Unofficial English Translation

Re Chher

In the matter of:

The Rules of the Investment Industry Regulatory Organization of Canada

and

The By-Laws of the Investment Dealers Association of Canada

and

Thi Sen Chher

2011 IIROC 79

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

Hearing held on December 15, 2011
Decision rendered on January 27, 2012
(61 paragraphs)

Hearing Panel:
Jean Martel, Ad. E. (Chair), Gilles Archambault, Lise Casgrain
Appearances:
Me Sébastien Tisserand, Enforcement Counsel, for IIROC
Me André Gingras, Lawyer – Gatineau, for the Respondent

Decision on Penalty

¶ 1 In *Re Chher* [2011] IIROC 50 ("**Decision on the Merits**"), our Hearing Panel found the Respondent guilty of having, during the period from February 28, 2006 to May 4, 2006, misappropriated funds belonging to a client, for his own benefit. At the material time, he was a representative and an employee of National Bank Direct Brokerage Inc. (hereinafter referred to as "**NBDB**", the "**Dealer**" or the "**Firm**", as the case may be), at the time a Member firm of the Investment Dealers Association of Canada ("IDA"), contrary to IDA *By-law 29.1,* concerning *Business Conduct*.

¶ 2 At the material time, *By-law 29.1* provided that:

> *"29.1. Members and each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board of Directors."*

The Facts

¶ 3 This matter invited our Hearing Panel to decide whether the Respondent's conduct in his capacity as a representative of NBDB, when he acted both as attorney for his own mother and a representative of his firm for the provision of discount brokerage services to the latter, was in conformity or not with the principles of By-law

29 of the IDA.

¶ 4 To conclude in the negative, we had to distinguish between the two types of relationships that bound the representative to the client at the material times, and which overlapped:

(i) the relationships of provider and beneficiary of professional investment services, which are normally regulated by the securities legislation as though naturally conducted at arm's length; and

(ii) their family relationship, imbued with the values of unity, mutual support and trust, characteristic of the Chinese culture.

¶ 5 The situation created a special context (which we refer to hereinafter as the "**family circumstances**") which had to be taken into account in order to rule on the merits, and which remain relevant to the exercise of our jurisdiction over penalty.

¶ 6 Let us briefly review the most evocative facts and circumstances, citing certain passages from the Decision on the Merits:

> *"[65] In September 2001, the Respondent joined Courtage à Escompte Banque Nationale (which became Courtage Direct Banque Nationale Inc. (National Bank Direct Brokerage Inc.) in 2003) as an investment agent. NBDB is a discount brokerage firm which is registered in Quebec and a member of the IDA, which authorized the Respondent to act as a representative of the Firm. In consideration thereof, the Respondent agreed to observe the rules of the Association.*
>
> *[66] At NBDB, the Respondent acted for a time as a contact person for a group of financial planners who were employees of the network of individuals and commercial clients of the National Bank group in Quebec. He provided services to them in connection with securities transactions. The planners relayed buy or sell orders from their clients and the Respondent carried out their instructions by conducting all sorts of transactions for them and, where required, he confirmed that the trades had been authorized by the clients. […]*
>
> *[71] The Respondent was also a client of the Firm. He traded for himself on the securities market from accounts he maintained with his employer […]*
>
> *[75] Some of the clients assigned to him had powers of attorney and were thus authorized to act on behalf of account holders and give trading instructions that the Respondent then executed in the name of the Dealer. These were not self-directed accounts, discretionary accounts or professionally managed accounts, according to industry standards, and the persons giving instructions were generally not registered in this capacity with the securities authorities. They were simply agents acting as alter egos of the account holders. […]*
>
> *[77] Mr. Chher was therefore acceding to Mrs. C's request to create this type of relationship between them and they agreed that he would help her manage her investments, just as he managed his own. He did what any son would do for his mother, albeit within the contractual and regulatory framework which governed his employer and its representatives and employees. Hence, the application of IDA rules to the professional acts performed by the Respondent under his mandate.*
>
> *[78] Mrs. C became a client of NBDB on November 20, 2002. In the new client information form for her first discount brokerage account (Exhibit P-4-A), she indicated that her investment knowledge was limited and that she should not be viewed as a securities professional. We note that the account was a Canadian dollar cash account and that her investment objectives were conservative. At that time, there was no question of her engaging in riskier investments.*
>
> *[79] The brokerage agreement entered into by Mrs. C on the form marked P-4-A (Brokerage Agreement) provided that NBDB agreed to act solely as her agent for the purpose of*

executing buy, sell or other orders and, generally, conduct such transactions in securities as the client would relay.. […]

[82] […] Mrs. C agreed with her son, a securities professional, that he would watch over her interests. Indeed, on her new client application form, she mentioned that she granted him the authorization to trade in the account, and she granted him power of attorney the same day. This is the power of attorney marked P-5/D-10, conferred on a form entitled "Authorization to Trade or Power of Attorney" (POA), dated November 20, 2002.

