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Citation: Rudensky (Re), 2019 ONSEC 24
Date: 2019-07-09
File No. 2018-68

IN THE MATTER OF
ANDREW PAUL RUDENSKY

REASONS AND DECISION
(Section 21.7 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	March 26, 2019	
Decision:	July 9, 2019	
Panel:	M. Cecilia Williams	Commissioner and Chair of the Panel
Appearances:	Kevin Richard Martin Mendelzon	For Andrew Paul Rudensky
	Sally Kwon Robert DelFrate	For the Investment Industry Regulatory Organization of Canada
	Christina Galbraith	For Staff of the Ontario Securities Commission

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REASONS AND DECISION

I. OVERVIEW

[1] Andrew Paul Rudensky was a Registered Representative with Richardson GMP (**RGMP**) and was regulated by the Investment Industry Regulatory Organization of Canada (**IIROC**).

[2] In a decision issued on July 23, 2018 (the **Merits Decision**),[1] an IIROC hearing panel (the **IIROC Panel**) concluded that Mr. Rudensky had:

a. engaged in personal financial dealings with a client of RGMP, contrary to IIROC Dealer Member Rule 43 (**Rule 43**); and

b. made a false and misleading representation to RGMP contrary to IIROC Dealer Member Rule 29.1 (**Rule 29.1**).

[3] In a subsequent decision issued on October 17, 2018 (the **Sanctions and Costs Decision**),[2] the IIROC Panel ordered:

a. a suspension of Mr. Rudensky's IIROC registration for 2 years, commencing on July 23, 2018;

b. a $5,000 fine for contravening Rule 43;

c. a $25,000 fine for contravening Rule 29.1;

d. a $25,923 fine representing disgorgement of the net profits Mr. Rudensky gained from his personal financial dealings with the client;

e. Mr. Rudensky to rewrite and pass the Conduct and Practices Handbook Course prior to any registration with IIROC; and

f. costs in the amount of $24,500.

[4] Mr. Rudensky applies to the Commission for a hearing and review of the Merits Decision and the Sanctions and Costs Decision. He asks that both decisions be set aside.

[5] With regards to the Merits Decision, Mr. Rudensky asserts that the IIROC Panel erred in several ways, including by:

a. finding that Mr. Rudensky made admissions that he didn't make;

b. finding that an allegation of a breach of Rule 29.1 could proceed in an enforcement hearing commenced after September 1, 2016, when Rule 29.1 had been repealed as of September 1, 2016;

c. failing to consider material evidence;

d. failing to interpret Rule 43 in a flexible manner that reflects the intention of Rule 43, including by finding a breach of Rule 43 despite finding that the client at issue did not need the protection of Rule 43; and

[1] *Rudensky (Re)*, 2018 IIROC 28
[2] *Rudensky (Re)*, 2018 IIROC 38

e. finding that a manager's question about a source of the funds required a response that included every relevant fact or else it was false and misleading, in breach of Rule 29.1.

[6] As regards the Sanctions and Costs Decision, Mr. Rudensky asserts that the IIROC Panel erred in several ways, including:

a. ordering a disproportionate fine and disgorgement from a transaction that was a technical contravention of the IIROC Dealer Member Rules (the **IIROC Rules**);

b. ordering that a significant fine be imposed because the suspension being imposed would not have enough financial impact on Mr. Rudensky; and

c. finding that Mr. Rudensky's conduct had harmed market integrity and the reputation of the marketplace, without any evidence of such harm.

[7] Mr. Rudensky raised an issue about the potential conflict created by industry members serving on IIROC panels, which I address as a preliminary matter. For the reasons set out below, I conclude that, as a general principle, the presence of industry members on IIROC panels does not create a conflict of interest.

[8] For the reasons that follow, I conclude that in conducting the analysis that led to the finding that Rule 29.1 was available in an enforcement hearing commenced after September 1, 2016, the IIROC Panel made an error in law that leads me to set aside the portion of the Merits Decision that relates to the IIROC Panel's ruling on that point. Having said that, once I complete my own analysis to substitute the Commission's own decision, I reach the same result as the IIROC Panel; that is, Rule 29.1 remained in effect for conduct that occurred prior to September 1, 2016 but which was the subject of an enforcement hearing commenced on or after that date.

