Re Rha

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Edward Ho Rha

2021 IIROC 12

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

Heard: June 3, 2021 in Edmonton, Alberta (by videoconference)
Decision: June 25, 2021
Reasons for Decision: June 25, 2021

Hearing Panel:
Eric Spink, QC, Chair, Jonathan Lund, Peter McWilliams
Appearance:
Tayen Godfrey, Enforcement Counsel
Edward Ho Rha (absent)

DECISION ON THE MERITS AND PENALTY

INTRODUCTION AND BACKGROUND

¶ 1 Edward Ho Rha (the "Respondent") did not respond to the Notice of Hearing and Statement of Allegations, and was not present at the hearing. After receiving proof of service (Exhibits 1-3), the Panel decided to:

- proceed with the hearing of the matter on its merits;
- accept as proven the facts and contraventions alleged in the Statement of Allegations; and
- hear submissions on sanctions immediately,

pursuant to sections 8415(4) and 8423(12) of the Consolidated Enforcement Examination and Approval Rules of IIROC ("Consolidated Rules").

¶ 2 In overview, the allegations are that the Respondent engaged in a pattern of excessive and unsuitable trading for two sets of clients, while generating significant commissions; he also borrowed $95,000 from another client, which he never repaid. The Panel heard significant additional evidence regarding the circumstances and, at one point, temporarily closed the hearing to the public in order to receive evidence of personal nature, pursuant to section 8203(5)(iii) of the Consolidated Rules.

¶ 3 Enforcement Counsel then made submissions on sanctions and costs, and the Panel adjourned to consider its decision. These are the reasons for our Decision to order that the Respondent:

- be suspended from registration in any registered capacity with IIROC for a period of 12 months

from the date of this Decision;

- pay a fine in the amount of $150,000;
- as a condition of being re-registered with IIROC, successfully complete the Conduct and Practices Handbook examination;
- if re-registered with IIROC, be under close supervision for a period of 12 months; and
- pay costs in the amount of $15,000.

EVIDENCE HEARD *IN CAMERA*

¶ 4 At the request of IIROC Counsel, the Panel heard evidence *in camera* pursuant to section 8203(5)(iii) of the Consolidated Rules.

¶ 5 Section 8203(5)(iii) states that a hearing must be open to the public except in certain circumstances, including: "where the hearing panel is of the opinion that the desirability of avoiding disclosure of intimate, personal or other matters outweighs the desirability of allowing the hearing or part of the hearing to be open to the public". In the Panel's view, that is essentially the same test applied in securities enforcement proceedings such as: *Re BridgeMark Financial* 2019 BCSCCOM 218, affirmed by *British Columbia (Securities Commission) v. BridgeMark Financial Corp.* 2020 BCCA 3010; *Re Lutheran Church Canada, the Alberta-British Columbia District* 2019 ABASC 43; *HudBay Minerals Inc.* 2009 ONSEC 18; and *Mega-C Power Corporation et al.* 2007 ONSEC 11. All those decisions apply the principles stated by the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)* 2002 SCC 41, which said (at para. 52):

> The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is seen to be done, such public scrutiny is fundamental. The open court principle has been described as "the very soul of justice", guaranteeing that justice is administered in a non-arbitrary manner …." (citation omitted, emphasis in original)

and (at para. 53):

> A confidentiality order … should only be granted when:
>
> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

¶ 6 Applying those principles to the present case, the Panel is satisfied that the evidence heard *in camera* is personal information of the type normally redacted from the hearing record pursuant to the IIROC *Policy Regarding Use and Disclosure of Personal Information in IIROC Disciplinary Proceedings* effective as of May 1, 2015. Moreover, the evidence heard *in camera* was only a small portion of the overall evidence, so its confidentiality does not significantly detract from the open court principle (see *Re Lutheran Church Canada* at para. 110, distinguishing the request for "a blanket order of secrecy covering virtually every aspect of the proceeding" from the situation in *Re Kostelecky* 2016 ABASC 297, where the confidentiality order applied "with respect to a single, specific piece of evidence"). In the Panel's view, the evidence we heard *in camera* is generally similar to evidence heard *in camera* in *Re Blanchard* 2013 IIROC 23 and *Re Jones* 2011 IIROC 17, and the Panel is of the opinion that the desirability of avoiding disclosure of that personal information outweighs the desirability of including it in the public hearing.