[…]

¶ 7 Now, here is what transpired as of February 28, 2006, which resulted in the Respondent being found guilty of violating IDA By-law 29:

"[192] […] on dozens of occasions, the Respondent transferred monies from Mrs. C's accounts to his own accounts held with NBDB. These monies served to finance trades which were substantially more aggressive that those authorized by Mrs. C's investor profile (even after the amendment made at the request of the Respondent), or to compensate overdrafts in his accounts which the Respondent did not have the wherewithal to cover. […]

[199] […] we are left with 42 unauthorized transfers of funds initiated or effected by the Respondent. […]

[200] The Respondent would, in part, reimburse amounts drawn from his mother's accounts by transferring them back from time to time whenever the available funds generated in his accounts by his own transactions allowed him to do so. In his opinion, the transfers between his accounts and those of Mrs. C were consistent with the exercise of his powers as an attorney under the POA, based on a strategy he had agreed upon with Mrs. C for her benefit, in accordance with NBDB's General Procedure marked P-13-A concerning Monetary Transfers. For this reason, he maintains that they were consistent with the Policies and Procedures of the Dealer. […]

[205] The fact that he made sure she would know as little as possible about the way he availed himself of the authorizations under the POA shows that he acted with full knowledge of the facts when he abused his mother's trust, beginning in February 2006, by skimming off the assets entrusted to him to wipe his trading losses or reconstitute his PRO accounts. He risked his mother's assets on personal trades and she is the one who incurred the losses. […]

[208] Nothing however, indicates that the Respondent intended to defraud Mrs. C or steal her money as such. In all likelihood, he seems to have convinced himself for a time that, by trading in his own accounts and financing the same off his mother's accounts, he could realize gains that would allow him to repay what he had withdrawn without his mother's knowledge. When he realized that he could not do it, it was too late to escape the vortex of a system of accommodation that, first and foremost, served his own interests rather than those of Mrs. C.

[209] This system, we believe, made him breach his duty of loyalty to Mrs. C in that it caused him to use the available liquidity in her accounts in a way that the POA did not permit. Thus he strayed from exemplary standards of conduct which he knew well, which his Firm's Policies and Procedures (which he also knew very well) constantly endeavoured to enforce and, basically, from the standards that a client is entitled to expect his securities representative and dealer's employee to respect. Therefore, he violated the high standards of ethics and conduct imposed on him by IDA By-law 29.1.

[210] We believe the Respondent when he says he regrets having lost his way and the losses he caused his mother and his family to suffer. But the fact that the client yielded to her maternal instincts, forgave a son who undertook to repay the losses he caused her to incur,

and continues to include him in her businesses, does not relieve the Respondent of the consequences of the inappropriate conduct he engaged in as a securities representative and employee of the Dealer."

¶ 8 Finally, let us mention that at the Penalty Hearing, the Investment Industry Regulatory Organization of Canada ("**IIROC**") argued (with no objection from the Respondent) that the amounts misappropriated by the Respondent, as a result of transfers initiated or effected without authorization, total some $115,400, whereas the net loss recorded in Mrs. C's accounts at NBDB was around $53,000.[1]

Jurisdiction over penalty

¶ 9 The jurisdiction that allows us to determine and impose disciplinary penalties on the Respondent in this matter stems from the provisions of IIROC Dealer Member Rule 20.33 (2), *Hearing Processes*, which grants us broad discretion in this regard:

"[…] a Hearing Panel may impose any one or more of the following penalties upon the Approved Person:

(a) a reprimand;
(b) a fine not exceeding the greater of:
(i) $1,000,000 per contravention; and
(ii) an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention.
(c) suspension of approval for any period of time and upon any conditions or terms;
(d) terms and conditions of continued approval;
(e) prohibition of approval in any capacity for any period of time;
(f) termination of the rights and privileges of approval;
(g) revocation of approval;
(h) a permanent bar from approval ; or
(i) any other fit remedy or penalty."

