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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

- and -

IN THE MATTER OF BRYAN ANDREW VICKERS

- and -

IN THE MATTER OF A HEARING AND REVIEW OF A DECISION OF A PANEL OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA, DATED JUNE 19, 2014

REASONS AND DECISION
(Section 21.7 and Subsection 8(3) of the Act)

Hearing:	December 16, 2014		
Decision:	April 24, 2015		
Panel:	Christopher Portner	-	Commissioner
Counsel:	Jeremy Devereux	-	For Bryan Andrew Vickers
	Andrew P. Werbowski Alexandra Clark	-	For the Investment Industry Regulatory Organization
	Jennifer Lynch	-	For the Ontario Securities Commission

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REASONS AND DECISION

I. BACKGROUND

A. Introduction

[1] On December 16, 2014, the Ontario Securities Commission (the "**Commission**") held a hearing to consider an application made by Bryan Andrew Vickers ("**Vickers**") dated July 17, 2014 (the "**Application**") under section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") for a hearing and review of a decision of a hearing panel (the "**Panel**") of the Investment Industry Regulatory Organization of Canada ("**IIROC**") dated June 19, 2014 (the "**Decision**").

[2] The Decision was issued by the Panel following a sanctions hearing (the "**Hearing**") that was based on an Agreed Statement of Facts dated June 9, 2014 (the "**Agreed Statement of Facts**").

[3] In the Agreed Statement of Facts, Vickers admitted that, from April 2010 to August 2011, he failed to adequately supervise a registered representative, Derek Axford ("**Axford**"), and certain of his client accounts, when Axford recommended certain inverse exchange-traded funds (the "**IETFs**") to clients, contrary to IIROC Dealer Member Rule 38.4.

[4] Paragraph (a) of IIROC Dealer Member Rule 38.4 states that:

> A Supervisor must fully and properly supervise each partner, Director, Officer, Registered Representative, Investment Representative or agent in accordance with the supervisory responsibilities assigned to the Supervisor, the Rules of the Corporation and the written policies and procedures of the Dealer Member so as to ensure their compliance with the Rules of the Corporation and all other laws, regulations and policies applicable to the Dealer Member's securities and commodity futures business.

[5] The IETFs involved were the Horizons BetaPro S&P/TSX 60 Inverse ETF (the "**Horizons IETF**") and the ProShares Short S&P 500 (the "**ProShares IETF**"), each of which was issued pursuant to a prospectus. The prospectus for the Horizons IETF described the fund as highly speculative and involving a high degree of risk. The prospectus for the ProShares IETF at the relevant time stated that the fund may not be suitable for all investors and should only be used by knowledgeable investors.

[6] In the Decision, the Panel ordered that Vickers:

(a) Pay a fine of $30,000;

(b) Be prohibited or suspended from becoming a Supervisor for a period of six months; and

(c) Re-write the Supervisor's course before again becoming a Branch Manager.

Counsel for IIROC and Vickers agreed that Vickers would pay $3,000 for costs.

B. The Application

[7] Vickers applied for a hearing and review of the Decision by the Commission on the following grounds:

(a) The Panel erred in law and proceeded on incorrect principles in basing its decision to a significant extent on facts and conduct that were not admitted in the Agreed Statement of Facts and not otherwise admissible;

(b) The Panel's reasons are inadequate in the circumstances; and

(c) The Panel erred in law and proceeded on incorrect principles in imposing sanctions that are disproportionate to the facts and conduct agreed upon in the Agreed Statement of Facts.

C. IIROC's Rules Notice – Guidance Note

[8] On June 11, 2009, IIROC issued a Rules Notice/Guidance Note entitled *Sales Practice Obligations Relating to Leveraged and Inverse Exchange-Traded Funds* (the "**Guidance Note**"). As stated in paragraph 34 of IIROC's Written Submissions:

> The [Guidance Note] was, on its face, intended to be distributed internally to "Legal and Compliance, Retail, Senior Management and Training" personnel. The Agreed Statement of Facts does not refer to the Guidance Note.