¶ 7 The following summary of facts and evidence therefore does not include the evidence heard *in camera*.

SUMMARY OF FACTS AND EVIDENCE

¶ 8 The Respondent was a Registered Representative from 2008 until March 2018, and is not currently working in an IIROC registered capacity.

¶ 9 Throughout 2016 and 2017, the Respondent had been experiencing personal, professional, and financial difficulties. He was going through a divorce and moved into his parents' home. In October 2016, the Respondent's firm placed him on Close Supervision for a period of no less than 12 months, primarily because of the Respondent's inability to maintain adequate margin in his personal account, which had lost approximately $3,000,000 over the previous five years.

¶ 10 In May 2017, the Respondent's firm expressed the following concern (Exhibit 4):

> "It appears that [the Respondent] has only the one 'tactical' trade strategy that is being applied across a number of client accounts, and that the client accounts do not appear to be benefitting, while [the Respondent] appears to be earning a commission."

¶ 11 Later in May 2017, the Respondent moved to a different firm.

¶ 12 In October 2017, the Respondent borrowed $95,000 from client MW, which was deposited to the Respondent's margin account (Exhibit 23). The Respondent left the industry shortly afterwards, the loan was never repaid, and MW passed away in 2019. When the Respondent was interviewed by the IIROC investigator in 2020, he acknowledged that he knew the loan was prohibited at the time (Exhibit 27).

¶ 13 The Respondent's excessive and unsuitable trading during 2016 and 2017 involved two sets of clients, Mr. & Mrs. R and Mr. & Mrs. C., both retired couples.

¶ 14 Mr. & Mrs. R declined to be interviewed by the IIROC investigator, but a review of their account records showed:

- the New Client Application Forms ("NCAFs") for Mr. & Mrs. R were updated in March of 2016;
- both NCAFs showed the risk tolerance to be 0% low, 35% medium and 65% high;
- both NCAFs included handwritten statements (under section 16 "Notes") that were essentially similar – the statement in Mrs. R's NCAF (Exhibit 6) said:

  > "IA had discussed & clients have expressed desire to be active & take advantage of market volatility. Clients do not rely on the account for income.";

- in 2016, Mr. R's accounts turned over 7.21 times, and Mrs. R's accounts turned over 12.35 times;
- in 2016, Mr. & Mrs. R paid combined transactional commissions of $36,554, or 21.4% of their combined average portfolio value of $170,985 during this period; and
- between January 2016 and May 2017, Mr. & Mrs. R's combined portfolio declined by a total of $163,430 (61.4%).

¶ 15 When interviewed by the IIROC investigator, the Respondent acknowledged his excessive trading and said (Exhibit 7):

> "I think it's -- in hindsight looking at these ratios, a different decision would've been made 'cause I agree they're excessive. I think when I look at the decision that was made at the time, I didn't have that -- I -- I don't have that visibility. I just tried my best."

¶ 16 Mr. & Mrs. C declined to give evidence at the hearing, but were interviewed by the IIROC investigator.

Portions of the transcripts of those interviews, together with account documents, were entered in evidence. The evidence showed:

- Mr. & Mrs. C each had several accounts with the Respondent which, collectively, contained about 70% of their liquid assets;
- the NCAFs for Mr. C were updated in 2013, 2014 and 2016; the NCAFs for Mrs. C were updated in 2013 and 2016; and new NCAFs were created for both Mr. & Mrs. C when the Respondent changed firms in May of 2017; all of which are summarized in Exhibits 10 and 11;
- in 2013, Mr. & Mrs. C's risk tolerances were 10% low, 80% medium and 10% high in all accounts except Mr. C's cash account, which was 10% low, 70% medium and 20% high;
- by 2016, these risk tolerances had increased to the following:
    - for Mr. C's cash account – 0% low, 20% medium and 80% high;
    - for Mr. C's registered account – 7% low, 33% medium and 60% high;
    - for Mrs. C's cash account – 7% low, 63% medium and 30% high;
    - for Mrs. C's registered account– 7% low, 63% medium and 30% high;
    - for Mr. & Mrs. C's joint cash account – 100% high risk
- Mr. C's 2016 NCAF (Exhibit 5) included the following handwritten and typed statement (under section 16 "Notes"):

