NOVA SCOTIA COURT OF APPEAL

Citation: *Locke v. Investment Industry Regulatory Organization of Canada*, 2022 NSCA 31

Date: 20220412
Docket: CA 508139
Registry: Halifax

Between:

Shirley A. Locke

Appellant

v.

Investment Industry Regulatory Organization of Canada, Nova Scotia Securities Commission and Attorney General of Nova Scotia

Respondents

Judge: The Honourable Chief Justice Michael J. Wood

Appeal Heard: February 16, 2022, in Halifax, Nova Scotia

Subject: *Securities Act* – Investment Advisor Conduct Proceedings

Summary: Locke was alleged to have breached Dealer Member Rules in relation to the suitability of investments for certain clients as well as unauthorized trading. A hearing was held by a panel of IIROC ("Hearing Panel") and the allegations were upheld. She requested a hearing and review by the NS Securities Commission ("SC") which upheld most of the allegations. Locke appealed to the Court on the basis that the IIROC panel improperly considered expert opinion evidence concerning the risk rating for certain securities and erred in principle in concluding the Dealer Rules were breached.

Issues:
(1) Did the Hearing Panel improperly admit expert opinion?
(2) Did the SC err in upholding the Hearing Panel decision?

Result: Appeal dismissed. The Hearing Panel did not rely on the opinion of the IIROC investigator concerning the risk rating of securities. They formed their own conclusions from the source materials. The SC was correct to reject this complaint.

The SC was required to review the Hearing Panel decision with deference and only intervene if one of the criteria in the *Canada Malting* decision was established. They applied the proper standard and dismissed the majority of the complaints raised by Locke. On the issue of unauthorized trading the SC substituted their own conclusion for that of the Hearing Panel. They erred in doing so but the outcome was not changed because both found unauthorized trading to have been established.

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 26 pages.

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Respondents

Judges: Wood, C.J.N.S.; Hamilton and Scanlan, JJ.A.

Appeal Heard: February 16, 2022, in Halifax, Nova Scotia

Held: Appeal dismissed without costs, per reasons for judgment of Wood, C.J.N.S.; Hamilton and Scanlan, JJ.A. concurring

Counsel: Thomas Keeler, Kevin J. Kiley, and Duncan Sturz (articled clerk) for the appellant
Kathryn Andrews and April Engelberg, for the respondent Investment Industry Regulatory Organization of Canada
H. Jane Anderson, for the respondent Nova Scotia Securities Commission
Edward A. Gores, Q.C. for the respondent Attorney General of Nova Scotia (not participating)

Reasons for judgment:

Overview

[1] The appellant, Shirley A. Locke, has been an investment advisor in the securities industry since 1979. The Investment Industry Regulatory Organization for Canada ("IIROC") is the regulatory body governing the professional conduct of persons working in the securities industry, including the appellant.

[2] On July 3, 2019, IIROC issued a Notice of Hearing and Statement of Allegations against the appellant. These documents allege the following breaches of professional standards on the part of Ms. Locke:

> **Contravention 1** Between January 2010 and September 2014, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to clients GR, JF, F Limited and EH, contrary to Dealer Member Rule 1300.1(a).
>
> **Contravention 2** Between January 2010 and September 2014, the Respondent failed to use due diligence to ensure that recommendations made for clients GR, JF and F Limited were suitable for them, based on their investment objectives and risk tolerance, contrary to Dealer Member Rule 1300.1(q).
>
> **Contravention 3** Between January 2010 and September 2014, the Respondent effected trades in the accounts of clients EH and AH that were not within the bounds of good business practice, contrary to Dealer Member Rule 1300.1(o).
>
> **Contravention 4** Between January 2010 and September 2014, the Respondent conducted unauthorized trades in the accounts of clients GR, JF, EH and RC, contrary to Dealer Member Rule 29.1.
>
> **Contravention 5** Between January 2015 and December 2017, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to client LG, contrary to Dealer Member Rule 1300.1(a).
>
> **Contravention 6** Between January 2015 and December 2017, the Respondent failed to use due diligence to ensure that recommendations made for client LG were suitable for her, based on her investment objectives and risk tolerance, contrary to Dealer Member Rule 1300.1(q).

[3] An IIROC panel ("Hearing Panel") conducted a hearing over nine days in December 2019 and March 2020 resulting in a decision issued on May 28, 2020 upholding all of the allegations against Ms. Locke with the exception of Contravention 3 as it related to client AH ("the Merits Decision").

[4] The Hearing Panel issued a further decision on August 8, 2020 imposing various penalties on Ms. Locke ("the Penalty Decision"). The penalties were:

1.) A fine of $25,000 in respect to Contraventions 1 and 5 inclusive
2.) A fine of $25,000 in respect to Contraventions 2 and 6 inclusive
3.) A fine of $20,000 in respect to Contravention 3
4.) A fine of $20,000 in respect to Contravention 4
5.) Costs in the amount of $30,000
6.) A nine-month suspension commencing July 20, 2020
7.) Six months of close supervision upon re-registration including trade approvals
8.) Re-write and pass the Conduct and Practices examination within six months of re-registration.

[5] Ms. Locke requested a hearing and review of the IIROC decisions by the Nova Scotia Securities Commission ("the Commission") pursuant to the provisions of s. 30(5) of the *Securities Act*, R.S.N.S. 1989, c. 418 (the "*Act*") which provides:

> The Director or any person or company which is a registrant and directly affected by a decision, order or ruling of a self-regulatory organization is entitled to a hearing and review of the decision, order or ruling by the Commission to the same extent as if the decision, order or ruling had been a decision of the Director.

[6] The grounds for Ms. Locke's request were as follows:

> 1. The IIROC Hearing Panel erred in law and breached the rules of natural justice and fairness by allowing the admission of opinion evidence with respect to the risk rating of securities from a witness who was not duly qualified as an expert, and otherwise;
>
> 2. The IIROC Hearing Panel erred in law, overlooked material evidence, and proceeded on an incorrect principle with respect to the alleged contraventions of Dealer Member Rules 1300.1(a), 1300.1(q) and 29.1, in circumstances involving an account held jointly between multiple persons, or between corporate account holders, and otherwise;
>
> 3. The IIROC Hearing Panel erred in law, overlooked material evidence and proceeded on an incorrect principle in application of Dealer Member Rule 29.1 with respect to allegations of unauthorized trading, in that the IIROC Hearing Panel applied an incorrect standard of proof, and otherwise;
>
> 4. The IIROC Hearing Panel erred in law with respect to the applicable standard of proof and application of Dealer Member Rule 1300.1(o) in concluding

> that trades in the account of a single client were not within the bounds of good business practice, and otherwise;
>
> 5. The IIROC Hearing Panel erred in law and overlooked material evidence in failing to consider or apply industry standards with respect to assessment of suitability, in compliance with Rule 1300.1(q), and otherwise; and
>
> 6. Such further and other grounds for review as counsel may advise prior to a hearing and review.

