Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF AN APPLICATION FOR A HEARING AND REVIEW OF A DECISION OF THE ONTARIO DISTRICT COUNCIL OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA PURSUANT TO SECTION 21.7 OF THE *SECURITIES ACT*, R.S.O. c. S.5, AS AMENDED

- AND –

IN THE MATTER OF DISCIPLINE PROCEEDINGS PURSUANT TO THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA AND THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

BETWEEN

STAFF OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

- AND -

GEORGES BENARROCH, LINDA KENT, MAJORIE ANN GLOVER AND CREDIFINANCE SECURITIES LIMITED

REASONS AND DECISION

Hearing:	November 22, 2010	
Decision:	December 15, 2010	
Panel:	James D. Carnwath Carol S. Perry	- Chair of the Panel - Commissioner
Appearances:	Michael Meredith Jocelyn Loosemore Crawley Meredith Brush LLP	- Counsel for Georges Benarroch, Linda Kent, Majorie Ann Glover and Credifinance Securities Limited
	Natalija Popovic Kathryn Andrews Milton Chan	- IIROC Staff
	Amanda Heydon	- OSC Staff

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REASONS FOR DECISION

I. INTRODUCTION

[1] Georges Benarroch, Linda Kent, Majorie Ann Glover and Credifinance Securities Limited (the "Applicants") apply for a hearing and review by the Ontario Securities Commission (the "Commission") of the decision and reasons of the Ontario District Council of the Investment Industry Regulatory Organization of Canada ("IIROC") dated April 13, 2010.

[2] The Applicants seek to set aside the sanctions decision of IIROC and to have the Commission substitute its findings respecting the appropriate sanctions to be imposed. In the alternative, the Applicants seek an order remitting the matter to a newly constituted panel of IIROC for a re-hearing.

[3] The issue to be decided is whether the decision should be set aside as requested because, as the Applicants allege, the reasons for the decision are inadequate.

II. THE APPLICANTS REGISTRATION HISTORY

[4] Credifinance became a member of the Investment Dealers Association ("IDA") in March 1991. Throughout the relevant time, Mr. Benarroch and Mss. Kent and Glover were Registered Representatives employed at Credifinance.

[5] Mr. Benarroch was the Director, Chairman, Chief Executive Officer ("CEO") and Ultimate Designated Person of Credifinance. He was the Director, Chairman and CEO since September 1991. He had also been a Registered Representative at Credifinance since the firm's inception. Prior to his employment at Credifinance, Mr. Benarroch was the director, president, CEO and an industry advisor of another brokerage firm starting in 1984.

[6] Ms. Glover was the Chief Compliance Officer ("CCO") and Alternate Designated Person ("ADP") at Credifinance. She had held the position of CCO since September 1997 and the position of ADP since November 2001. Before joining Credifinance, Ms. Glover was registered at another brokerage firm starting in 1984.

[7] Ms. Kent was a Registered Representative ("RR") at Credifinance. Before joining Credifinance, Ms. Kent was employed as an RR at various investment firms dating back to 1980. She joined Credifinance in January 2000.

III. BACKGROUND

[8] IIROC commenced the disciplinary proceeding against the Applicants by a notice of hearing dated November 11, 2008.

[9] Following negotiations, the parties reached a meeting of minds on an "Agreed Statement of Facts and Violations". The parties were unable to agree on the appropriate sanctions for any of the Applicants.

[10] A sanctions panel conducted a one-day hearing on March 3, 2010 and issued its decision on April 13, 2010, which imposed the following sanctions on the Applicants:

> (a) Georges Benarroch was suspended for life, fined $250,000, and ordered to disgorge all profits from the transactions in issue. (IIROC sought a fine of $250,000 and a 15 year suspension);
>
> (b) Linda Kent was suspended for ten years, fined $50,000, and ordered to disgorge all profits from the transactions in issue. (IIROC sought a two year suspension, a $50,000 fine and disgorgement of profits of $170,000);
>
> (c) Majorie Ann Glover was suspended for five years and fined $50,000. (IIROC sought a five year suspension permitting a supervisory role and a one year suspension from acting in any role in the industry);
>
> (d) Credifinance Securities Limited ("Credifinance") was fined $50,000 and "expelled forever". (IIROC sought the same sanctions worded slightly differently);
>
> (e) Costs of $100,000 were ordered against the four Respondents, jointly and severally. (IIROC sought this costs amount).