[9] The error of law I identified relates to the IIROC Panel's interpretation of whether Rule 29.1 remained in effect for the proceeding in the first instance against Mr. Rudensky. I find that the evidence related to that issue and the IIROC Panel's analysis supporting it are entirely separable from the evidence and analysis underlying the IIROC Panel's findings that Mr. Rudensky breached Rule 43 and Rule 29.1.

[10] Having reached the conclusion that the proceeding against Mr. Rudensky was proper despite the repeal of Rule 29.1, I must go on to consider as a separate issue whether Mr. Rudensky established any grounds under the *Canada Malting Co (Re)*[3] test to interfere in the substance of the Merits Decision. I found no such grounds.

[11] I also considered whether the *Canada Malting* test was satisfied with respect to the alleged errors of law in the Sanctions and Costs Decision. I found no grounds for interfering with the IIROC Panel's decision.

II. BACKGROUND FACTS

[12] Mr. Rudensky was employed by RGMP in their Toronto office from November 2009 until he left on September 8, 2015.

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[3] (1986) 9 OSCB 3565 at para 24 (***Canada Malting***)

[13] Mr. Rudensky held personal accounts at RGMP, including a margin account and a margin short account in the name of his holding company, Dark Horse Financial Corp. (**Dark Horse**).

[14] RGMP permitted its traders, advisors and other employees to buy shares of a bought deal, after it became clear that the bought deal would not be fully subscribed (**Pro Eligible**), at a discount to the offering price because of the deduction of commissions associated with the bought deal. RGMP employees would often short the security for the same number of shares being acquired in the offering and be able to make a profit equal to the spread.

[15] Mr. Rudensky was aware that RGMP had previously unwound trades by other RGMP employees who had used RGMP funds rather than their own money to participate in Pro Eligible bought deals by selling short shares and acquiring an equivalent number of new issue shares. As a result, Mr. Rudensky concluded that if he could ensure that any such trades were paid for using his own funds, there would be no issues with these types of transactions.

[16] On several occasions, Mr. Rudensky participated in Pro Eligible bought deals in this manner. Mr. Rudensky borrowed funds to carry out his trades.

[17] Mr. Rudensky first met the client at issue in the IIROC proceeding (who is referred to by the initials 'RS' by the IIROC Panel and throughout this decision) in 2013, in a social setting, and learned that RS ran a lending business, through which he provided customized loans. Mr. Rudensky also learned that RS structured and made early stage investments.

[18] In April 2015, RGMP was involved in a bought deal offering of Brookfield Asset Management Inc. Class A Limited (**BAM.A**) shares. On April 20, 2015, RGMP's bought deal offering of BAM.A shares became Pro Eligible.

[19] On April 21, 2015, Mr. Rudensky contacted RS to obtain a loan from his lending business to participate in the BAM.A Pro Eligible offering. This was the second such loan Mr. Rudensky sought from RS's lending company. Mr. Rudensky requested $3 million and he and RS agreed that Mr. Rudensky would pay 70 percent of the gross profit from Mr. Rudensky's short sale of the BAM.A shares and purchase of new issue BAM.A shares (the **BAM.A Transaction**).

[20] Mr. Rudensky and RS, in his affidavit, gave evidence that with respect to both loans, they discussed a mortgage being placed on Mr. Rudensky's condominium if the loan was outstanding for longer than the anticipated 3 or 4 days and discussed whether there was any equity in the condominium.

[21] RS, for his own personal reasons, provided the $3 million personally, rather than from his lending company, and the loan was reflected in a promissory note between RS and Dark Horse executed by Mr. Rudensky on April 21, 2015 (the **Brookfield loan**).

[22] Also on April 21, 2015, Mr. Rudensky executed the BAM.A Transaction, selling short 135,000 BAM.A shares and covering his short position by purchasing 135,000 new issue BAM.A shares.

[23] On April 23, 2015, Mr. Rudensky received a wire transfer of $3 million from RS into his account at BMO, which he transferred to his Dark Horse margin account on April 24, 2015, and which was used to cover the margin call on his BAM.A

short sale. On April 27, 2015, Mr. Rudensky received the allocation of new issue BAM.A shares, which he used to cover the BAM.A short sale.