[7] On January 14 and 15, 2021, the Commission held a hearing to consider the application by Ms. Locke. The parties provided written and oral submissions but no additional evidence was presented.

[8] By decision dated June 24, 2021, the Commission confirmed the conclusions of the Hearing Panel with the exception of the findings related to Contraventions 1 and 2 with respect to client GR and Contravention 3. The penalties were replaced with the following:

a) a fine of $20,000 for Contraventions 1 and 5;

b) a fine of $18,750 for Contraventions 2 and 6;

c) a fine of $20,000 for Contravention 4;

d) costs in the amount of $25,000;

e) a six-month suspension, commencing seven days from the date of the order, with credit to be provided for the suspension of the Applicant's registration from September 17, 2020, to December 23, 2020; and

f) six months of close supervision upon re-registration, including trade approvals.

[9] Ms. Locke appeals the Commission's decision to this Court. For the reasons set out below, I would dismiss her appeal without costs.

Standard of Review

[10] This appeal involves two standards of review. The first relates to the Commission's review of the decision of the Hearing Panel. The second is the standard to be applied by this Court in considering the appeal from the Commission's decision.

[11] Since s. 26 of the *Act* provides for an appeal to this Court, the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

requires us to apply an appellate standard of review which the Supreme Court describes as follows:

> [37] It should therefore be recognized that, where the legislature has provided for an appeal from an administrative decision to a court, a court hearing such an appeal is to apply appellate standards of review to the decision. This means that the applicable standard is to be determined with reference to the nature of the question and to this Court's jurisprudence on appellate standards of review. Where, for example, a court is hearing an appeal from an administrative decision, it would, in considering questions of law, including questions of statutory interpretation and those concerning the scope of a decision maker's authority, apply the standard of correctness in accordance with *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 8. Where the scope of the statutory appeal includes questions of fact, the appellate standard of review for those questions is palpable and overriding error (as it is for questions of mixed fact and law where the legal principle is not readily extricable): see *Housen*, at paras. 10, 19 and 26-37. Of course, should a legislature intend that a different standard of review apply in a statutory appeal, it is always free to make that intention known by prescribing the applicable standard through statute.

[12] The Commission's choice, and application, of the standard for reviewing the Hearing Panel decisions are questions of law and, therefore, reviewable by this Court on the standard of correctness.

[13] The authority for the Commission to conduct a hearing and review of a decision of an IIROC panel is found in s. 30(5) of the *Act*. Section 30(5A) incorporates the process found in s. 6 which provides, in part:

> (2) Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.
>
> (3) Upon a hearing and review, the Commission may, by order, confirm the decision under review or make such other decision as the Commission considers proper.

[14] The *Act* does not specify the standard to be applied by the Commission when conducting a "hearing and review" of a panel decision. The Supreme Court in *Vavilov* said, in determining the applicable standard for review of administrative decisions, the starting point for the analysis is a presumption that the legislature intended it to be reasonableness (see para. 23). This presumption can only be rebutted where the legislature has indicated that a different standard should apply:

> [33] This Court has described respect for legislative intent as the 'polar star' of judicial review: *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29, [2003] 1 S.C.R. 539, at para. 149. This description remains apt. The presumption of reasonableness review discussed above is intended to give effect to the legislature's choice to leave certain matters with administrative decision makers rather than the courts. It follows that this presumption will be rebutted where a legislature has indicated that a different standard should apply. The legislature can do so in two ways. First, it may explicitly prescribe through statute what standard courts should apply when reviewing decisions of a particular administrative decision maker. Second, it may direct that derogation from the presumption of reasonableness review is appropriate by providing for a statutory appeal mechanism from an administrative decision maker to a court, thereby signalling the application of appellate standards.

[15] This presumption of a reasonableness review arises whether the reviewing body is a court or an administrative tribunal (*Byun v. Alberta Dental Association and College*, 2021 ABCA 272 at para. 22). Since s. 6 of the *Act* is silent with respect to the standard to be applied by the Commission in conducting the hearing and review, the presumption of a reasonableness standard has not been rebutted.

[16] The parties agree the Commission correctly identified *Re: Canada Malting Co.*(1986), 33 B.L.R. 1, 9 O.S.C.B. 3565 ("*Canada Malting*") as setting out the standard to be applied to its review of the Merits Decision. In *Canada Malting*, the Ontario Securities Commission ("OSC") was reviewing a decision of the Toronto Stock Exchange ("TSE"). The OSC identified five criteria which would justify its intervention:

> 24 In summary, the OSC has indicated five possible grounds on which it might interfere with a decision of the TSE:
>
> (i) the TSE proceeded on some incorrect principles;
>
> (ii) the TSE erred in law;
>
> (iii) the TSE overlooked material evidence;
>
> (iv) new and compelling evidence was presented to the OSC that was not presented to the TSE; and
>
> (v) the TSE's perception of the public interest conflicts with that of the OSC.

[17] The OSC made it clear it would give significant deference to the TSE decision and only intervene if their decision was not reasonable:

> 25 In our view, and in considering all of the evidence, the decision of the TSE to accept the notice for filing under By-law 19.06 did not give grounds for

> interfering on the basis of any of the five heads set out above. In saying this, **we are not to be understood to be saying that our decision would have been the same as that of the TSE filing committee or that we agree with that decision.** As the OSC said in *Re Lafferty, Harwood*, the fact that we might have given a different decision is not reason enough for us to interfere with the decision of the TSE. **The TSE filing committee reasonably could have arrived at the decision that it did given the evidence that was before it**. There was no major new evidence placed before us that was not before the TSE that, in our view, should cause us to substitute our decision for theirs.
>
> …
>
> 27 This is not to say that the Commission will not interfere with a decision of the TSE on one of the five grounds set out in *Re Trizec*, supra. It is to say, however, that **an applicant has a heavy burden of showing that its case fits within one of those five grounds before the OSC will interfere**. Given the care with which the TSE's filing committee approaches its responsibilities under By-law 19.06, those occasions must necessarily be **extremely infrequent**. Accordingly, while we agree that shareholders of a company whose notice for filing is accepted under By-law 19.06 have standing under subs. 22(3), the Commission's decision in *Re Trizec* will be strictly applied in all such appeals.
>
> [emphasis added]