[11] With the exception of Credifinance and the costs award, the sanctions exceeded the sanctions that IIROC sought at the hearing.

[12] Counsel for IIROC and for the Applicants had made extensive submissions to the sanctions panel, taking up the better part of the day. IIROC counsel reviewed with the sanctions panel the agreed statement of facts, the jurisdiction of the panel applicable to sanctions and the activity of the Applicants in the 3-year period covered in the agreed statement of facts, that is January 2003 to March 2006.

IV. AGREED STATEMENT OF FACTS AND VIOLATIONS

[13] The agreed statement of facts is found in Vol. I, Tab 3 of the Applicants' Appeal Record. In Count One, Mr. Benarroch and Ms. Kent admitted:

> **COUNT 1**
>
> Benarroch and Ken, while Registered Representatives with Credifinance, and particularly from in or about January 2003 to in or about March 2006, failed to properly perform their gatekeeper responsibilities in connection with trading in Credifinance client accounts in the shares of Magnum D'Or Resources Inc. ("Magnum") and Osprey Gold Corp. ("Osprey") and engaged in financial and business transactions with Credifinance clients in relation to the distribution and sale of shares of Magnum and Osprey, which was conduct unbecoming and detrimental to the public interest, contrary to By-law 29.1 of the IDA.

[14] In Count Two, Ms. Glover admitted:

> **COUNT 2**
>
> Glover, while a Registered Representative and Chief Compliance Officer with Credifinance, and particularly from in or about January 2003 to in or about March 2006, failed to exercise due diligence and failed to adequately supervise the conduct of Benarroch and Kent in respect of their dealings with Credifinance clients, and in particular their dealings in shares in Magnum and Osprey, which conduct was a failure in her role as

gatekeeper and was unbecoming a registrant and detrimental to the public interest, contrary to By-law 29.1 of the IDA.

[15] In Count Three, Credifinance admitted:

> **COUNT 3**
>
> Credifinance, while a Member of the IDA, and particularly from in or about January 2003 to in or about March 2006, failed in its role as a gatekeeper in that it failed to supervise the conduct of Benarroch and Kent and failed to supervise the transactions in Benarroch's and Kent's clients' accounts, which conduct was unbecoming a Member and detrimental to the public interest, contrary to By-law 29.1 of the IDA.

[16] There then follows a history of the dealings leading to the admissions made by the Applicants. The period in question runs from January 2003 to March 2006. Shortly put, Mr. Benarroch and Mss. Kent and Glover permitted and facilitated suspicious transactions in client accounts at Credifinance without making diligent inquiries to ensure the legitimacy of the transactions in circumstances where such inquiries were required in order for them to properly discharge their respective obligations as RRs and CCO. Moreover, Mr. Benarroch and Ms. Kent personally participated in suspicious transactions with Credifinance clients for their personal benefit or, in the case of Mr. Benarroch, for the benefit of the Benarroch Entities. In permitting these transactions and/or failing to question them, Ms. Glover and Credifinance failed to adequately supervise the activities of Mr. Benarroch and Ms. Kent.

V. THE STANDARD OF REVIEW

[17] This application for a hearing and review is brought pursuant to s. 21.7 of the *Securities Act*, R.S.O 1990, c. S.5, as amended (the "Act"). Pursuant to s. 8(3) of the *Act*, the Commission may confirm the decision under review or make such other decision as the Commission considers proper. To this end, the Ontario Divisional Court has held that a hearing and review is treated much like a trial *de novo*. A hearing and review may be considered broader in scope than an appeal, which is usually limited to whether there has been an error in law or a contravention of a rule of natural justice.

(Investment Dealers Assn. of Canada v. Boulieris (2004), 27 O.S.C.B. 1597, Aff'd [2005] O.J. No. 1984 (Div. Ct.) at paras. 29-30)

[18] Although the scope of the hearing and review may be broad, there is a high threshold to meet in demonstrating that a decision of an SRO should be overturned.

(HudBay Minerals Inc. (2009), 32 O.S.C.B. 3733)

[19] Deference to a decision by an SRO will be afforded when that SRO is interpreting and applying its own by-laws because of its specialized expertise, as was the case in this matter.

(*Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629 (Ont. Div. Ct.)