¶ 10 The penalty hearing was held on December 15, 2011. On this occasion, we heard the parties' penalty submissions and their pleadings based on a short proof by testimony presented by the Respondent, along with documentary evidence PS-1 regarding the costs incurred by IIROC relative to this matter.

The allegations of the parties

¶ 11 Staff of IIROC submitted that given the circumstances of this matter, we should impose the following penalties:

(i) a permanent ban from approval to act in any registered capacity with an IIROC-regulated firm;

(ii) a fine of $35,000; and

(iii) costs in the amount of $60,000.

¶ 12 As for the Respondent, he argued that, in the circumstances, Staff of IIROC's penalty demands are exaggerated. Invoking certain mitigating factors, which we will discuss in a moment, and setting them apart from the facts that form the basis for the precedents invoked by IIROC in support of its position, he submits in substance that a permanent ban would go too far, that the fine imposed on the Respondent should not exceed $25,000, and that the costs claimed are too high.

Analysis

¶ 13 In exercising its jurisdiction to discipline a registered representative found guilty of violating the rules

[1] Stenographer's Notes, December 15, 2011, pp. 29 and 32.

of the IDA, an IIROC Hearing Panel must take a measured and balanced approach. Otherwise, it risks betraying the objective of the disciplinary mechanism from which it emanates.

¶ 14 That objective is not to punish the guilty, but to support the application of the rules, by disciplining the misconduct and violations of those subject to them so as to maintain the credibility of these rules and deter the commission of violations against them.

¶ 15 In this regard, we rely on *Re Mills* [2001] I.D.A.C.D. No. 7, where paragraph 3 states that:

> *"Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment."*

¶ 16 It is in this spirit that we have taken into account IIROC's *Dealer Member Disciplinary Sanction Guidelines* (March 2009 version) and considered the precedents submitted to us at the penalty hearing.

¶ 17 The overall circumstances in this matter reveal both mitigating and aggravating factors, which the legal counsel for both parties have endeavored to point out to us at either the hearing on the merits, or the penalty hearing. It is now appropriate to discuss these.

Mitigating Factors

¶ 18 Let us mention first that the Respondent worked in the industry for seven consecutive years and that he had no disciplinary history with the IDA, other than the present matter.

¶ 19 His coworkers at NBDB described him as a dedicated, intelligent, and qualified employee who gave his clients good advice. The broker officially acknowledged the good job he was doing more than once.

¶ 20 The basic honesty of the Respondent is not really at issue in this matter. He faithfully served the clients assigned to him by the authorities at his firm, and there is no evidence that he was careless about acting in compliance with the securities regulations. On the contrary, he frequently consulted the firm's compliance staff on this subject.

¶ 21 The Respondent's mother relied on him entirely for her finances, accounting and taxes, and she trusted him implicitly in all these matters. She counted on him to use his talents to manage the family assets wisely and to take whatever action was required to this end. After all, these were fields in which she knew nothing, whereas he was an investment professional.

¶ 22 The terms of the power of attorney marked P-5 / D-10 (the "**POA**"), which she gave to the Respondent when her accounts were opened at NBDB, clearly reflect Mrs. C's intention to allow him to look after investing the sums that she had planned to entrust to the broker. She expected that the Respondent would be the one making the decisions in her name and giving, as her attorney, whatever trading instructions he thought were required on her accounts.

¶ 23 In exercising this latitude, the Respondent went too far. He exceeded the powers conferred on him by the POA, and the actions he then took were contrary to the standards of conduct prescribed by the IDA.

¶ 24 The Respondent devised an operating model that allowed him to combine the operation of the accounts that he himself held as an employee of the firm with his administration under POA of Mrs. C's accounts. This scheme, which his firm's administrative processes allowed him to operate in the normal course of business, and which he used to effect 42 unauthorized fund transfers, is how he incurred his disciplinary liability.

¶ 25 These transfers could have been validly authorized and therefore consistent with the family circumstances that were invoked before us to exonerate the Respondent. However, there is no preponderance of evidence that the terms of the POA were amended on this point by the client and the fact is, we believe, that

they were not.

¶ 26 IIROC emphasized that the Respondent had not really committed 42 misappropriations, as mentioned in the decision on the merits (par. 211), since 10 of these transactions were reimbursements of the client's accounts.