[18] In this matter, the Commission reviewed other securities commission decisions and extracted a series of governing principles related to the standard of review:

> [32] In determining the appropriate standard of review in these decisions, the Securities Commissions were guided by the following:
>
> (a) the applicant has the heavy burden of showing that its case fits squarely within at least one of the five *Canada Malting* grounds before the Securities Commission will intervene;
>
> (b) deference is shown to factual determinations and decisions made by an SRO which are central to the SRO's specialized expertise to regulate and discipline its members for contraventions of the SRO's rules;
>
> (c) where a factual finding is based on an assessment of the credibility of a witness, the SRO had the advantage of seeing the witness testify;
>
> (d) It is only in rare circumstances that a Securities Commission will intervene in an SRO decision. Securities Commissions have taken a restrained approach to ensure that SROs have control and direction over their own processes and procedures;

> (e) a Securities Commission generally will not substitute its own view of the evidence for that of an SRO merely because it may have reached a different decision on the facts;
>
> (f) a Securities Commission's authority in a review of an SRO decision should not be used as a means to second-guess a reasonable decision made by the SRO; and
>
> (g) the standard of review of an SRO decision is reasonableness. Was the SRO's decision reasonable in the context of the evidence, record and law before it and does the decision fall within a range of possible outcomes?

[19] As it relates to Ms. Locke, the Commission described the standard of review which it applied to the Merits Decision as follows:

> [46] Based on the Securities Commissions decisions, we conclude that the appropriate standard of review of an IIROC decision under subsections 30(5) and (5A) of the Act is reasonableness. The role of the Commission in a hearing and review is not to provide a second opinion of an SRO decision. The Applicant has the heavy burden of showing that its case fits squarely within at least one of the *Canada Malting* grounds before the Commission will intervene. If the Commission determines that there are grounds to intervene, it can consider the matter on a *de novo* basis and determine under subsection 6(3) of the Act whether to confirm the decision or make such other decision that it considers proper.

[20] I am satisfied the Commission correctly identified its standard of review which, in the context of securities matters, is expressed through the *Canada Malting* test.

[21] Having concluded that the Commission correctly articulated the standard of review, I will now consider whether the Commission erred by misapplying it in the assessment of the Merits Decision.

Issues

[22] The grounds of appeal alleged by Ms. Locke in her Notice of Appeal are as follows:

> 1. The Commission Panel erred in finding that the IIROC Panel did not err in law or breach the rules of natural justice and fairness by admitting and considering opinion evidence from an individual employed by IIROC as an investigator, who was neither independent nor properly qualified to provide opinion evidence;

2. The Commission Panel erred in finding that the IIROC Panel did not err in their analysis of alleged breaches of IIROC Dealer Member Rules 1300.1(a) (Know Your Client) and 1300.1(q) (Suitability), with respect to, *inter alia*, the following accounts:

   a. a joint account held by Client CR, Client LC and Client JF, in circumstances where the IIROC Panel failed to consider the personal circumstances, investment objectives and risk tolerance of two of the three joint account holders;

   b. an account held by company F Limited, in circumstances where the IIROC Panel focused inappropriately on the personal circumstances of two directors and shareholders of F Limited, and not F Limited itself; and

   c. an investment account held by Client LG;

3. The Commission Panel erred in concluding that the IIROC Panel did not err in their analysis of alleged breaches of IIROC Dealer Member Rule 1300.1(a) (Know Your Client) with respect to an investment account held by Client EH, in circumstances where the IIROC Panel failed to distinguish between two separate accounts opened by Client EH.

4. The Commission Panel erred in their analysis of alleged contraventions of IIROC Dealer Member Rule 29.1 (Unauthorized Trading), in that the Commission Panel first found that the IIROC Panel had erred in law in concluding that IIROC Staff had presented clear, cogent and convincing evidence of unauthorized trading, but subsequently confirmed the reasons of the IIROC Panel with respect to Rule 29.1 without conducting a *de novo* review of the evidence;

5. The Commission Panel erred in their analysis of the appropriate penalty; and

6. Such further and other grounds as counsel may advise and this court may permit.

[23] In light of the two standards of review which must be considered, I would restate the issues on appeal as follows:

1. Did the Commission err in its review of the Hearing Panel's use of the evidence of the IIROC investigator, Pat Gerada?

2. Did the Commission err in its review of the Hearing Panel's application of, and findings with respect to, Dealer Rules 1300.1(a)(o)(q)?

3. Did the Commission err in its review of the Hearing Panel's application of, and findings with respect to, Dealer Rule 29.1?

4. Should the penalty imposed by the Commission be set aside in whole or in part?

Analysis

Issue #1 - Did the Commission err in its review of the Hearing Panel's use of the evidence of the IIROC investigator, Pat Gerada?

[24] The allegations set out as Contraventions 2 and 6 required consideration of the risk rating for certain securities recommended to clients by Ms. Locke. Pat Gerada, an investigator for IIROC, compiled materials with respect to a number of corporations whose securities were recommended to Ms. Locke's clients. As part of this, she prepared a summary chart setting out the risk rating for these securities.

[25] Before the Hearing Panel, counsel for Ms. Locke argued the chart prepared by Ms. Gerada constituted opinion evidence which should not be admitted unless she was qualified as an expert. Counsel for IIROC submitted the entries in the chart were not intended to usurp the function of the Hearing Panel which was to consider all of the evidence and determine the risks associated with the securities in question and their suitability for Ms. Locke's clients. Following arguments, the Hearing Panel gave an oral decision explaining how it would use the Gerada materials:

> I'd like to thank counsel for their submissions with respect to the objection raised by Mr. Kiley, with respect to the exhibit at tab 7 in Volume 1 page 343, we have considered the submissions of counsel and reviewed the cases put forward by counsel for our consideration. **The panel is of the view that it is the sole role of the panel to make the determination on issues of risk and suitability** in the matter before the panel for its consideration and deliberation. In fulfilling that role, the panel is entitled to rely on any of the evidence that is put before the panel for its consideration upon the issue. **Having determined that it is the responsibility of the panel to determine the issue of risk, it is our opinion that the exhibit in page 343 in so far as it relates to ratings, and any comments that associate those ratings prepared by the investigator are not determinative of the issue of risk**. That being our sole discretion, and perhaps if evidence is lead at a later date by someone who is qualified as an expert for our consideration of that opinion, but even then it remains at our sole discretion to determine the issue of risk and the suitability for the individual client. **I am not prepared to reject the document that is set forth on page 343, it may be of some assistance to the panel in its own review and determination of suitability and risk rating, but it does certainly not determinative of the issue**. Again, I reiterate that it our decision. I will provide, at a later date, at the conclusion of this matter, when a decision ultimately is forthcoming, when the