[20] The test for determining whether the Commission should intervene is set out in *Canada Malting Co.* (1986), 9 O.S.C.B. 3565, where the Commission established that it will only interfere with a decision of an SRO on the following grounds:

1. The SRO has proceeded on an incorrect principle;
2. The SRO has erred in law;
3. The SRO has overlooked some material evidence;
4. New and compelling evidence is presented to the Commission that was not presented to the SRO; or
5. The SRO's perception of the public interest conflicts with that of the Commission.

VI. ADEQUACY OF REASONS AND THE STANDARD OF REVIEW

[21] The practice of administrative tribunals providing reasons for their decisions provides important safeguards to those affected by such decisions; proper reasons militate against the risk of arbitrary or capricious decisions, reinforce public confidence in the judgment and fairness of administrative tribunals, afford the parties an opportunity to assess whether or not to appeal a decision and allow for a full hearing by a reviewing or appellate tribunal.

Re Northwestern Utilities Ltd. And City of Edmonton, (1978), 89 D.L.R. (3d) 161 (SCC) cited in *Gray v. Ontario (Director, Disability Support Program)*, [2002] O.J. No. 1531 (C.A.) at para. 20.

Venneri v. College of Chiropractors of Ontario, [2008] O.J. No. 2278 (Div. Ct.) at para. 8.

[22] Where an administrative tribunal has a legal obligation to give reasons for its decision as a part of its duty of procedural fairness, the question on judicial review is whether that legal obligation has been complied with. The court cannot give deference to the choice by a tribunal whether to give reasons. The court must ensure that the tribunal complies with its legal obligation. It must review what the tribunal has done and decide if it has complied. In the parlance of judicial review, the standard of review used by the court is correctness.

Clifford v. Ontario Municipal Employees Retirement System, 2009 ONCA 670, para. 22

[23] Where there is a right of appeal (or as in this case, a hearing and review), reasons must provide a sufficient basis for the decision to permit meaningful appellate review to the extent contemplated by the permitted scope of appeal. The Ontario Court of Appeal has held that where reasons given by a hearing panel were so inadequate as to foreclose meaningful appellant review, the inadequacy of those reasons constituted an error in law requiring an order directing a new hearing.

Law Society of Upper Canada v. Neinstein, [2010] O.J. No. 1046 (C.A.) at para. 4.

[24] As noted earlier in this matter, it is also open to us to substitute our finding for that of the IIROC panel should we conclude the reasons are inadequate.

VII. ANALYSIS

[25] Applying the principles set out above, regrettably we conclude the reasons given by the IIROC panel are inadequate. We do so for the following reasons:

(1) In his submission to the panel, IIROC's counsel set out a list of factors to be considered in the imposition of sanctions, found at page nine of the Dealer Member Disciplinary Sanction Guidelines of IIROC dated March 2009. IIROC's counsel stressed the repeated pervasive and systemic contraventions of the Dealer Member Rules by the Applicants. Counsel invited the panel to find that there was a high degree of participation in the activities by all of the Applicants. Counsel submitted that the registrants benefitted financially from the misconduct in question. Counsel fairly conceded that no clients lost money, nor were there client complaints.

Counsel for the Applicants asked the IIROC panel to consider other factors in the Dealer Member Rules to be applied in mitigation. These included the submission that the individual Applicants had no prior disciplinary record, that they made an admission or wrongdoing thereby implying remorse, that they acknowledged and that they fully co-operated with the investigation. Counsel also pointed out the extensive costs associated with an appeal taken by Credifinance against a finding by another panel that Credifinance failed to co-operate in an investigation. The Chair responded to this submission by pointing out that, "the highest plane, you can put this argument on, is a mitigating factor under the mitigation section when it comes to penalty and costs".

Other facts submitted in mitigation included that no harm came to clients, and no complaints by clients were received. There is no reference in the panel's reasons to any of the mitigating factors advanced by the Applicants' counsel. Were they considered by the panel? The reasons are silent on the issue.

(2) During the course of submissions, the Chair is reported in the transcript of the proceeding at p.73 ll.23 and following, to this effect:

> THE CHAIR: It seems to me that this was a manipulated scheme by the principal from day one and there was no interest of clients involved, it was solely for himself.
>
> MS. SAINSBURY: Right. And ---
>
> THE CHAIR: And in my recollection, that's out and out fraud.
>
> MS. SAINSBURY: And I think Staff would agree with your assessment. All I was trying to do was draw your attention to the fact that factors such as those should be taken into serious consideration by the panel when determining sanctions.
>
> THE CHAIR: Thank you.