II. THE ISSUES

[9] In considering the Application, we will address the following issues:

(a) The Commission's jurisdiction to intervene in this matter;

(b) The appropriate standard of review under section 21.7 of the Act;

(c) Whether the Applicant has established any of the grounds on which the Commission may intervene in the Decision; and

(d) If there are grounds to intervene in the Decision, what the appropriate disposition of the matter by the Commission should be in the circumstances.

III. SUBMISSIONS OF THE PARTIES

A. Applicant's Submissions

[10] The Applicant submits that the Panel committed three errors set out below which justify and require the intervention of the Commission.

1. Sanctions Were Based on Facts and Contraventions That Were Not Admitted

[11] Vickers submits that the Panel committed an error in law and in principle by basing its decision on facts and contraventions that were not contained in the Agreed Statement of Facts and were not otherwise admissible. Vickers submits that the legal principles surrounding agreed statements of facts are clear and that courts have consistently held that triers of fact are bound by agreed statements of facts.

[12] Vickers submits that civil courts have held that, when the parties have entered into an agreed statement of facts, the court should not go beyond those facts, with the possible exception of limited inferences drawn from the agreed upon facts and relies in this regard on *Brown v Dalhousie University*, [1995] NSJ No 264 at para 27 (CA).

[13] Vickers further submits that the binding nature of an agreed statement of facts is even clearer in criminal cases in which the prosecution and the accused have agreed on facts and the accused has pleaded guilty based on those facts. He cites the case of *R v Druken*, [2006] NJ No 326 at para. 18 (CA) ("***Druken***"), in which Justice M. Rowe of the Newfoundland and Labrador Court of Appeal stated as follows:

> Counsel must provide sufficient facts to permit the sentencing judge to determine whether the sentence is reasonable in the circumstances. The court is bound by the agreed statement of facts; the sentencing judge cannot 'find' additional facts. As well, any inferences the judge may draw must follow clearly from what is set out in the agreed statement. [Emphasis added.]
>
> (*Druken*, *supra* at para. 18)

[14] Vickers submits that the principles derived from civil and criminal cases are applicable to discipline hearings such as the current proceeding and cites the case of *McGarrigle v Canadian Interuniversity Sport*, [2003] OJ No 1842 ("***McGarrigle***") at para. 42 (SCJ), in which the Ontario Superior Court of Justice held that when parties to a disciplinary proceeding have entered into an agreed statement of facts, those are "the only facts regarding the alleged improper conduct" of the respondent that the panel is "allowed to consider".

[15] Vickers further submits that it is against the public interest for a discipline panel to go beyond an agreed statement of facts. Agreed statements of facts and admissions of contraventions result in a substantial savings of time and resources and as such are in the public interest. Vickers emphasizes that registrants will be far less likely to rely on agreed facts and contraventions if there is a risk that the panel will consider matters outside the agreed facts and contraventions and impose sanctions greater than would be supported by the agreed facts and contraventions.

[16] Vickers submits that the Panel "found" multiple facts and contraventions that went beyond the Agreed Statement of Facts when there was no basis on which it was entitled to do so in the following five instances:

(a) The Panel referred to and quoted from statements relating to the risks of IETFs in the Guidance Note in its recitation of the facts. The Agreed Statement of Facts

made no reference to the Guidance Note and did not indicate whether or not Vickers had knowledge of it. In addition, counsel for IIROC had pointed out to the Panel that the Guidance Note was not before the Panel, there was no evidence that the Guidance Note had been seen and ignored or not seen at all and it should not be a factor in this matter.

(b) In its assessment of Vickers's conduct, the Panel held that, if Vickers knew what the Guidance Note stated, his conduct showed a "serious error of judgement" and that, if he did not know, he was "at least negligent" in not knowing.

(c) The Panel's conclusions regarding the Guidance Note are premised on the statements in the Guidance Note about the risks of IETFs being correct when no such admission was made.

(d) The Panel held that, if Vickers knew what the prospectuses for the Horizons IETF and the ProShares IETF (collectively, the "**Prospectuses**") stated, his conduct showed a "serious error of judgment" and that, if he did not know, he was "at least negligent" in not knowing. No such admission was included in the Agreed Statement of Facts.