[24] On April 27, 2015, Mr. Rudensky repaid RS, wiring $3 million from his Dark Horse margin account to his BMO account, which was then wired to RS, and wrote a cheque to RS in the amount of USD $44,076, which was 70 percent of Mr. Rudensky's gross profit from the BAM.A Transaction.

[25] On April 24, 2015, RGMP's Chief Compliance Officer asked Mr. King, the RGMP Branch Manager, to determine the source of the $3 million that Mr. Rudensky used to cover the margin call on his BAM.A short sale. Mr. King verbally asked Mr. Rudensky where the funds came from and Mr. Rudensky advised him that it was a loan, collateralized against his condo. At Mr. King's request, Mr. Rudensky confirmed this information in an email.

[26] IIROC Staff commenced its investigation in May 2016 and issued its Statement of Allegations on November 2, 2017. The IIROC merits hearing occurred over three days in May 2018.

III. ISSUES

[27] The following issues are raised in this Application:

a. What is the applicable standard of review?

b. As a preliminary matter, does the presence of industry members on IIROC hearing panels create a conflict of interest this Panel needs to consider?

c. What restrictions, if any, result from the Commission relying on the written record of the original proceeding, rather than hearing *viva voce* testimony?

d. Has Mr. Rudensky established any of the grounds on which the Commission ought to intervene in the Merits Decision and, if there are such grounds, what is the appropriate disposition in the circumstances?

e. Has Mr. Rudensky established any of the grounds on which the Commission ought to intervene in the Sanctions and Costs Decision and, if there are such grounds, what is the appropriate disposition in the circumstances?

IV. ANALYSIS

A. What is the applicable standard of review?

[28] Subsections 8(3) and 21.7(2) of the *Securities Act*, RSO 1990, c S.5 (the **Act**), govern an application to the Commission, by a person or company directly affected by a decision of a self-regulatory organization (**SRO**), for a review of that decision. Together, those subsections authorize the Commission to confirm the decision of the SRO, or to "make such other decision as the Commission considers proper."

[29] The Commission's review of an SRO decision is a hearing *de novo*, rather than an appeal. In other words, the Commission exercises original jurisdiction rather than a more limited appellate jurisdiction.[4]

[30] Despite the broad scope of a hearing and review, there is "a high threshold to meet in demonstrating that an SRO decision should be overturned."[5] In practice, the Commission takes a "restrained approach".[6]

[31] The Commission takes a restrained approach because it acknowledges the specialized expertise of SROs, including IIROC hearing panels. The Commission accords deference to an SRO decision within the SRO's specialized expertise, such as interpreting and applying its own by-laws and making factual determinations central to its specialized competence.

[32] The parties agreed that the Commission should only interfere with a decision of an SRO where one or more of the following grounds from *Canada Malting* have been satisfied:[7]

a. the SRO has proceeded on an incorrect principle;

b. the SRO has erred in law;

c. the SRO has overlooked material evidence;

d. new and compelling evidence is presented to the Commission that was not presented to the SRO; or

e. the SRO's perception of the public interest conflicts with that of the Commission.

[33] In this Application, Mr. Rudensky only makes assertions under the first three legs of the above test.

B. Does the presence of industry representatives on IIROC hearing panels create a conflict of interest this Panel needs to consider?

(a) Mr. Rudensky's Position

[34] Mr. Rudensky submits that a conflict is created by the presence of industry members on IIROC hearing panels, given that one of the principles applicable to IIROC hearings is the protection of IIROC members.

(b) IIROC Staff's Position

[35] IIROC Staff adopted the same submissions that they provided in *Pariak-Lukic (Re)*[8] on this point, which were that:

a. IIROC hearing panels also consider investor protection as a factor,

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[4] *Boulieris (Re)*, 2004 ONSEC 1, (2004) 27 OSCB 1597 at paras 29-30 (***Boulieris***), aff'd [2005] OJ No 1984 (Div Ct); *Vitug (Re)*, 2010 ONSEC 7, (2010) 33 OSCB 3965 at para 43 (***Vitug***), aff'd 2010 ONSC 4464 (Div Ct)