¶ 27 On this point, we would like to note that at the stage of assessing the inappropriateness of the Respondent's conduct under the meaning of By-law 29, it would have been inappropriate to consider otherwise than as a whole the transactions that resulted from the scheme devised by the Respondent to take advantage of Mrs. C's assets. The reimbursement transactions were the direct consequence of the misappropriations. They allowed the Respondent to show his mother statements of account proving the influx of funds, to reassure her, and to carry on. Thus, they should have been considered part of the misappropriations themselves.

¶ 28 However, at the decision on penalty stage, we agree that the partial reimbursements made to the client's accounts by means of reciprocal transfers from the Respondent's accounts, whenever the trading done by the latter generated the liquidity to do so, are relevant and must be taken into account. These reimbursements represent mitigating factors, just as do the sums that he is paying to his mother in compensation.

¶ 29 Indeed, the Respondent continues to reimburse his mother, at a rate of $625 per month, for the amounts that his misconduct at NBDB caused her to lose. Thus, since the month of September 2008, he has paid her a total amount evaluated at $22,500.

¶ 30 Even though he behaved deceitfully towards the client concerned and engaged in conduct unbecoming in her regard, we do not believe that the Respondent intended to defraud his mother or to steal her money when he engaged in trading that the mandate he had from her did not allow. The remorse he expressed seemed genuine to us, and he acknowledged and admitted without hesitation that he was wrong to engage in such misconduct.

¶ 31 Finally, we should mention that the Respondent cooperated in IIROC's investigation, which was conducted in parallel to the investigation of his firm regarding the same circumstances and which ended in a settlement agreement that was accepted.

¶ 32 All of these considerations, which mitigate the disciplinary liability, lead us to draw a distinction between the present case and the decisions in *Re Dettelbach* [2011] IIROC 6 and *Re Jones* [2011] IIROC 17 that were cited to us in support of imposing a penalty of permanent prohibition in the present matter.

¶ 33 In both these matters, there had been no voluntary disgorgement of the misappropriated funds prior to discovery of the events that led to the disciplinary complaints. In particular, the honesty of the accused was in question, as these were cases of fraudulent misappropriation of funds that were tantamount to theft. Unlike the Respondent's case, the intention to abuse the public trust was apparent.

¶ 34 There is nothing of that here, as we have seen.

Aggravating Factors

¶ 35 The POA, especially with a discount broker that did not give advice and was not required to verify the suitability of the orders placed, in fact gave the Respondent full powers over the operation of Mrs. C's accounts, with a few exceptions.

¶ 36 Thus, the POA did not authorize him to appropriate, for his own ends, the monies contained in one of Mrs. C's accounts, regardless of the fact that he may have returned the sums from time to time, in whole or in part.

¶ 37 The Respondent acted knowingly. He had all the required knowledge, and solid experience acquired serving discount brokerage clients, some of whom were even attorneys acting under the authority of POAs.

¶ 38 He had to have known that the POA that his mother had given him, not to mention the Policies and Procedures of his employer, which he knew well (the NBDB General Procedure marked P-13-A) prohibited him from making monetary transfers from his mother's account for purposes other than the latter's benefit.

¶ 39 He therefore did not have sufficient authority to carry out the 42 unauthorized transactions dictated by his scheme, and he knew it. He pushed on regardless, doubtless convinced that his mother, had she been informed, would not have been offended. He was wrong about that, as witnessed by the episode of the formal demand letter that was sent to NBDB on behalf of Mrs. C.

¶ 40 In short, the prevailing family circumstances and their eventual impact on the standards of ethics and conduct that the Respondent was required to respect with regard to a client of his firm in no way alter the fact that these transactions were regulated, and that they had to comply with the IDA rules.

¶ 41 We are willing to believe that the family circumstances were such that despite her vulnerability as an uninformed investor with an account at NBDB, Mrs. C. was not really a victim of the Respondent, at least not on the same level that a complete stranger with an account at NBDB might have been under the same circumstances.

¶ 42 The fact still remains that from the standpoint of his professional conduct, the Respondent committed a serious offense with regard to his mother in her capacity as a client of the firm, with regard to the principles that required that, in the transaction of his business as a registered representative of an IDA member firm, he observe high standards of ethics and conduct and that he refrain from any business conduct or practice which is unbecoming or detrimental to the public interest.

¶ 43 IIROC's *Dealer Member Disciplinary Sanction Guidelines* teach that misappropriation is one of the more serious regulatory offences and that the penalty upon conviction should generally be a permanent bar, with few exceptions.