> outcome of this proceeding separate reasons in writing for our ruling on your objection Mr. Kiley.
>
> [emphasis added]

[26] Following the Merits Decision, the Hearing Panel issued a written decision confirming its reasons for admitting Ms. Gerada's evidence, which included the following:

> 5. After hearing the submissions of counsel and considering the cases to which counsel referred, the Panel decided that it would hear the evidence of the investigator and admit the exhibit. It is the role of the Panel as finder of fact to make determinations of fact in respect to the evidence offered in a hearing**. It is clearly in the expertise of the Panel to make its own determination of risk based upon what it has heard and the documentary evidence before it**. The sources of the data are relevant considerations in determining what weight the Panel should give the evidence. The evidence of the investigator and the exhibit were not determinative of the issue before the Panel. The evidence may be of some assistance, but was evidence to be considered in its totality in making a determination whether or not certain securities were suitable for the clients.
>
> [emphasis added]

[27] The Hearing Panel made no reference to the Gerada documentation in the Merits Decision. That decision included comments indicating the panel made an independent determination of the risk rating for the securities in question. For example:

> 60. GR's account statements show that in the relevant periods several high-risk securities were purchased by Ms. Locke for GR's RRSP/RIFF accounts. A summary of these securities purchased for GR's account can be found in the Written Submissions, Schedule A and the account statements.
>
> 61. A review of the risk ratings for these securities as stated in the Securities Commission's approved documents for public consideration such as prospectus, Short Form Prospectuses and information circulars reveals a concentration of high-risk securities. These are variously described as being volatile, could result in substantial losses, high risk, considered speculative, a history of significant losses. IIROC Staff prepared a yearly suitability analysis for GR's account in the relevant periods. It is noted that there were holdings in GR's account that were low to medium risk together with the high-risk securities.
>
> 62. The Panel finds that there were securities in the account of GR that, on the balance of probabilities in the circumstances and upon reasonable interpretation and application of all the evidence, render the trading on the whole as unsuitable for GR. Once again, as stated in consideration of client JF, the Panel finds that Ms. Locke cannot use the NCAF/KYCs as a shield to protect and defend

> unsuitable trades where the documents do not accurately reflect the client's investment objectives, knowledge, resources and time horizon.

[28] Ms. Locke argued before the Commission that the Hearing Panel erred in law by admitting the evidence of Ms. Gerada which she characterized as "opinion evidence".

[29] The Commission reviewed the arguments advanced by Ms. Locke and found no error in the Hearing Panel treatment of the Gerada documentation. It noted the IIROC compendium of documents filed as evidence contained the original source materials from which Ms. Gerada prepared her chart. The Commission explained its analysis as follows:

> [60] After taking a recess to consider the parties' submissions and review the cases, the IIROC Panel decided **that it was the sole role of the IIROC Panel to make determinations regarding risk and suitability and that it was entitled to rely on any evidence put before it.** It was not prepared to reject Gerada's documents as they may be of some assistance to the Panel in making those determinations (pgs. 121 and 122 of the Dec. 19 Transcript). This decision is reflected in paragraph 5. of the Admissibility Decision.
>
> [61] The issuer documents that Gerada used as the source for the ratings in the charts she prepared were admitted as Exhibits 7a to 7k, forming part of the evidence considered by the IIROC Panel in making its decisions. These consisted of IIROC Compendium Volumes 7-A to 7-K.
>
> [62] With respect to the Applicant's submissions relating to paragraphs 28, 61 and 94 of the Merits Decision, the IIROC Panel referenced the issuers' continuous disclosure documents, Volumes 7A to 7K, as well as the staff charts, in its analysis with respect to the risk ratings of securities in the various accounts. In paragraph 150 of the Merits Decision, there is no reference to any particular documents.
>
> [63] We find that at the Merits Hearing, the IIROC Panel did not misinterpret the applicable law before it and that it provided adequate reasons for its decision after hearing submissions from both parties. Therefore, the IIROC Panel did not err in law or breach the rules of natural justice and fairness in admitting the Gerada charts and determining that the charts may be of assistance to it in its determination of the risk ratings of the securities. We find no basis upon which to intervene in the Admissibility Decision.
>
> [64] We do note that the Gerada charts contain a few ratings for medium risk securities that are not supported by any issuer documents entered as exhibits. For example, in the "List of Securities Rated" chart for JF in Exhibit 1, IIROC Compendium Volume 1, tab 7, page 343, the ratings for National Bank of Canada and Royal Bank of Canada are "medium". These ratings may be opinion evidence as there are no supporting issuer documents for these two issuers in Exhibits 7a to

> 7k. However, **it is clear from the Admissibility Decision and the Merits Decision that the IIROC Panel was cognizant that it was the Panel's responsibility to make determinations regarding risk and suitability and that it did so based on all of the evidence put before it.**
>
> [emphasis added]

[30] Before this Court, Ms. Locke presented the same arguments she made to the Commission, suggesting the Hearing Panel improperly admitted and relied upon Ms. Gerada's opinion. The difficulty with this assertion is it is contrary to the submissions made by IIROC counsel to the Hearing Panel as well as the Merits Decision, which indicates the risk rating for securities was determined from the source documents. The Hearing Panel was not asked to rely on the alleged opinion in Ms. Gerada's chart nor did they do so.

[31] In my view, there is no basis to intervene in the Commission's decision to reject this ground for challenging the Merits Decision. I would dismiss this ground of appeal.

Issue #2 - Did the Commission err in its review of the Hearing Panel's application of and findings with respect to Dealer Rules 1300.1(a)(o)(q)?

[32] Dealer Member Rules 1300.1(a), (o) and (q), which were in effect at the relevant time, describe the obligation to understand a client's circumstances, risk tolerances and the suitability of securities in relation to their situation. The specific provisions relied on by IIROC are as follows:

> 1300.1(a) Each Dealer Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order account accepted.
>
> (o) Each Dealer Member shall use due diligence to ensure that the acceptance of any order for any account is within the bounds of good business practice.
>
> (q) Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such customer based upon factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance.