[5] *Vitug,* at para 44

[6] *Boulieris*, at para 31; *Vitug,* at paras 43-44; *Northern Securities Inc. (Re)*, 2013 ONSEC 48, (2013) 37 OSCB 161 at paras 56-57 (***Northern Securities***), aff'd [2015] OJ No 2924 (Div Ct)

[7] *Canada Malting*, at para 24

[8] 2015 ONSEC 18, (2015) 38 OSCB 5755 (***Pariak-Lukic***)

b. the fact that two-thirds of IIROC hearing panels are industry members has in the past led the Commission and other commissions to accord deference to these panels because of their industry knowledge,

c. IIROC Staff is not aware of any decision where a commission has said that the inclusion of industry members on a hearing panel has led to a lesser penalty due to some type of bias or by reason of wanting to protect industry members, and lastly,

d. the IIROC model has been approved by the Commission and other commissions across Canada.

(c) OSC Staff's Position

[36] Staff of the Commission (**OSC Staff**) took no position on this point.

(d) Analysis

[37] This is the sort of issue that should be raised with an IIROC panel in the first instance, rather than on a hearing and review. Mr. Rudensky did not indicate that this issue had been raised with the IIROC Panel.

[38] However, since Mr. Rudensky raised this issue with me I agree with IIROC Staff's position and do not agree that, as a general principle, the presence of industry members on IIROC hearing panels creates a conflict of interest.

C. What restrictions, if any, result from the Commission relying on the written record of the original proceeding, rather than hearing *viva voce* evidence?

(a) Mr. Rudensky's Position

[39] Mr. Rudensky is not requesting that the Panel rehear this matter with all the evidence to be put in through live witnesses. He recognizes that a rehearing can be based on a review of the written record, which includes transcripts of the testimony of the witnesses.

[40] Mr. Rudensky's position is that while a hearing and review can be done based on the written record, if determinations of credibility need to be made they "can and should be difficult to make when only reading a paper record."

[41] Mr. Rudensky argues that, on a hearing and review, a rehearing of the merits is as if the original decision does not exist and findings of the panel whose decision has been vacated cannot be relied on by the Commission. Therefore, it will be for the Commission to attempt to weigh any conflicting evidence on material issues, if it is necessary, and determine whether the Commission can fairly adjudicate those issues based solely on the paper record.

(b) IIROC Staff's Position

[42] IIROC Staff submits that if the Commission decides to intervene, a rehearing on the written record is appropriate unless the Commission determines otherwise. Further, IIROC Staff concurs with OSC Staff's submissions on this point, as set out below.

(c) OSC Staff's Position

[43] OSC Staff submits that if the Commission finds there is a basis to intervene in either the Merits Decision or the Sanctions and Costs Decision, then a rehearing

on the written record would be appropriate unless the Commission determines otherwise.

[44] In deciding whether the Commission needs to hear oral evidence, OSC Staff submits that the Commission needs to consider Newbould J.'s comments about credibility assessments in *Springer v Aird & Berlis LLP*, which were adopted by the Commission in *Suman (Re)*:[9]

> The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.

[45] OSC Staff submits that in assessing a witness's evidence in this case, it is sufficient for the Commission to consider whether the evidence is in harmony with the probabilities disclosed by the other evidence in the case, which can be adequately done by reviewing the transcript.

(d) Analysis

[46] I consider it appropriate in these circumstances to proceed with a rehearing based on the record of the original proceeding, as well as the written and oral submissions made before me.

[47] As set out below, my only finding of an error warranting interference in the Merits Decision was with respect to the IIROC Panel's interpretation of whether Rule 29.1 remained in effect, which did not require evidence beyond the materials before me. The balance of my reasons and decision focuses on an assessment of whether the test in *Canada Malting* was met with respect to the alleged substantive errors in the Merits Decision and the Sanctions and Costs Decision, which similarly required no additional information beyond what was before me.

[48] Given my findings in this matter there is no need to decide whether credibility can be assessed in a hearing and review based on the written record alone.

D. Have any of the factors from *Canada Malting* been satisfied with respect to the Merits Decision?

1. Did the IIROC Panel err in law in its consideration of the application of Rule 29.1 in this matter, given that the Rule had been repealed before the IIROC proceeding commenced?