(e) The Panel's conclusions regarding the Prospectuses are premised on the statements in the Prospectuses about the specific risks of the IETFs being correct when no such admission was made.

[17] Vickers submits that it is clear from the Decision that the Panel's findings with respect to the Guidance Note and the language of the Prospectuses formed a significant part of the Panel's assessment of Vickers's conduct and, accordingly, had a significant effect on the Panel's decision relating to sanctions. Moreover, the Panel's references to Vickers's conduct as being either "at least negligent" or that it showed a "serious error of judgment" demonstrates that the Panel considered the Guidance Note and the language of the Prospectuses to be very significant. Vickers further submits that he only admitted what the Prospectuses stated and not that such statements were correct and that there was no admission on his part that the IETFs were unsuitable for clients based on the Prospectuses.

[18] Vickers acknowledges that a court or tribunal may draw inferences from an agreed statement of facts, however, any such inferences must follow "clearly" or "necessarily" from the agreed facts and not be "simply possibilities that are consistent with the agreed facts". (*Druken, supra* at para 18.) He argues that the Guidance Note was not admissible by way of inference as it is a stand-alone document whose existence and contents do not follow from the Agreed Statement of Facts. Similarly, the Panel's conclusions with respect to Vickers's conduct in light of the Guidance Note and statements in the Prospectuses do not follow clearly or necessarily from the facts and contraventions that were agreed upon.

[19] Vickers submits that the unadmitted facts are not admissible through judicial notice. He submits that the Commission in *Re Northern Securities Inc.* (2014) 37 OSCB 161 ("***Re Northern***") held that judicial notice may only be taken of facts which are so notorious as to not be the subject of dispute among reasonable persons, or facts capable of immediate and accurate

demonstration by resorting to readily accessible sources of indisputable accuracy. It is Vickers's position that the technical statements about risks of the specific IETFs in the Prospectuses do not satisfy the foregoing standard of indisputable accuracy and that Vickers never admitted that the statements in the Prospectuses were correct.

[20] Vickers further submits that the Panel was not permitted to take judicial notice of the statements in the Guidance Note or the correctness of the statements in the Prospectuses as the basis for finding fault on his part.

[21] Vickers submits that the unadmitted facts are not admissible based on the expertise of the Panel. While he acknowledges the ability of expert panels to rely on their specialized industry knowledge, he submits that the unadmitted facts are matters of technical evidence and the Panel was not entitled to admit such evidence on the basis of its specialized industry knowledge.

2. The Panel's Reasons Are Inadequate

[22] Vickers submits that the Panel erred in law and in principle by failing to provide adequate reasons. He submits that the Panel's reasons do not provide a sufficient basis for understanding why the Panel imposed the sanctions set out in the Decision.

[23] Vickers states that the Panel did not compare Vickers's conduct to that of the registrants in prior discipline cases notwithstanding the detailed submissions by counsel for each of IIROC and Vickers with respect to the case law, most of which in Vickers's submission was favourable to him, and only referred in a general way to the IIROC Dealer Member Disciplinary Sanction Guidelines (the "**Sanction Guidelines**").

[24] Vickers submits that the reasons of the Panel are so inadequate as to foreclose a meaningful review by the Commission resulting in an error of law requiring the Commission to substitute its own findings for those of the Panel or, in the alternative, direct a new hearing.

3. The Sanctions Are Disproportionate to the Conduct Admitted

[25] Vickers submits that the suspension and fine imposed by the Panel are disproportionate to the conduct admitted and unfair and amount to errors of law and principle.

[26] Vickers submits that, when viewed in the light of the Sanction Guidelines and previous manager supervision cases of IIROC and one of its predecessor organizations, the Investment Dealers Association of Canada, this is not an appropriate case for a suspension. He further submits that, when compared to Axford whose conduct is at the root of the matter at issue, his suspension, although only of supervisory responsibilities, is of a longer duration.