[33] The issues of whether Ms. Locke properly informed herself and recorded the essential facts related to the circumstances of each client, and whether securities recommended and purchased for those clients were suitable, encompassed a

significant portion of the evidence before the Hearing Panel. It covered the following contraventions and clients:

- Client JF in relation to Contraventions 1 and 2
- Client F Limited in relation to Contraventions 1 and 2
- Client EH in relation to Contravention 1
- Client LG in relation to Contraventions 5 and 6

[34] The Hearing Panel upheld the allegations primarily because they accepted the testimony of the clients over that of Ms. Locke concerning the discussions which had taken place. For some conversations, Ms. Locke produced notes which she said were prepared at the time. The Hearing Panel considered the notes and her explanation, but did not find this evidence sufficient to diminish the client testimony they chose to accept.

[35] As the initial decision maker, the Hearing Panel was required to consider the evidence and make factual findings. Where there were conflicting recollections between the client and Ms. Locke, the panel needed to decide how to reconcile them. They were in the best position to make this determination.

[36] When the Commission was asked to review the Merits Decision they applied a reasonableness standard using the *Canada Malting* criteria. This deferential approach meant they should not overturn factual findings unless an incorrect legal principle was applied or material evidence ignored. The standard of review would not justify substituting their own opinion with respect to whose testimony to accept or reject.

[37] When one examines the Hearing Panel's findings, which were upheld by the Commission, there is no indication an incorrect principle was applied. The Commission was correct when it deferred to the Panel with respect to these allegations. A review of some of the specific findings will demonstrate the point.

[38] Clients JF, F Ltd., EH and LG testified about their meetings and discussions with Ms. Locke during which the initial account documentation was prepared for their signature. In some cases, the account forms showed a risk tolerance greater than indicated by the clients in their testimony. The Hearing Panel accepted the client testimony over the entries in the documents for the following reasons:

> 17. The evidence of JF, GR, F Limited and EH describe meetings and conversations with Ms. Locke during the completion of the initial NAAF/KYC and subsequent updates. The Panel accepts the evidence of these clients. The forms were completed by Ms. Locke prior to presentment to them for review, initials, and signatures. The Panel is satisfied that clients JF, GR, F Limited and EH did not have a full appreciation of the risks associated with aggressive portfolios and high-risk tolerances. Each of these clients are discussed further.

[39] Specifically with respect to JF, the panel said:

> 22. It is a fact that Ms. Locke obtained JF's signature and initials on the KYCs discussed here. However, the Panel finds that the KYCs do not in fact represent an objectively suitable portfolio for JF. The evidence of JF is clear that there was no full discussion and explanation from Ms. Locke to JF of the nature and risk of the recommended portfolio. The Panel adopts the position taken by the Alberta Securities Commission in *Re Lamoureux*:
>
> > 'Neither the 'know your client' obligation nor the 'suitability' obligation can be fulfilled by completing poorly constructed forms or by following a procedure in a perfunctory fashion. Forms and procedures are merely tools that can assist in performing a task and that may provide reminders or evidence of efforts taken or not undertaken.'

[40] The suitability of securities is directly related to the client's circumstances and risk tolerance. The Hearing Panel described it this way:

> 27. The Panel takes the position that the central factor in suitability analysis is that the focus is on the client and not on the KYC form. If the KYC is not realistic, accurately, and truthfully completed, it cannot be used as the standard for assessing the suitability of subsequent purchases of securities. Given that the Panel has found that due diligence was not exercised by Ms. Locke in the completion of KYCs for JF; those KYCs cannot be the sole reference point for evaluating suitability. Suitability should be assessed *vis a vis* the client JF and her stated desire for income, her age, financial resources, and time horizon.

[41] Client JF was 103 years old with limited investment knowledge at the time of the hearing. She relied on Ms. Locke for her investment decisions, and her account contained medium and high risk securities which the Hearing Panel determined were not suitable.

[42] JF's investment account was jointly held with her two daughters. Ms. Locke's notes of her discussions with JF indicate she was told:

1. The daughters were added to the account for estate planning purposes.
2. The assets invested in the account belonged to JF.

3. JF did not necessarily plan on leaving money to her daughters.

[43] The position of Ms. Locke before the Hearing Panel was the Know Your Client ("KYC") form should govern and was a complete answer to the allegations concerning JF. This position was rejected by the Hearing Panel for the following reasons:

> 31. The Panel is not satisfied and finds that the KYCs prepared by Ms. Locke for JF's review and signature were not a good faith, diligent nor responsible statement of the client's risk tolerances and objectives. Therefore, they cannot be relied upon wholly or in part to justify the high-risk investments made in JF's account. The Panel is cognizant that some of the holdings in JF's account would be considered as suitable. The holdings of the securities set out above in the account of JF were not suitable for JF.

[44] Before the Commission, Ms. Locke argued the client suitability assessments should have involved consideration of the two daughters' circumstances in addition to JF. She pointed out one of the daughters did not testify and, therefore, the Hearing Panel was not in a position to say the documentation did not accurately reflect the circumstances of the account holder. The Commission noted the same argument had been made before the Hearing Panel and rejected. It also referred to the evidence showing JF's financial circumstances were independent of those of her daughters. The Commission found the Hearing Panel's decision to be reasonable based upon the facts, evidence and law before them.

[45] Client F Limited was a small, family owned corporation. The shareholders were a couple and their son. The investments in the account were high risk and Ms. Locke testified she had discussed this with the principals. The clients denied such a discussion took place.

[46] The Hearing Panel accepted the testimony of the parents, who were the controlling shareholders, and upheld the allegations against Ms. Locke. The rationale was as follows:

> 79. F Limited is a small family wood lot cooperation(sic) owned by GB, NB and their son JB. The corporation had $300,000 in net assets including land, machinery and $50,000 to $60,000 in liquid assets. GB and NB had no income from F Limited nor did the corporation have any income. GB and NB's only source of income was from OAS. Their son JB was employed as a carpenter. A corporation is a legal fiction, it has no intellect or knowledge beyond what its officers, directors or owners bring to it. In this case, the controlling persons of F Limited were GB and NB. The Panel finds that F Limited's investment horizon,

> risk tolerance and objectives are co-incidental to those of GB and NB. There is no degree of sophistication in capital markets for this corporate body.
>
> …
>
> 89. The Panel accepts the evidence of GB and NB that they were not told they could lose all or substantially all their investment. GB and NB were not moved in their evidence under cross-examination and an assessment of credibility inconsideration(sic) of all the circumstances favours NB and GB. The Panel finds that by not providing clear and unequivocal warnings to neophyte investors that Ms. Locke failed in her duty to use due diligence ‘relative to every customer and to every order or account accepted’.