It would not be unreasonable for the Applicants to wonder whether the panel sanctioned them for the offence of fraud, when the allegations were restricted to failing to properly perform gatekeeping responsibilities and improperly engaging in financial and business transactions with Credifinance clients in relation to the distribution and sale of shares of Magnum and Osprey. The reasons are silent on the issue.

(3) In the course of Applicants' counsel's submissions, a discussion took place on the subject of drawing inferences:

> THE CHAIR: But you'll agree with me that an inference can be drawn from suspicious circumstances.
>
> MR. MEREDITH: Well, sir, I'm not sure I would agree with you in this case and the reason I say that is because we are dealing with an agreed statement of facts and we're dealing with admissions of specific conduct. And if there was evidence of more serious conduct or more serious infractions, in my respectful view, it would be in here. That evidence would be in these agreed facts, those allegations would have been made and they were not.

> THE CHAIR: Okay. But perhaps they couldn't ascertain "the evidence", but surely you'll concede that a judicial inference is commonplace in judgments in our country.
>
> MR. MEREDITH: I'll certainly concede that judges draw inferences, sir. Yes, they do.
>
> THE CHAIR: That's as far as I'm going.
>
> MR. MEREDITH: That's fine.

It would not be unreasonable for the Applicants to wonder if the panel drew inferences from the agreed statements of fact that had an influence on the sanctions imposed. The reasons are silent on this issue.

(4) On p. 12 of the panel's reasons, the last sentence of the second paragraph reads as follows:

> "It appears as if these may have been illegal distributions of securities, but we hasten to say that there is no sufficient evidence for us to reach that conclusion."

It would not be unreasonable for the Applicants to wonder why this speculation is found in the final section of the reasons on p. 12, unless the appearance of illegal distributions had some influence on the sanctions imposed.

(5) Also on p. 12 of the reasons, the conduct of all parties is described as a "self-serving and contumacious disregard of their duties to their industry and the public at large over a protracted period of time. Accordingly, we believe harsh penalties are merited." In the *Shorter Oxford English Dictionary*, 3d ed., "contumacious" is defined as "1. Contumacy; stubbornly perverse, insubordinate, rebellious. 2. Wilfully disobedient to the summons or the order of the court." In the *Canadian Oxford English Dictionary*, 2d ed., "contumacy" is defined as "a stubborn refusal to obey or comply." Whatever the conduct of the

Applicants, it did not fall within the definition of "contumacious." Moreover, the agreed statement of facts did not acknowledge "contumacious" behaviour. The possibility exists that the Applicants were sanctioned for conduct not acknowledged in the agreed statement of facts.

(6) The sanctions imposed were considerably more severe than those sought by IIROC counsel at first instance. It was, of course, open to the panel to impose whatever sanction it felt was in the public interest. Nevertheless, where the panel's sanctions go beyond what staff seeks in a negotiated settlement leading to an agreement on the facts, we find it even more important that the panel's reasons deal with the arguments advanced by the Applicants in a manner consistent with the jurisprudence cited above.

(7) Finally, the decision of the panel at page six of its reasons, contains an incorrect version of Count One found in the Agreed Statement of Facts and Violations. In line five of Count One, the word "improperly" appears. It does not appear in the Agreed Statement of Facts and Violations. In line seven, the word "registrants" appears. It does not appear in the Agreed Statement of Facts and Violations. It is clear to us that the Applicants did not admit they "improperly engaged in financial and business transactions." They may have been sanctioned on the grounds that they did.

VIII. CONCLUSION AND DISPOSITION

[26] We conclude that the reasons are so inadequate as to constitute an error in law. The decision is set aside. We have the option to substitute our decision for that of the panel or to remit the matter to a newly-constituted Hearing Panel of the District Council for a re-hearing.

[27] At the conclusion of the hearing, we told counsel that if the Applicants were successful, we would hear submissions as to whether we would exercise our jurisdiction

to substitute our decision for that of the panel. Each party has fifteen days from this date to tell the Secretary that that party wishes to make such submissions.

DATED at Toronto this 15th day of December, 2010.

"James D. Carnwath"	*"Carol S. Perry"*
James D. Carnwath	Carol S. Perry