(a) Mr. Rudensky's Position

[49] Mr. Rudensky submits that Rule 29.1 was repealed as of September 1, 2016, as part of the implementation of IIROC's consolidated enforcement, examination and approval rules (the **Consolidated Rules**). He also submits that Schedule

[9] *Suman (Re)*, 2012 ONSEC 7, (2012) 35 OSCB 809 at para 315, citing *Springer v Aird & Berlis LLP* (2009), 96 OR (3rd) at para 14

C.1 to Transition Rule No. 1 (the **Transition Rule**)[10] did not effectively carry Rule 29.1 forward for enforcement proceedings commenced after the implementation, involving behaviour occurring before September 1, 2016.

[50] The Transition Rule reads as follows:

> 1.3 Enforcement Proceedings
>
> (1) Any Enforcement Hearing commenced by IIROC in accordance with IIROC Rules prior to September 1, 2016 shall proceed in accordance with the Rules and Practice and Procedure in effect and applicable to such Enforcement Hearing at the time it was commenced.
>
> (2) Any Enforcement Hearing commenced on or after September 1, 2016 shall be undertaken and proceed in accordance with the Consolidated Procedural Rules, irrespective of when the conduct which is the subject of the Enforcement Hearing occurred. [*underlining in original*]

[51] Mr. Rudensky submits that the IIROC Panel erred in law and proceeded on an incorrect principle when it apparently found, without explanation, that the *Interpretation Act (Canada)*[11] preserved Rule 29.1 for the proceeding. The Merits Decision does not expressly refer to the *Interpretation Act*. However, the IIROC Panel cites an excerpt from *Sullivan and Driedger on the Construction of Statutes* (***Sullivan and Driedger***)[12] that paraphrases the text of the federal statute. This context was lacking from the Merits Decision, leading to Mr. Rudensky's argument that the IIROC Panel was incorrectly applying the legislation. Mr. Rudensky submits that the IIROC Panel adopted IIROC Staff's written submissions about the relevance of the excerpt from *Sullivan and Driedger* without adequately reviewing the authority and that the IIROC Panel erred in law by not providing reasons of its own.

[52] The common law of statutory interpretation with respect to repealed laws, as set out in the *Sullivan and Driedger* excerpt before the IIROC Panel, is that once repealed the law cannot be relied on retroactively and must be treated as if it never existed.

[53] Mr. Rudensky argues that the Transition Rule expressly provides for matters commenced prior to September 1, 2016, and could have, but did not, create a rule to continue Rule 29.1 in effect for proceedings commenced after September 1, 2016. Therefore, he submits, the common law rule applies and with the repeal of Rule 29.1 it is to be treated going forward as if it never existed for a proceeding such as the one that was before the IIROC Panel.

(b) IIROC Staff 's Position

[54] IIROC Staff submits that the IIROC Panel correctly found that Rule 29.1 remained in effect, notwithstanding the introduction of the Consolidated Rules

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[10] IIROC Transition Rule No. 1 made pursuant to By-law 13.1 of the Corporation, Schedule C.1, *Consolidated Enforcement, Procedural, Examination and Approval Rules*

[11] RSC 1985, c I-21

[12] Sullivan, Ruth, *Sullivan and Driedger on the Construction of Statues*, 4th ed (Lexis Nexis Butterworths: 2009)

and the Transition Rule on September 1, 2016, and made no reviewable error in so doing.

[55] IIROC Staff argues that Rule 29.1 was in force and binding on Mr. Rudensky when he engaged in the conduct in question, by the effect of IIROC General By-law No. 1, Article 13 (the **By-law**).

[56] The By-law speaks to IIROC's "power to make, amend or repeal rules" and states:

> All such Rules for the time being in force, unless expressly otherwise provided, shall be binding upon all Regulated Persons.

[57] IIROC Staff repeats the position, taken at the merits hearing and adopted by the IIROC Panel, that Mr. Rudensky's position is based on an incorrect interpretation of the Transition Rule.

[58] IIROC Staff submits that the subsections of Transition Rule s. 1.3 must be read together, which leads in their view to the obvious conclusion that the provisions refer to procedural, rather than substantive, aspects of the hearings.

[59] IIROC Staff repeats their position from the merits hearing that the repeal of Rule 29.1 does not destroy a registrant's obligations under Rule 29.1, nor does it forgive any contravention of Rule 29.1. As they had in their written submissions to the IIROC Panel, IIROC Staff continues to rely on the quotation from the excerpt from *Sullivan and Driedger* with respect to the impact of legislation on the common law rule relating to the effect of a repeal.