[47] Before the Commission, Ms. Locke argued the corporation should have a different profile in terms of investment objectives and risk tolerance than the principals and, without testimony from the son, the Hearing Panel should not have concluded the securities were unsuitable.

[48] The Commission noted the same argument had been made before the Hearing Panel and rejected. The Commission said the documentary record included information about the son’s circumstances, and the Hearing Panel did not overlook any material evidence. Their decision was reasonable based on the facts, evidence and law before them.

[49] The allegations involving EH required the Hearing Panel to resolve a dispute between the client and Ms. Locke with respect to discussions concerning a margin account. The Panel resolved this contradiction in favour of EH and upheld the allegations against Ms. Locke. They summarized their rationale for doing so as follows:

> 114. Ms. Locke gave evidence that covered a broad range of conversations and explanations of risk to her client EH, which were refuted or not recalled by the client. The Panel was not directed to any intelligible written record or note of these detailed explanations to which Ms. Locke referred. Nor could one be found in the notes kept by Ms. Locke.
>
> 115. The Panel accepts the evidence of EH in so far as it relates to the operation of the margin account and his understanding of how a margin account works. On the balance of probabilities, it has been established that the margin amount [sic] was managed on behalf of EH in a manner that was not within the bounds of good business practices.

[50] The Commission was satisfied the Hearing Panel did not overlook any material evidence and the decision to uphold the complaint involving EH was reasonable based on the facts, evidence and law.

[51] With respect to client LG, there was also a contradiction between the client's testimony and Ms. Locke which the Hearing Panel resolved in favour of the client. The reasons for doing so were as follows:

> 142. LG sold her position at a point and paid off her mortgage and held 50% of the proceeds in cash within the account. During LG's discussions about moving from Industrial Alliance to Aligned Capital Partners, there were discussions about using the cash in the account to purchase securities. LG's evidence is that the KYC does not reflect her actual investment objective and that she was risk averse. She testified that Ms. Locke mentioned by name some of the securities she recommended but that she did not know their risk rating.
>
> 143. Ms. Locke, in her written submissions, states that she took notes of these conversations with LG. An examination of these notes provides no evidence or assistance to Ms. Locke that she met her obligations to truly know and accurately reflect the investor's objectives, goals and risk tolerance. Rather, they focus on and [sic] acknowledgement of the commissions for each transaction in accordance with the dealer policy.
>
> 144. The Panel finds that Ms. Locke was not diligent in knowing and remaining informed of essential facts relative to LG. On the whole, the Panel prefers and accepts the evidence of LG. Ms. Locke provided broad statements that contradicted LG, but they are not backed up by notes intelligible to the Panel. The Panel does not believe, on all the probabilities, that Ms. Locke would have such detailed recall of events absent cogent and detailed contemporaneous notes.
>
> …
>
> 150. In consideration of LG's testimony, her age, extremely limited income and investment objectives of having funds for emergencies and funding part of her retirement, the Panel finds that the mix of speculative and medium risk securities were not suitable for LG. The investments were not wildly offside but beyond what a prudent portfolio would contain in the circumstances.

[52] On the review by the Commission, Ms. Locke argued the Hearing Panel ignored the notes she had prepared. The Commission rejected this argument because the notes in question were specifically referenced in a footnote to the Merits Decision. The Commission went on to conclude the decision to uphold the allegations involving LG was reasonable based upon the facts, evidence and law.

[53] An examination of the Merits Decision in relation to all of these allegations demonstrates the position advanced by Ms. Locke; her evidence: including the notes, should be accepted and the testimony of the clients given little weight. She was unable to convince the Hearing Panel and, as a result, the Contraventions were upheld.

[54] When the Commission was called upon to review the Merits Decision, Ms. Locke repeated the argument her evidence should be preferred over the clients. The Commission was unable to identify any error in principle by the Hearing Panel and found their conclusions to be reasonable. By application of the appropriate standard of review, the findings by the Hearing Panel with respect to the above-noted allegations were upheld.

[55] Before this Court, Ms. Locke repeated the arguments she had made before the Hearing Panel and Commission which I would summarize as follows:

- In assessing the investment objectives and risk tolerance for JF, the circumstances of her daughters, the joint account holders, should have been taken into account.
- With respect to F Limited, the corporation should have been treated as having different investment objectives and risk tolerance than the principals and the circumstances of the son should have been taken into consideration.
- The notes of Ms. Locke should have been considered and preferred over the testimony of LG in resolving the contradictions in their evidence.
- The account documentation prepared by Ms. Locke and signed by EH should have been accepted as reflecting the overall investment strategy rather than EH's testimony.

[56] Although Ms. Locke attempts to describe these findings by the Hearing Panel as errors in principle, they are quintessentially factual findings in which conflicting evidence needed to be considered. The Commission was correct to defer to the Hearing Panel on these issues when conducting their reasonableness review. There is no basis on which we should interfere with the Commission's determination, and I would dismiss this ground of appeal.

Issue #3 – Did the Commission err in its review of the Hearing Panel's application of, and findings with respect to, Dealer Rule 29.1?

[57] Prior to placing a trade in securities on behalf of a client, an investment advisor is required to have instructions with respect to all four elements of the trade: the security, quantity, price and timing. Contravention 4 alleges Ms. Locke engaged in unauthorized trades with respect to four clients. The Hearing Panel found that she did so with respect to GR, JF and EH.

[58] At the time of the events leading to the charges against Ms. Locke, unauthorized trading fell under IIROC Dealer Member Rule 29.1 which said:

> 29.1 Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer 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.
>
> For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.

[59] The evidence of the clients before the Hearing Panel was very similar. They did not testify about specific securities but made general statements to the effect they rarely discussed trades with Ms. Locke prior to them appearing in their account. The position of Ms. Locke was that such evidence was insufficient to ground an allegation of unauthorized trading. In order to succeed, IIROC was required to present evidence with respect to particular transactions which they did not do. Her position before the Hearing Panel is summarized in her counsel's post-hearing written submissions:

> 269. In summary, in order for IIROC Staff to establish that the Respondent is guilty of a DMR 29.1 contravention for Unauthorized Trading, IIROC Staff must demonstrate that, on the balance of probabilities, the Respondent failed to confirm the requisite security, quantity, price, and timing elements of a trade with the client in question, before proceeding to place the disputed trade order, and that if so, the manner in which this trading took place amounted to conduct which was unethical, unbecoming or detrimental to the public interest and/or whether such conduct was unethical, unbecoming or detrimental to the public interest and/or whether such conduct reflected a character that is inconsistent with ethical standards.
>
> 270. In our submission, IIROC Staff have failed to establish on a balance of probabilities that any unauthorized transactions did in fact take place, and accordingly the allegations of unauthorized trading in this matter are unsupported on the facts, and are properly dismissed. IIROC Staff have not demonstrated that any particular disputed trade order was in fact unauthorized, but have been content to present evidence that unspecified transactions may have been

> unauthorized. This can be contrasted with the clear evidence of Ms. Locke regarding the method she confirmed transactions with various clients.

