however it was my duty to review such documents for accuracy and I failed to do so as did my manager."

¶ 11 Furthermore there are several aspects of the NCI which were inaccurate or did not adequately reflect the investment knowledge or intentions of GM. Among other things, the NCI form indicated that

- the account was to be a margin account;
- GM's investment objectives were "aggressive growth";
- GM had "high/expert" investment knowledge.

¶ 12 In his letter of June 8, 2011, the Respondent states GM was "aware of margin as the previous joint account was a margin account" which was "carried over when GM's investment account was opened." However, in her GM Statement, GM states that she was unaware that she was opening a margin account and did not find out what it meant until it was explained by her lawyer after these proceedings were commenced. The use of a margin account increases the risk level of the account as well as the costs because of interest charges.

¶ 13 The NCI was inaccurate regarding GM's investment objectives. In the GM Statement, GM states that the "aggressive growth" investment objective shown on the NCI form absolutely did not reflect her investment objectives, which she then states to be "balanced". This is not contradicted by the Respondent's letter of June 8, 2011; the Respondent merely states that he "did not select the investment objectives. I am not aware as to who selected the investment objectives."

¶ 14 Lastly, the NCI was inaccurate in referring to GM's investment knowledge as "high/expert". This is apparent from the GM Statement and is confirmed by the Respondent's letter of June 8, 2011 where he states: "I would never consider GM to have 'high/expert' investment knowledge. I only became aware of this when I attended an IIROC examination in June 2010. I confirm it is my opinion that GM had 'limited/average' investment knowledge. In fact, I would agree with GM's assessment that GM had minimal investment knowledge…"

¶ 15 It is clear to this Panel that GM had limited experience in dealing with securities, had a "balanced" investment objective not "aggressive/growth", did not understand the added risk of a margin account, and had a low tolerance for risk, needing to preserve the capital in her account because of her family circumstances and her inability to earn additional income. It is also clear to this Panel that the Respondent did not do adequate due diligence to ascertain the proper investment profile for his customer, GM. The NCI for GM's account did not reflect her true investment profile.

¶ 16 The last aspect of this issue is whether the securities bought, sold and maintained in GM's account were suitable for GM, given her true investment profile. The NOH states that" the majority of the securities held in GM's account throughout the relevant time were speculative in nature in that they were predominantly small capitalized companies in the mining, or oil and gas sectors. Many had little or no financial or operating history." This characterization of GM's portfolio is not contradicted by the Respondent's letter of June 8, 2011. He first

states that "GM was aware of the risks and rewards of owning individual stocks", but does not challenge the characterization of the stocks in her portfolio as being "speculative". In fact he appears to agree with the characterization in the next sentence by stating that "GM had benefited…from the aggressive/speculative stocks in the…joint account of" GM and her then husband. The Witness reviewed with the Panel the list of securities held at any point in time in GM's account. While it is possible to argue about how many of these securities could be called "speculative" and about how speculative they might be considered, many of the stocks would be considered speculative or aggressive. The Panel agrees with IIROC that the portfolio could be considered speculative or aggressive, and certainly inappropriate for GM.

¶ 17 Part of the case against the Respondent was that he failed to advise GM that he knew that withdrawals from her account could not be sustained by the return on investment. In or about February 2006, GM started withdrawing $5000 per month from the account for living expenses. In the GM Statement, GM states that she often asked if this amount was too much and was told that it was an acceptable, safe amount because the return on the investment compensated for the amount being withdrawn. In his letter of June 8, 2011, the Respondent states that it was GM's choice to withdraw this amount, that he was concerned about the amount being withdrawn, but was less concerned because of a substantial inheritance she would eventually receive. However, in his Respondent Statement he acknowledges that even though he knew about the future inheritance, he was not "gearing the portfolio around something in the future…with regard to an inheritance side of things." He states that he never assured GM that the $5000 withdrawals were satisfactory, it was more a matter of this amount being necessary for GM to live on. However, in his interview with IIROC dated June 3, 2010 (Respondent Statement), the Respondent states that he "knew it was too much money to take out of the Account" and, in response to her inquiries, did not advise GM that it was too much. The Respondent Statement also shows that he did not do an Investment Policy Statement or Financial Plan for GM or discuss with her the rate of return necessary on the account to support the withdrawals and maintain the capital. The Panel has concluded that the Respondent did not advise GM that the Account was not generating enough returns to support the $5000 per month withdrawals or other lump sum withdrawals made, and was remiss in not doing so.

¶ 18 The withdrawals from the account together with interest expenses due to margin borrowing, margin calls, commissions and loss on the investments of $220,000 resulted in GM's account being depleted from approximately $640,000 to approximately $60,000.

¶ 19 It is this Panels conclusion that the Respondent was in breach of IDA Regulation 1300.1(q) and IIROC Rule 1300.1(q) as alleged by IIROC.

(ii) Unauthorized Trading

¶ 20 The second allegation by IIROC is that the Respondent engaged in unauthorized trading in GM's account contrary to IDA By-law 29.1 and IIROC Rule 29.1 which provide in essence that

> "each…registered representative…(i) shall observe high standards of ethics and conduct in the conduct of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest…."

¶ 21 The NOH states that GM learned of trading in her account only after the fact, usually from reading the trade confirmations; she did not instruct the Respondent to buy or sell any securities and he rarely, if ever contacted GM prior to executing a purchase or sale of securities. GM relied solely and completely on the Respondent's judgment and knowledge and did not question the activities in her account. The Respondent completed the transactions in GM's account without her knowledge or consent.