[60] In response to my question about why the IIROC Panel referred to this part of the excerpt dealing with the Canadian federal *Interpretation Act*, IIROC Staff's submission was that the IIROC Panel did not make a finding that the *Interpretation Act* applied to the IIROC Rules. Rather, the IIROC Panel was referring to the excerpt by analogy in holding that this reasoning should be applied in this instance.[13]

[61] IIROC Staff also submits that IIROC hearing panels have applied the concept that Rule 29.1 remained in effect in multiple decisions involving the rule that have been released since the implementation of the Consolidated Rules, referring specifically to: *Bodnarchuk (Re)*, 2018 IIROC 22; *Niewswandt (Re)*, 2018 IIROC 41 and *Trudeau (Re)*, 2017 IIROC 51.

[62] At the Hearing and Review Application, Mr. Rudensky argued that IIROC Staff's three above-cited cases were not helpful on the point of whether or not Rule 29.1 remained in effect, as there was no discussion or decision about whether or not the rule had been repealed in two of the cases and, in the third, the Rule 29.1 allegation had been dropped at the commencement of the proceeding.

[63] IIROC Staff also takes the position that the IIROC Panel's decision on this point was consistent with IIROC notices with respect to the Transition Rule (Notices 12-0104 and 13-0275) and regarding the intended effect of Consolidated Rule 1400, which replaced Rule 29.1.

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[13] Transcript, *Rudensky (Re),* March 26, 2019 at 83, lines 1-10.

[64] Finally, IIROC Staff submits that to accept Mr. Rudensky's position would lead to the conclusion that no standards of conduct existed for IIROC's members and their representatives prior to September 1, 2016, which would create a void and lead to an absurd result.

(c) OSC Staff's Position

[65] OSC Staff made no submissions on this point.

(d) Analysis

[66] The IIROC Panel accepted IIROC Staff's position that Mr. Rudensky's submission that Rule 29.1 cannot be relied upon was based on an incorrect interpretation of the Transition Rule. The IIROC Panel accepted IIROC Staff's submission that the subsections of Transition Rule 1.3, when read together with the definition of "Consolidated Procedural Rules", clearly refer to procedural, rather than substantive, aspects of hearings.[14]

[67] The IIROC Panel continued, in paragraph 180 of the Merits Decision, by quoting from the excerpt from *Sullivan and Driedger* about the impact of interpretation legislation on the common law rule that repealed rules cannot be applied retrospectively.

[68] The reasoning in this part of the Merits Decision appears to be virtually identical to IIROC Staff's Written Reply submissions to the IIROC Panel on this point.[15]

[69] Although, in those submissions, IIROC Staff had provided the IIROC Panel with a two-page excerpt from *Sullivan and Driedger*, which covered both the common law rule with respect to repealed legislation and analysis of the impact of legislation on that rule, there is no analysis in IIROC Staff's Written Reply about the application of the quotation referred to from that excerpt.

[70] In the Merits Decision, the IIROC Panel does not explain its application of the *Sullivan and Driedger* quotation replicated from IIROC Staff's Written Reply. Nor is there anything in the Merits Decision to support IIROC Staff's oral submission to me that the IIROC Panel was referring to this one aspect of the *Sullivan and Driedger* excerpt by analogy.

[71] The IIROC Panel is clear, in paragraphs 177 to 179 of the Merits Decision, that it interpreted the Transition Rule such that Rule 29.1 remained in effect for the purposes of this proceeding.

[72] The IIROC Panel, however, failed to explain the application of the excerpt it cited in paragraph 180 of the Merits Decision, which does not appear applicable to the circumstances. It is also not possible, without documented analysis, to know how the *Sullivan and Driedger* excerpt influenced the IIROC Panel's analysis of the Transitional Rule.

[73] Therefore, I conclude that the IIROC Panel made an error in law or proceeded on an incorrect principle during its analysis of whether Rule 29.1 remained in effect. I conclude that the test in *Canada Malting* is met and that I have grounds to

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[14] Merits Decision at paras 177-179

[15] IIROC'S Reply Submissions and Authorities, June 20, 2019 (**IIROC Staff's Written Reply**) at paras 7-10

interfere with the Merits Decision. I must now proceed to determine the application of Rule 29.1 and the appropriate outcome.