¶ 44 The number of fund transfers that may be viewed as misappropriation on the part of the Respondent is high, and the monetary loss that resulted for the client, substantial.

¶ 45 What's more, these transfers were made without the knowledge of the Respondent's mother, and therefore without her consent. The facts in evidence thus inspire a fairly strong conviction that if the Respondent's mother had known how the Respondent was conducting himself with her money, she would have disapproved.

¶ 46 While the family circumstances are unique, the fact remains that the Respondent, in his capacity as representative of an IDA member firm, engaged in numerous actions that resulted in substantial losses for a client, without right and contrary to the rules of the Association.

¶ 47 In the circumstances, there is no excuse for the professional acts carried out by the Respondent without regard for the standards of ethics and conduct that governed him, and these acts cannot be tolerated even if they were carried out to the detriment of his mother under circumstances that are known to us (*Re Pinet* [2007] I.D.A.C.D. No. 34, a matter in which a misappropriation of funds had also been perpetrated between family members).

¶ 48 Severe sanctions are therefore indicated here.

The Penalties

¶ 49 We are not in the presence here of a respondent who acted dishonestly or fraudulently, but an intelligent ex-representative who failed to draw a distinction between the role of financial expert that fell to him with his family and that of an industry member required to conduct himself in the best interests of the public. The overlapping of these two roles caused him to lose his way, to lose sight of the professional obligations to which he was subject regardless of his ties with the client concerned.

¶ 50 This is why a permanent ban on approval in any registered capacity with an IIROC-regulated firm would seem to us an excessive measure.

¶ 51 The Respondent committed multiple violations which, despite unique family circumstances (this we grant), objectively present a very high level of gravity. It is important that the penalties for this misconduct be proportional, but in line with the *Mills* ruling invoked above.

¶ 52 For this reason, we conclude that a ban on approval for a period of 10 years will be sufficient to enable the Respondent to reposition his vision of things, acquire the maturity that he seems to be lacking and, meanwhile, protect the public.

¶ 53 What's more, if at the end of this ban the Respondent is reinstated with an IIROC-regulated firm, he must be subject to strict supervision by his employer for a period of one year from the date of his rehiring as a registered representative or approved person, as applicable.

¶ 54 As for what fine to impose, *Re Dettelbach* cited above (in which a $25,000 fine was imposed under By-law 29 for 53 offending orders, some of which were transacted fraudulently, which incurred losses of approximately $164,000 for 15 clients) has convinced us that the suggested fine of $35,000 would be a little high. Rather, we are of the opinion that a $25,000 fine would be adequate in this case.

Costs

¶ 55 Staff of IIROC has suggested that costs be set at $60,000. The sworn statement (PS-1) of an IIROC representative, dated November 10, 2011, shows that IIROC incurred a total of $90,315.89 in costs and expenses in connection with this matter.

¶ 56 We agree that Mr. Chher should shoulder a substantial portion of the costs incurred by IIROC.

¶ 57 However, such a contribution should not be such that it ultimately deters an individual subject to By-law 29.1 from obtaining justice before a Hearing Panel, by arguing a defense against a complaint he deems unfounded.

¶ 58 The Respondent has documented evidence that he incurred over $26,000 in legal costs to ensure his defense, a defense that, in fact, was found admissible in part by the decision on the merits.

¶ 59 What's more, the Hearing Panel is of the opinion that the Settlement Agreement P-88 and the decision rendered on this subject in *Re National Bank Direct Brokerage Inc. [2011] IIROC 2* occasioned public disclosures that compelled him to want to defend his reputation and integrity against allegations made against him which he considered false.

¶ 60 Taking these factors into account, we are in agreement with ordering costs in the amount of $25,000.

Conclusions

¶ 61 FOR THESE REASONS, THE HEARING PANEL IMPOSES THE FOLLOWING PENALTIES ON THE RESPONDENT:

1) A ban on approval in any capacity with an IIROC-regulated firm for a period of 10 years;
2) strict supervision by the Respondent's employer for a period of one year from the date of his rehiring, as applicable, at the end of the ban on approval, as a registered representative or approved person with an IIROC-regulated firm;
3) a fine in the amount of $25,000; and
4) costs in the amount of $25,000.

Montréal, January 27, 2012.

Jean Martel, Ad. E., Panel Chair

Gilles Archambault, Panel Member

Lise Casgrain, Panel Member