¶ 22 In his letter of June 8, 2011, the Respondent takes "strong exception to GM's assertion that she learned of trading activity …only after the fact" and says that he "spoke to GM and discussed each and every trade with GM prior to making any trade….If BMONB's phone records and GM's telephone records are examined and correlated to the date of each trade in GM's account, it will no doubt prove conclusively that I called and discussed each trade with GM prior to making any trade…."

¶ 23 The witness testified that the phone records from the Respondent's phone to GM and from GM to the

Respondent had been made available to the Respondent as part of the IIROC document disclosure. The testimony was that there were 54 calls between the Respondent's number and GM's number from January 1, 2007 to May 2009. Of these, 18 were initiated by the Respondent and 36 by GM. 75 trades were made in this period over 57 trading days; 3 calls were made by BMONB prior to trades; 5 were made by GM prior to trades. There is no record of the content of these calls. Contrary to the position asserted by the Respondent, the phone records reveal that, at most, 3 of the 54 calls could have been initiated by the Respondent prior to a trade in GM's account. Furthermore, in her GM Statement and in a letter to BMONB dated September 23, 2009, GM's position is that at no time did the Respondent phone her to inform her of what he was buying or selling prior to it taking place.

¶ 24 It is also important to note that the account was not set up as a discretionary trading account and no one other than GM had trading authority in the account.

¶ 25 It is the decision of this Panel that it was the responsibility of the Respondent to get the consent of GM prior to making any purchases or sales in her account but he did not do so. Consequently he is breach of IDA By-law 29.1 and IIROC Rule 29.1 as alleged by IIROC.

Disciplinary Guidelines

¶ 26 IIROC counsel reviewed with the Panel the Dealer Member Disciplinary Sanction Guidelines (Guidelines). This Panel agrees with the statement in the guidelines that the main concerns when determining an appropriate penalty are protection of the investing public, the IIROC membership, the integrity of the IIROC process, the integrity of the securities markets and prevention of a repetition of conduct of the type under consideration. As stated in the Guidelines, sanctions should be based on the particular misconduct of the respondent with an aim of general deterrence which will be achieved if a sanction strikes an appropriate balance by addressing a registrant's specific misconduct, but also being in line with industry expectations.

¶ 27 The key considerations listed in the Guidelines which are applicable in the case are as follows.

Harm to client

¶ 28 It is clear in this case that the client suffered significant financial harm. Furthermore, a reading of GM's letter of complaint dated September 23, 2009 indicates that she was devastated by the conduct of the Respondent who she trusted and relied on and who was aware of her vulnerable personal circumstances.

Blameworthiness

¶ 29 The Respondents conduct was not unintentional or inadvertent and was repeated over a number of years.

Enrichment

¶ 30 The Respondent earned commissions of approximately $26,000 from activity in GM's account.

Acceptance of Responsibility

¶ 31 Other than his admission that he did not pay proper attention to the completion of the NCI form and his regret regarding the use of margin, the Respondent has not acknowledged the misconduct of his actions nor shown acceptance of responsibility, continuing to blame unforeseeable market conditions for the financial losses in GM's account.

Multiple Incidents of Misconduct Over Extended Time

¶ 32 The Respondent's misconduct took place over a 3.5 year period and involved approximately 120 trades initiated by the Respondent

Vulnerability of Victim

¶ 33 The client, GM was in a vulnerable position due to her lack of sophistication regarding investing, her recent divorce, her inability to earn income other than from the account, her responsibility for the financial support of her children as well as herself and her reliance on the Respondent for safe and balanced investment

decisions in order to preserve the capital in the account, all to the knowledge of the Respondent.

Significance of Economic Loss

¶ 34 The financial loss suffered by the client was very significant. The loss in the value of the securities together with commissions paid, interest on the margin, the margin call and the unsupportable withdrawals from the account resulted in the account declining from approximately $640,000 to about $60,000.

Prior Disciplinary Record

¶ 35 The only mitigating factor in this case is that the Respondent has no prior disciplinary record.

Order

¶ 36 IIROC counsel suggested the following penalty:

1. A fine of $75,000 for both charges;
2. Disgorgement of commissions earned in the amount of $26,000;
3. A 5 year suspension from registration with IIROC starting from the date that the Respondent left BMONB;
4. Costs of $10,000.

¶ 37 IIROC counsel advised the Panel that the actual costs incurred by IIROC were $22,000, but IIROC was requesting only $10,000 for costs because the process was streamlined since the Respondent did not actively participate.

¶ 38 IIROC counsel reviewed with the Panel 5 cases which were included in the IIROC Book of Authorities. Although none of these cases was identical to this case, each was instructive as to the proper penalty to impose on the Respondent, and taken together support the sanctions suggested by IIROC counsel. In addition to the sanctions suggested by IIROC counsel, the Panel decided that a rewrite of the qualifying examinations by the Respondent would be required if the Respondent wished to return to the industry, even though that appeared unlikely. The Panel felt that it was important to add this sanction as a precedent for future cases.

¶ 39 Accordingly the Panel orders the following sanctions against the Respondent:

1. A fine of $75,000 for both charges;
2. Disgorgement of the commissions earned in the amount of $26,000;
3. A 5 year suspension from registration with IIROC starting from the date that the Respondent left BMONB, May 8, 2009, provided that the Respondent may not thereafter become a registrant with IIROC without successfully rewriting the appropriate examinations;
4. Costs in the amount of $10,000.

Dated as of the 26th day of July, 2011

Fred Webber- Chairman

Charlie Macfarlane-Member

F. Michael Walsh- Member

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