[27] Vickers refers to the case of *Re Mills*, [2001] IDACD No 7 ("***Re Mills***"), which was cited by Staff in its submissions to the Panel, in which the hearing panel stated as follows:

> As it has previously stated, in deciding on an appropriate penalty the District Council's main concerns are protection of the investing public, the Association's membership and the integrity of the Association's processes and the securities market. … A penalty imposed by the District Council thus reflects its assessment of the sanctions necessary in the case before it to accomplish these goals, taking

into account the seriousness of the respondent's conduct and specific and general deterrence.

(*Re Mills, supra* at para. 56.)

[28] Vickers submits that the sanctions imposed on him are inappropriate in terms of the needs of either, or both, specific and general deterrence and that sanctions "must be proportionate to the specific conduct of the respondent, and the particular circumstances of the respondent including, for instance, the size of the respondent and the impact sanctions may have. The failure to impose proportionate sanctions constitutes an error in principle or in law within the meaning of *Canada Malting*[1]." (*Re Northern, supra* at para. 78.)

B. IIROC Staff Submissions

1. The Guidance Note

[29] IIROC Staff acknowledges that notices such as the Guidance Note "are not enforceable in the same manner as a prescriptive Rule or Policy would be and did not make such a submission during oral argument." (Written Submissions of IIROC at para. 35.)

[30] IIROC Staff submits that a hearing panel "may have regard to a Rules Notice", which would include the Guidance Note, whether or not it is included in an agreed statement of facts and that this is no different than a hearing panel referring to a Dealer Member Rule, a Universal Market Integrity provision, a National Instrument or a Staff Notice of a provincial securities commission. (Written Submissions of IIROC at para. 36.)

[31] IIROC Staff also submits that the *Re Euston Capital* decision[2] of the Alberta Securities Commission (the "**ASC**"), in which the ASC considered the text of a Companion Policy in connection with the alleged sale of securities to individuals who did not qualify as accredited investors, is relevant. In its decision, the ASC stated that "Companion policies do not set standards, but provide general guidelines for the assistance of sellers of securities...". In the view of IIROC Staff, the Panel was "equally permitted to refer to a Guidance Note which, as the name suggests, forms part of the guidance made available to supervisory personnel to assist them in their assessment of product risk." (Written Submissions of IIROC at para. 38.)

[32] Finally on the issue of the Guidance Note, IIROC Staff makes the following submission which is reproduced in its entirety given the importance of the issue in this matter:

> While it may have been more appropriate for the IIROC Hearing Panel to heed the admonitions of counsel that is was permissible but not necessary for them to consider the Guidance Note, the Hearing Panel's reference to it was not sufficient to constitute an error of law such that the Sanction Decision, as a whole, must be set aside. This is particularly the case where, as described above, there were other facts in evidence which led to precisely the same conclusion.
>
> (Written Submissions of IIROC at para. 42.)

[1] As defined in paragraph [49] below.
[2] *Re Euston Capital Corp*. 2007 ABASC 75 at para. 109.

2. IETF Prospectus Statements

[33] IIROC Staff submits that the Agreed Statement of Facts sets out in detail the disclaimers and warnings regarding the complex nature and risk factors associated with the two IETFs. In the Agreed Statement of Facts, Vickers makes the following statements regarding the inquiries made by the Compliance Department of his employer, RBC Dominion Securities Inc. ("**RBC DS**"), relating to Axford's investment strategy and the fact that most, if not all, of Axford's accounts were concentrated in the two IETFs and in a fixed income fund:

> 40. In response, Vickers' Assistant Branch Manager on behalf of Vickers, advised the Compliance department that he and Vickers were aware of these issues and were continuing to review them with Axford.
>
> 41. Vickers had a detailed discussion with Axford wherein Axford again explained his strategy. In response to an inquiry from Compliance, Axford explained his strategy in writing. Vickers reviewed the written explanation and asked that Axford add to it the explanation he gave to his clients. The explanation offered by Axford did not refer to the statements in the prospectuses for the IETFs regarding risk.
>
> (Agreed Statement of Facts, paras. 40 and 41.)