    "Client agrees to be tactical and move around core defensive positions in the markets. Client is willing and able to withstand risks within the parameters defined. Advisor is in regular contact and provides regular updates and tactical suggestions.";
- Mrs. C's 2016 NCAF (Exhibit 6) included the following handwritten and typed statement (under section 16 "Notes"):

    "Client is readily available and agrees to be tactical around core defensive positions. Client understands and agrees to the risks inherent within the equity markets and understands the risks that exist. Client is keen to be tactical and is readily available to adapt to changes that occur with the market.";
- in January 2017, at the request of the Respondent's firm, Mr. & Mrs. C signed a letter acknowledging that they were comfortable with the risk levels and the Respondent's "tactical" trading strategy (Exhibit 20);
- a review of the trading activity in Mr. & Mrs. C's accounts (excluding their cash accounts) for the period between January and May 2017 showed the following:
    - Mr. C's accounts were turned over 1.83 times, for an annualized turnover ratio of 4.4, resulting in Mr. C paying $46,152 in transactional commissions, or 3.66% of his average portfolio value of $1,260,203 during this period;
    - Mrs. C's accounts were turned over 2.19 times, for an annualized turnover ratio of 5.25, resulting in Mrs. C paying $51,742 in transactional commissions, or 4.38% of her average portfolio value of $1,181,337 during this period;
    - Mr. & Mrs. C's combined portfolio declined by $370,755 (15%), of which $97,894 (3.9%) resulted from transactional commissions.
- when the Respondent moved firms in May 2017, the new NCAFs for Mr. & Mrs. C showed the

risk tolerances for all accounts to be 15% low, 35% medium and 50% high;

- from May to December 2017, over 60% of Mr. & Mrs. C's holdings were concentrated in the energy sector and consisted primarily of four or five different holdings; and their low-risk holdings made up between 0.8% and 4% of their holdings.

ANALYSIS

¶ 17 As noted in paragraph 1, the following contraventions were accepted as proven pursuant to sections 8415(4) and 8423(12) of the Consolidated Rules:

(i) Between January 2016 and May 2017, the Respondent engaged in excessive trading that was unsuitable and inconsistent with good business practices, in the client accounts of Mr. & Mrs. R, contrary to Dealer Member Rule 1300.1(o) and (q);

(ii) Between January and December 2017, the Respondent failed in his know your client obligations, for his clients Mr. & Mrs. C, contrary to Dealer Member Rule 1300.1(a);

(iii) Between January and December 2017, the Respondent engaged in excessive trading that was unsuitable and inconsistent with good business practices, in the client accounts of Mr. & Mrs. C, contrary to Dealer Member Rule 1300.1(o) and (q); and

(iv) In October 2017, the Respondent borrowed money from his client MW, contrary to Dealer Member Rule 43.2(3)

¶ 18 The Panel agrees with Enforcement Counsel's submission that, although each contravention is serious in its own right, a global approach to sanctioning is appropriate in this situation, as stated in the 2015 IIROC Sanction Guidelines ("Guidelines") at p. 5: "the total or cumulative sanction should appropriately reflect the totality of the misconduct".

¶ 19 Enforcement Counsel referred to the following decisions: *Re Dunn* 2020 IIROC 11, *Re Dunn & Wimble* 2015 IIROC 16, *Re O'Brien* 2020 ABASC 160, *Re Barkwell* 2018 IIROC 49, *Re Matthews* 2014 IIROC 56, and *Re Matthews* 2015 IIROC 2. He submitted that, while the previous decisions offer some guidance, no two cases are ever completely similar and, because sanctioning is fact-specific, the non-public facts in this case are significant. The Panel agrees, and notes that these reasons are constrained by our inability to refer to those facts.

¶ 20 The Panel agrees with Enforcement Counsel's submission that the Respondent's most significant contravention was borrowing $95,000 from his client, MW, in October 2017. *Re O'Brien* and *Re Barkwell* both illustrate that borrowing may occur in a variety of forms, and is always serious. In this case, the Panel views the loan as a reflection of the Respondent's desperate and misguided faith in his "tactical" trading strategy, which was also the root cause of the other contraventions, as discussed below.

¶ 21 The decisions in *Re Dunn* and *Re Dunn & Wimble* discuss sanctions for contraventions of the know-your-client and suitability obligations in the context of excessive or unsuitable trading. However, those situations differed from the present case in that Mr. Dunn, for example, had never met two of his clients despite being their financial advisor for 12 years (*Re Dunn & Wimble* 2015 at paras. 14-18).