[60] Counsel for IIROC disagreed with the assertion that evidence of individual transactions was necessary. Their reply submissions to the Hearing Panel said:

> The Respondent suggested that an exact itemization of trades must be established to prove that she effected unauthorized trades in JF's account, EH's accounts and GR's RIF account. Staff submits that this argument is without merit as the Hearing Panel may find that unauthorized trading took place without such specificity. For example, regarding discretionary trading in *Brodie*, the Panel stated that 'We are unable to determine from the evidence the exact extent of the breach but we find that any breach, even 'less than five percent' to be significant.'

[61] The Hearing Panel was satisfied that IIROC had established unauthorized trading on the part of Ms. Locke with respect to JF, GR and EH.

[62] With respect to JF, the Hearing Panel said:

> 37. Ms. Locke, in her written submissions, states that she would often speak directly with client CR, but that "she would also speak with client JF or with both clients independently." It is Ms. Locke's position that she discussed trades in JF's account prior to placing the order with either JF or CR. Allowing for the expected inability for either JF or CR to remember with specificity the content of a call from Ms. Locke on a particular day nor the exact content of those alleged calls, the Panel is satisfied that Ms. Locke did not call in advance of all of the trades in JF's account. This finding is based on the Panel's observation of JF, CR and Ms. Locke's demeanour, veracity and consistency.
>
> …
>
> 41. Ms. Locke testified for three days and had opportunity to provide detailed evidence in respect to each of the trades in JF's account. The Panel found her evidence to be unspecific and rambling without detail in respect to the allegations.
>
> …
>
> 43. In a few instances, these notes were presented to the Panel in respect to meetings or calls. However, the notes were not presented to the Panel in respect to most of the trading in the account. Notwithstanding the opportunities to provide cogent evidence that the trades were authorized, none was introduced to counter the evidence of JF that she was not consulted, nor did she authorize the individual trades.

[63] With respect to GR, the Hearing Panel found:

69. It is clear from the evidence of GR, CR and Ms. Locke that there were frequent social interactions. What is not disclosed on the evidence is that Ms. Locke obtained trading instruction from GR before initiating trades. GR testified:

> ‘Q…. from 2010 to 2014 time period did Ms. Locke discuss each trade with you before it was made in your RIFF account?
>
> A. No, not with me directly. There’s ongoing and – and other discussion between Ms. Locke and my wife…’

70. GR also testified under cross-examination that:

> ‘Q. And do you recall times where Shirley and CR would talk about your-your account and your family accounts and receive recommendations from Shirley, and CR would share those recommendations with you, and Shirley would follow up on a call and make sure that you’re Okay with it?
>
> A. No, I don’t recall that.
>
> Q. Is it possible that occurred at all?
>
> A. Probably. There was, you know, this was over quite a period of time so I can’t recall specific discussions and telephone calls…’

71. Even though CR was not authorized to give instructions for trading in GR’s account, the evidence discloses that Ms. Locke sometimes contacted CR to discuss the accounts of CR, JF and GR. CR testified:

> ‘Q. Did Ms. Locke contact you for instructions on all the trades in GR’s RIFF account?
>
> A. She contacted me on-I would estimate about 20% of the trades. We only found out about others as they arrived in the mail, but yes she did contact me on occasions on some of the accounts on some of the equities, yeah.’

72. Ms. Locke executed 124 trades in GR’s account during the first material period.

73. Ms. Locke asserts, in her written submissions, that she contacted GR with respect to contemplated transactions in his account in every instance, but in many cases, this would be for the simple purpose of confirming her discussions with CR.

74. The Panel is aware that in 2014 GR and CR had a joint account in which CR could give instructions but not in the account in question at the relevant material time.

75. Both GR and CR testified that they were not contacted to provide instructions in most of the trading in GR’s account. Allowing that Ms. Locke may have discussed some of the trades, the Panel finds that Ms. Locke did conduct unauthorized trades in the account of GR.

[64] The Hearing Panel's analysis with respect to the finding that Ms. Locke engaged in unauthorized trading on behalf of EH was as follows:

> 119. EH accounts were not discretionary. The issue is then did Ms. Locke obtain prior approval for each transaction made in EH's accounts?
>
> 120. EH testified in direct and cross-examination that he did not receive a call from Ms. Locke nor anyone else in respect to each trade in his accounts. He did acknowledge that he did speak on occasion with Ms. Locke about a proposed transaction. In the relevant time period, there were 243 trades effected in EH's accounts. The Panel finds that EH would recall having spoken to Ms. Locke that frequently. Under cross-examination, EH emphatically denied having authorized the sale of his Crombie Reit position.
>
>> 'Q. Okay, let me put it a different way. Are you aware that there were shares of Crombie (Reid (sic) sold in account on September 27, 2011?
>>
>> A. No.
>>
>> Q. You didn't think it happened?
>>
>> A. Oh, it happened, but I didn't authorize it..
>>
>> Q. That's wasn't what..
>>
>> A. ..because I didn't want anything touched with the $500,000.'
>
> 121. EH was forthright in acknowledging that he could not recall every call from Ms. Locke:
>
>> 'A. I got a few calls; I can't determine exactly. Nobody could sit here and say, I got 10 calls, 15 calls, 5 calls. I did not get a continuous phone call every 2 or 3 weeks which you were implying earlier.'
>
> 122. The Panel finds EH's evidence credible and accepts it.
>
> 123. Ms. Locke, in her written submissions, stated:
>
>> 'By contrast, Ms. Locke provided clear evidence regarding the interactions she had with client EH. It should be noted that Ms. Locke maintained notes which contain reference to <u>some</u> transactions with client EH.' (emphasis added)
>
> 124. The Panel notes that an examination of Ms. Locke's notes provides occasional reference to EH without any decipherable detail that would enable a third-party reader to reasonably establish the nature of the content of the references. The notes of Ms. Locke do not add weight to any implication that she had obtained authorization for every trade in EH's accounts.