[34] IIROC Staff states that the Panel correctly noted in the Decision that the Agreed Statement of Facts does not indicate what knowledge Vickers had of the contents of the Prospectuses. However, they submit that the Panel was entitled to rely on a statement by Vickers's counsel in response to a question from the Panel by which he acknowledged that Vickers was not aware of the contents of the Prospectuses.

[35] In his oral submissions to the Commission, IIROC Staff's counsel stated that the prospectus issue is the "linchpin of Staff's case"[3]. It is IIROC Staff's position that the matter of the Guidance Note is not an essential element of the case because the description of the risks of IETFs included in the Guidance Note is set out in the Prospectuses and described in the Agreed Statement of Facts and, as a result, was properly before, and considered by, the Panel.

3. The Sanctions Were Not Inappropriately Severe

[36] IIROC Staff submits that the sanctions imposed on Vickers were not inappropriately severe and fall squarely within the ranges provided by the Sanction Guidelines. IIROC Staff submits that the relevant precedents were before the Panel which weighed the facts of this matter against such precedents and that Vickers is merely requesting that the Commission reweigh the facts and evidence, which is not the role of the Commission.

[37] IIROC Staff submits that, in any event, the Panel's analysis and the results of that analysis are reasonable and that it was acceptable for the Panel to consider specific and general deterrence as a sanctioning factor and that certain IIROC hearing panels continue to cite *Re Mills* while others cite *Re Cartaway Resources Corp.*, 2004 SCC 26 ("*Cartaway*"), a decision that

[3] Transcript p. 106 at line 21.

post-dates *Re Mills*. In *Cartaway*, the Supreme Court of Canada held that general deterrence may be taken into account.

[38] Finally, IIROC Staff submits that the reasons must be sufficient to satisfy the criteria of justification, transparency and intelligibility and refers to the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, [2011] SCJ No 62 ("***Newfoundland Nurses***") in which the Court stated:

> … reasons must be sufficient to permit the parties to understand why the tribunal made the decision and to enable judicial review of that decision. The reasons should be read as a whole and in context, and must be such as to satisfy the reviewing court that the tribunal grappled with the substantive live issues necessary to dispose of the matter.
>
> (*Newfoundland Nurses, supra* at para. 9, citing *Dunsmuir v. New Brunswick*, 2008 SCC 9.)

C. OSC Staff Submissions

[39] Staff of the Ontario Securities Commission ("**OSC Staff**") submits that, when the parties put an agreed statement of facts before the court, both the parties and the court are bound by those facts and may not depart from them. (*R. v. Bayani*, [2011] OJ No 4368 at para. 139 (SCJ), *Brown v Dalhousie University*, [1995] NSJ No 264 at para. 27 (CA), *Chenier v Stephens*, [2000] OJ No 2721 at paras. 11-12 (SCJ).)

[40] OSC Staff also submits that the same principle applies to administrative tribunals and that the Panel was bound by the Agreed Statement of Facts and should only have considered the facts set out in the Agreed Statement of Facts, which did not include any reference to the Guidance Note.

[41] OSC Staff also takes the position that, like the courts, administrative tribunals may take judicial notice of certain facts, however:

> "…the threshold for judicial notice is strict: a court may properly take judicial notice of facts that are either: (1) so notorious or generally accepted as to be not the subject of debate among reasonable persons; or (2) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy;
>
> (*R v Find*, [2001] 1 SCR 863 at para. 48 ("***Find***").)

[42] OSC Staff submits that it is a well-established principle that, if a court or tribunal is going to take judicial notice, it must give the parties an opportunity to make submissions and rely in this regard on *Judicial Review of Administrative Action in Canada* in which the authors state as follows:

> The general rule proscribing ex parte evidence-gathering is qualified, however, to the extent that it is permissible for administrative adjudicators to make use of

> information that can be judicially noticed… And because tribunals have often been established in order to provide more specialized decision-making, and sometimes escape the adversarial procedural model of the court, it may be that their members may take notice of a wider range of information than that within the narrowly-circumscribed scope of judicial notice. As well, of course, tribunal members may draw on their experience to assist them in assessing the evidence that they have heard, including their awareness of relevant published material that may suggest principles to guide them in the exercise of their discretion.
>
> (Brown & Evans, *Judicial Review of Administrative Action in Canada*, Volume 3, Carswell, 2013 (looseleaf) at Chap. 12:2110.)