¶ 22 Enforcement Counsel suggested that the present case more closely resembled *Re Matthews*, which "wasn't so much a know-your-client as an ignore-your-client situation" (*Re Matthews* 2014 at para. 26; *Re Matthews* 2015 at para. 3). He noted that that *Re Matthews* involved a finding of churning, which is not alleged in this case.

¶ 23 In the Panel's view, the situation in *Re Matthews* was more egregious than the present case, because churning (a subcategory of excessive and unsuitable trading) is motivated by personal gain from the commissions (see *Re Matthews* 2014 at paras. 12-16, 66, 69, 71, and 99). The churning in *Re Matthews* was

aggravated by the fact that he knew his clients well, but put his own interests ahead of theirs. In this case, the commissions were not the motive – they were merely a by-product of the Respondent's "tactical" strategy, and his misguided, but evidently sincere, belief in that strategy. The excessive and unsuitable trading here stemmed from the Respondent's inability to recognize defects in his strategy, and the Respondent was not so much putting his own interests ahead of his clients' as he was combining their interests – albeit in a misguided way. The Panel views that as serious, but less egregious than the self-interested churning that occurred in *Re Matthews*.

¶ 24 The Panel agrees with the following statement in *Re Matthews* 2014 at para. 10 (citing *Re Lamoureux* [2001] A.S.C.D. *No. 613*):

> The "know your client" and "suitability" obligations are conceptually distinct but, in practice, they are so closely connected and interwoven that the terms are sometimes used interchangeably.
>
> The "know your client" obligation is the obligation to learn about the client, their personal financial situation, financial sophistication and investment experience, investment objectives and risk tolerance.
>
> The "suitability" obligation is the obligation on a registrant to determine whether an investment is appropriate for a particular client. Assessment of suitability requires both that the registrant understands the investment product and knows enough about the client to assess whether the product and client are a match.

Because the obligations are interwoven, and the Respondent's beliefs were misguided, it is difficult to allocate his failure between the two obligations with any degree of precision. In the Panel's view, however, that allocation is unnecessary because we take a global approach to sanctioning, based on the totality of the Respondent's misconduct.

¶ 25 The Panel agrees with Enforcement Counsel's submission that a 12-month suspension is a significant, and appropriate, sanction in this case. The Panel agrees with the statement of the Alberta Securities Commission in *Re O'Brien* (at para. 268) that:

> … a suspension of a year or more 'is tantamount to the termination of [a]registrant's career', and that, '[a]t a minimum, it requires the registrant to build a book from scratch, a process that takes years and enormous effort' (*Re O'Brien* at para. 268, citing *Re Steinhoff* 2013 BCSECCOM 308 at para. 90).

Should the Respondent seek reinstatement, it is appropriate that he be required to successfully complete the Conduct and Practices Handbook exam, and work under close supervision for a period of 12 months.

¶ 26 Enforcement Counsel also referred to the statement in the Guidelines which says "[s]anctions should ensure that a respondent does not financially benefit as a result of the misconduct", and the Panel agrees that the fine in this matter should include disgorgement by the Respondent. The Panel imposes a fine of $150,000 comprising:

- disgorgement of the unpaid loan of $95,000;
- disgorgement of $35,000 (a portion of the commissions received from excessive trading); and
- a fine of $20,000 for the contraventions themselves.

¶ 27 The primary objective of these sanctions is, as stated in the Guidelines, "to protect the public interest by restraining future conduct that may harm the capital markets". The Panel is satisfied that these sanctions are significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).

¶ 28 The Panel received evidence showing that IIROC's actual costs in this matter were significantly higher than the amount sought by Enforcement Counsel, which was $15,000.

CONCLUSION

¶ 29 For the reasons above, the Panel orders that the Respondent:

- be suspended from registration in any registered capacity with IIROC for a period of 12 months from the date of this Decision;
- pay a fine in the amount of $150,000;
- as a condition of being re-registered with IIROC, successfully complete the Conduct and Practices Handbook examination;
- if re-registered with IIROC, be under close supervision for a period of 12 months; and
- pay costs in the amount of $15,000.

Dated at Edmonton, Alberta this 25 day of June, 2021.

Eric Spink, QC, Chair

Jonathan Lund

Peter McWilliams