[65] It is clear the Hearing Panel preferred the evidence of the clients indicating they did not discuss all transactions with Ms. Locke in advance. They were also satisfied it was not necessary for IIROC to call specific evidence with respect to

each and every transaction in the client account in order to support a finding of unauthorized trading.

[66] The Commission, in conducting its reasonableness review, was required to give deference to the conclusions of the Hearing Panel, particularly with respect to credibility findings. They should only intervene if one of the five grounds set out in *Canada Malting* was established:

1. The Hearing Panel proceeded on an incorrect principle.
2. The Hearing Panel erred in law.
3. The Hearing Panel overlooked material evidence.
4. The Commission was presented with new and compelling evidence not available to the Hearing Panel.
5. The Hearing Panel's perception of public interest conflicted with that of the Commission.

[67] The submissions by Ms. Locke and IIROC to the Commission focused on whether it was necessary to have evidence of specific unauthorized transactions in order to find Ms. Locke was in breach of Rule 29.1. The position of Ms. Locke was summarized by the Commission as follows:

> 180. The Applicant submitted that this was best evidenced by the fact that the findings in the Merits Decision were limited to general findings of unauthorized trading, and failed to identify specific examples, or evidence in support, of unauthorized trading sufficient to establish a clear end cogent evidentiary basis for the IIROC Panel's decisions.
>
> 181. The Applicant submitted that since IIROC Staff's allegations did not generally relate to any specific unauthorized transactions, the standard of proof was reversed as the onus was on the Applicant to affirmatively demonstrate that she had authority for each and every transaction in the clients' accounts. This was an error of law.

[68] The position of IIROC was described as:

> 183. IIROC Staff submitted that the IIROC Panel made no error in finding that the Applicant effected unauthorized trades in the accounts of JF, GR and EH. The IIROC Panel considered all of the evidence and accepted the clients' evidence where it conflicted with the Applicant's evidence. There was no change in the

> standard of proof. The IIROC Panel simply found the clients' evidence more credible in terms of this allegation.
>
> 184. IIROC Staff submitted that it was able to prove the unauthorized trading contraventions by asking each client whether they discussed trades in advance or gave instructions to the Applicant during the time period in question. The clients provided clear, cogent and convincing evidence that the Applicant did not discuss all trades with them in advance of making the trades and that unauthorized trades took place in their accounts.

[69] After reviewing the case authorities provided to the Hearing Panel, the Commission concluded the panel had erred in law and intervention was required:

> 204. Unlike in the cases discussed above, no evidence, in particular documentary evidence, was provided by IIROC Staff to the IIROC Panel of specifics of at least some of the unauthorized transactions in the three accounts during the First Material Period. The IIROC Panel's decision was based on the acceptance of the oral testimony of JF, CR, GR and EH that they were not consulted on all trades in the three accounts together with specific information about the Crombie Sale from EH.
>
> 205. With respect, we find that, based on the case law presented at the Merits Hearing, the IIROC Panel erred in law in concluding that there was clear, convincing and cogent evidence of unauthorized trading by the Applicant in the accounts of JF, GR and EH, except with respect to the Crombie Sale.
>
> 206. The Applicant has demonstrated that its case fits at least one of the *Canada Malting* factors. Therefore, we set aside the IIROC Panel's decisions and conduct a hearing *de novo* of these portions of the Merits Decision.

[70] Having decided to proceed with a *de novo* hearing, the Commission was free to consider new evidence and come to its own conclusion concerning the allegations of unauthorized trading. No new evidence was provided and so the Commission made its decision based upon the evidentiary record before the Hearing Panel. The Commission was given copies of two IIROC panel decisions, which had not been given to the Hearing Panel. In those cases, allegations of unauthorized transactions were substantiated by oral testimony of clients which was similar to that provided by JF, GR and EH. The Commission accepted the rationale from those decisions and confirmed the allegations of unauthorized trading against Ms. Locke:

> 210. In contested hearings where there will be conflicting evidence between a registrant and their clients, it could be crucial for IIROC Staff to provide documentary evidence to support allegations of unauthorized trading. However, based upon *Harding* and *Bodnarchuk*, it is clear that an IIROC hearing panel can

> accept and conclude that the oral testimony of a client provides clear, convincing and cogent evidence of unauthorized trading.
>
> 211. After considering the Review Record and the application of the law in *Harding* and *Bodnarchuk*, we adopt and confirm the IIROC Panel's decisions that the Applicant conducted unauthorized trades in the accounts of JF, GR and EH contrary to Rule 29.1.

[71] The Commission's analysis and conclusions on the issue of unauthorized trading are inconsistent and problematic. It says the Hearing Panel erred in law by finding unauthorized trading because there was insufficient evidence to meet the burden on IIROC. The Commission then makes its own finding of unauthorized trading on the same evidentiary record. The only additional information which it had were two non-binding IIROC panel decisions with similar facts.

[72] There is no legal principle that oral testimony is insufficient to establish unauthorized trading by an investment advisor or that clients must testify about specific trades, rather than provide general testimony to the effect that trades were not discussed in advance. The Commission was wrong when it stated the Hearing Panel had erred in law in accepting such evidence to establish unauthorized trading. The Commission did not defer to the Hearing Panel and misapplied its standard of review. This error by the Commission means its decision to overturn the Hearing Panel decision and conduct a *de novo* review must be set aside.

[73] Ironically, setting aside the Commission decision on unauthorized trading leaves the Hearing Panel's conclusions on this issue intact, which is the same as the outcome reached by the Commission following the *de novo* hearing. Despite establishing an error by the Commission, the result for Ms. Locke is unchanged; she has been found to have engaged in unauthorized trading.

[74] I would set aside the Commission's conclusion on unauthorized trading, restore the findings of the Hearing Panel and dismiss this ground of appeal.

Issue #4 – Should the penalty imposed by the Commission be set aside in whole or in part?

[75] Counsel for Ms. Locke advised the Panel her appeal from the penalties imposed was only to the extent this Court set aside some or all of the disciplinary findings against her. Since we have not done so, there is no basis to intervene in any aspect of the Penalty Decision and I would dismiss this ground of appeal.

Disposition

[76] I would dismiss the appeal for the reasons set out above. Counsel for IIROC advised it is acting in the public interest as a regulatory body and, as a result, is not seeking costs. None are awarded.

Wood, C.J.N.S.

Concurred in:

Hamilton, J.A.

Scanlan, J.A.