[43] It is the position of OSC Staff that the Panel appears to have taken judicial notice of the Guidance Note as it was not referred to in the Agreed Statement of Facts and was not entered into evidence at the hearing before the Panel. As a result, OSC Staff submits that the Panel erred in taking judicial notice as the Guidance Note did not meet the test of notoriety or general acceptance set out in *Find* (see paragraph [41] above.)

[44] With respect to the sufficiency of the reasons, OSC Staff submits that the test for determining whether the reasons of an administrative tribunal are sufficient were set out in *Clifford v Ontario Municipal Employees Retirement System*, [2009] OJ No 3900 ("***Clifford***") in which the Court of Appeal of Ontario stated:

> The basis of the decision must be explained and this explanation must be logically linked to the decision made. This does not require that the tribunal refer to every piece of evidence or set out every finding or conclusion in the process of arriving at the decision.
>
> (*Clifford*, *supra* at para. 20.)

[45] OSC Staff submits that the Panel erred in law in considering the Guidance Note and that the Commission should send the matter to a newly-constituted IIROC hearing panel for re-consideration. It is further submitted that, if in the alternative, the Commission decides to determine the matter, the sanctions imposed by the Panel were not disproportionate to the conduct admitted to in the Agreed Statement of Facts.

IV. ANALYSIS OF SUBSTANTIVE ISSUES RAISED ON THE APPLICATION

A. Jurisdiction to Intervene

[46] The Commission has the authority to review any direction, decision, order or ruling of a self-regulatory organization such as IIROC under section 21.7 of the Act which provides as follows:

> **21.7 (1) Review of Decisions** – The Executive Director or a person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization,

recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling.

(2) Procedure – Section 8 applies to the hearing and review of the direction, decision, order or ruling in the same manner as it applies to a hearing and review of a decision of the Director.

[47] Subsection 8(3) of the Act provides that, on a hearing and review, the Commission may confirm the decision under review or make such other decision as the Commission considers proper.

B. Standard of Review and Grounds for Intervention

[48] The Commission exercises original jurisdiction similar to conducting a new trial and may admit new evidence in a hearing and review under section 21.7 of the Act.

[49] The grounds on which the Commission will intervene in a decision of a self-regulatory organization were established in *Canada Malting Co. (Re)* (1986), 9 OSCB 3565 ("***Canada Malting***"). Based on *Canada Malting*, Vickers must meet the burden of demonstrating that his case fits squarely within at least one of the following grounds before the Commission will intervene in the Decision:

(a) The Panel proceeded on an incorrect principle;

(b) The Panel erred in law;

(c) The Panel overlooked material evidence;

(d) New and compelling evidence is presented to the Commission that was not before the Panel; or

(e) The Panel's perception of the public interest conflicts with that of the Commission.

(*Canada Malting, supra* at para. 21; *Hudbay Minerals Inc. (Re)* (2009), 32 OSCB 3733 ("***Hudbay***") at para. 114).

[50] Although the scope of the Commission's authority on a hearing and review is well established, in practice, the Commission takes a restrained approach to applications under section 21.7 of the Act, and will only substitute its decision for that of an IIROC hearing panel in rare circumstances (*Investment Dealers Assn. of Canada v Kasman* (2009) 32 OSCB 5729 at para. 43; *Hudbay, supra* at paras. 103, 104 and 114.)

[51] In addition to its restrained approach to applications under section 21.7 of the Act, the Commission recognizes the specialized expertise of an IIROC hearing panel and accords deference to factual determinations central to the panel's specialized competence (*Re Boulieris* (2004), 27 OSCB 1597, aff'd (2005), 28 OSCB 5174 (Div Ct); *Re Northern Securities, supra* at para. 61; *Re Questrade Inc.* (2011), 34 OSCB 2595 at paras. 16-17; and *Re Kasman* (2009), 32 OSCB 5729 at para. 43). The Commission accords even greater deference in matters of

sanctions, and recognizes that IIROC hearing panels will have greater familiarity with IIROC's regulations and sanction guidelines than the Commission (*Re Benarroch* (2011), 34 OSCB 2041 at paras. 4 and 5).

C. Analysis

1. Were the sanctions based on facts and conduct that were not admitted in the Agreed Statement of Facts

[52] The Guidance Note was distributed internally by members of IIROC and forms part of the guidance made available to supervisory personnel to assist them in their assessment of product risk (see paragraphs [8] and [31] above.)

[53] As acknowledged by IIROC Staff, notices such as the Guidance Note are not enforceable in the same manner as a prescriptive rule or policy (see paragraph [29] above.)

[54] It is quite clear from their respective terms that the Agreed Statement of Facts did not include any mention of the Guidance Note and that the Decision not only mentioned the Guidance Note but also included an extensive excerpt from the Guidance Note that stated, among other things, that:

> … leveraged and inverse ETFs that are reset daily typically are unsuitable for retail investors who plan to hold them for longer than one trading session, particularly in volatile markets.
>
> (Decision, para. 17.)

[55] In addition, the Decision effectively states that, if Vickers had known what the Guidance Note stated, "his conduct showed a serious error of judgment" and, if he did not know what the Guidance Note stated, "he was at least negligent in not knowing".

[56] IIROC Staff takes the position that an IIROC hearing panel "may have regard to a Rules Notice", which would include the Guidance Note, whether or not it is included in the Agreed Statement of Fact, and likens it, among other things, to a Staff Notice of a provincial securities commission. Staff notices are described in *Securities Law in Canada* (2010) as follows:

> Staff notices are a mechanism for the CSA or provincial regulatory staff to communicate with market participants in a less formal manner, <u>often in relation to emerging regulatory problems that have not yet become the subject of a policy or a rule.</u> Notices are also used to convey to the market the results of staff investigations into how specific issues are handled by market actors, such as executive compensation disclosure or specific accounting issues. [Emphasis added.]
>
> (Condon et al. *Securities Law in Canada* (Toronto: Edmond Montgomery Publications, 2010) at p. 26.)

[57] Both Vickers and OSC Staff take the position that the Panel was bound by the Agreed Statement of Facts and should only have considered the facts set out in the Agreed Statement of Facts which would preclude any reference to the Guidance Note.

[58] In my view, the case law is clear. As stated by the Ontario Superior Court of Justice in *McGarrigle*, when parties to a disciplinary proceeding have entered into an agreed statement of facts, those are the only facts regarding the alleged improper conduct of the respondent that the panel is allowed to consider. This is entirely appropriate as respondents must know the case they have to meet. Hearing panels, including the Panel, are bound by and limited to the facts set out in agreed statements of facts which are intended to substantially simplify proceedings by obviating the need for additional evidence.

[59] It was inappropriate for the Panel to have considered the Guidance Note and it is clear that the Panel ascribed some weight, possibly significant weight, to what the Panel described as the consequences of Vickers's knowledge of what the Guidance Note stated or his failure to have such knowledge, neither of which were addressed in the Agreed Statement of Facts. In this regard, I do not agree with IIROC Staff's assertion that the Guidance Note is not an essential element of the case because the description of the risks of IETFs included in the Guidance Note is set out in the Prospectuses.

[60] IIROC Staff have attempted to downplay the Panel's consideration of the Guidance Note by submitting that the Panel had not prejudged its importance and by referring to the following comment of the Chair of the Panel:

> THE CHAIR: Picture the average member of the public that's reading our reasons. And they read our reasons and they say, particularly the compliance people, "Those clowns didn't even know that there was a document out there the year before on this very topic," *whatever we make of it*.
>
> (Written submissions of IIROC at para. 40, citing Transcript of IIROC Sanctions Hearing, Vickers Record, at p. 19, Tab 6, emphasis added.)

[61] In my view, the comments of the Chair of the Panel appear to be more consistent with what he perceived to be the opprobrium that would ensue if the Panel failed to take the Guidance Note into account. Regardless of the motivation, the Guidance Note should not have been considered by the Panel.

[62] I do not agree with the submission of IIROC Staff that, in the present matter which involves an agreed statement of facts, an IIROC hearing panel "may have regard to a Rules Notice", which would include the Guidance Note. The Guidance Note is neither a policy nor rule of IIROC and its very name confirms its intended use. The Panel was also not entitled to take judicial notice of the Guidance Note as the Guidance Note was not "so notorious or generally accepted as to be not the subject of debate among reasonable persons" or "capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy". In addition, the Panel would have to have provided the parties with an opportunity to make submissions as to the admissibility of the Guidance Note which it did not do.

[63] I should note that both IIROC Staff and counsel to Vickers provided written submissions relating to statements that they had made to the Panel with respect to its ability to consider the Guidance Note in a prior hearing on the same day as the Hearing. The prior hearing concerned RBC DS and arose from the same facts as this matter. I have concluded that I should not take these submissions into account as they pertained to a different hearing and had not been placed before me as new evidence in this matter.

[64] Based on the foregoing, I find that the Panel should not have considered the Guidance Note and it was an error in law for the Panel to have done so.

2. Were the Panel's reasons inadequate in the circumstances

[65] Vickers's submissions relating to his assertion that the Panel's reasons were inadequate were largely based on his submissions relating to the severity of the sanctions that were imposed on him by the Panel. That said, I do view the reasons of the Panel to be stated in very broad terms and the absence of a detailed analysis of the case law makes an assessment of the sanctions imposed on Vickers difficult. This is reflected in part by the following statement of the Panel in the Decision:

> We find that the prior cases, both contested and Settlement Agreements, do not give clear guidance on the appropriate penalty for this case.
>
> (Decision, para. 48.)

[66] IIROC Staff has provided a detailed summary of the Panel's analysis and the manner by which the Panel came to a conclusion and submits that, when reviewed in its entirety, the Decision is "justifiable, transparent and intelligible." In my view, the standard suggested by IIROC Staff has not been fully met, particularly with respect to transparency and whether or not the Panel took the Guidance Note into account. As a result, I find that the test in *Clifford* described in paragraph [44] above has not been satisfied, i.e., the basis of the Decision was not fully explained and the explanation that was provided was not logically linked to the Decision.

3. Were the sanctions disproportionate to the facts and conduct admitted in the Agreed Statement of Facts

[67] Given the conclusions set out in paragraphs [64] and [66] above and for the reasons set out in paragraph [70] below, I do not propose to review and make any findings with respect to the sanctions imposed on Vickers by the Panel.

V. CONCLUSION

[68] Given my findings that the Panel erred in law in two respects, the Commission is entitled to intervene in the Decision on the basis of the grounds for intervention established by the *Canada Malting* case (see paragraph [49] above). Under subsection 8(3) of the Act, the Commission may, having conducted a hearing and review, by order confirm the decision under review or make such other decision as the Commission considers proper.

[69] In his submissions, Vickers requests that the Decision be set aside and replaced by an order of the Commission imposing the sanctions proposed by Vickers. In the alternative,

Vickers submits that the Decision should be set aside and the matter directed to a newly-constituted IIROC hearing panel. In its submissions, IIROC Staff similarly request that, in the event that the Commission decides to intervene in the Decision, the matter should be directed to a newly-constituted IIROC hearing panel.

[70] Although it would be expedient and far less costly for the parties, I am not prepared to substitute the Commission's judgment with respect to sanctions for that of the Panel for two reasons. First, IIROC hearing panels have greater familiarity with IIROC's regulations and sanction guidelines than the Commission (see paragraph [51] above). Second, I am unable to discern from the Decision whether or not the Panel ascribed weight to the Guidance Note and, if it did, as I believe to be the case, to what extent that factor affected the severity of the sanctions imposed on Vickers (see paragraph [59] above).

[71] Based on the foregoing considerations, the Application is granted and the matter is hereby directed to a newly-constituted IIROC hearing panel for re-consideration.

Dated at Toronto this 24th day of April, 2015.

"Christopher Portner"

Christopher Portner