(e) The Application of Rule 29.1

[74] The Transition Rule contains the following definitions:[16]

> "Consolidated Rules" refers to the IIROC Rules implemented on June 9, 2016 or September 1, 2016, which are Consolidated Rules 1200, 1400, 8100 through 8400 and 9100 through 9400.
>
> "Consolidated Procedural Rules" refers to Consolidated Rules 8200 through 8400, other than sections 8206, 8209, 8210, 8214, and 8216.
>
> […]
>
> "Practice and Procedure" means the rules of practice and procedure governing a hearing brought pursuant to IIROC Rules.

[75] The Transition Rule is clearly intended to address what procedural rules are to be used for hearings commenced after the Consolidated Rules became effective, as stated in subsection 1.3(2) of the Transition Rule:

> Any Enforcement Hearing commenced on or after September 1, 2016 shall be undertaken and proceed in accordance with the Consolidated Procedural Rules, irrespective of when the conduct which is the subject of the Enforcement Hearing occurred.

[76] The By-law provides that all IIROC Rules for the time being in force are binding on all registered representatives.

[77] At the time that Mr. Rudensky engaged in the alleged conduct, Rule 29.1 was in force and, therefore, binding on him.

[78] Post September 1, 2016, by reading the By-law in combination with subsection 1.3(2) of the Transition Rule, IIROC could hold its Members and Registered Representatives accountable for behaviour contrary to the IIROC Rules that were in effect at the time the behaviour occurred, but through proceedings in accordance with the Consolidated Procedural Rules then in effect.

[79] To conclude otherwise would be contrary to a clear reading of the provisions and would result in an absurd outcome.

[80] I agree with Mr. Rudensky's submission that the IIROC cases to which IIROC Staff referred, mentioned in section D.1(b) of this decision above, were distinguishable and were not helpful on this point. I placed no reliance on them in coming to my decision on this issue.

[16] Transition Rule, s 1.1

2. Have any of the factors from *Canada Malting* been satisfied with respect to the other alleged errors in the Merits Decision?

[81] I conclude that the appropriate disposition is to consider as a separate issue, whether there are grounds to intervene in the substance of the Merits Decision.

[82] On the point of whether a finding that I should intervene with respect to the finding of a breach of one of Rule 29.1 or Rule 43 would lead to a hearing *de novo* on both findings, Mr. Rudensky raised the example of *Northern Securities*. In that hearing and review decision the Commission Panel laid out the issues in their decision by counts and analyzed each count separately against the *Canada Malting* test. Mr. Rudensky's point was that this may have been possible in *Northern Securities* because of the facts of the case (counsel acknowledged that he didn't know enough about the intricate details of the case to say for certain). However, in Mr. Rudensky's submissions in this Application the motivations and most of the facts applied across both allegations and therefore the two counts are inextricably connected and could not be separated.

[83] My finding of an error of law warranting my intervention in the Merits Decision relates to the IIROC Panel's interpretation of the availability of Rule 29.1. I find that the conclusions in the Merits Decision that Mr. Rudensky breached Rule 43 and Rule 29.1, and the evidence relied upon by the IIROC Panel to arrive at those conclusions, are completely separate from the evidence and analysis by the IIROC Panel on the issue of the availability of Rule 29.1.

[84] I therefore conclude that the finding of an error with respect to the availability of Rule 29.1 does not result in a hearing *de novo* of the substance of the Merits Decision and I now consider whether Mr. Rudensky established any of the factors in *Canada Malting* with respect to the other alleged errors in the substance of the Merits Decision that would warrant my intervention.

3. Did the IIROC Panel err in law in its findings of fact?

(a) Mr. Rudensky's Position

[85] At paragraph 100 of the Merits Decision the IIROC Panel stated that Mr. Rudensky admitted to a list of facts. However, two of the cited facts were not actually admissions made by Mr. Rudensky:

a. Mr. Rudensky knew that another RGMP advisor (who is referred to by the initials 'SA' by the IIROC Panel and throughout this decision) "was part of the team in Calgary that serviced RS's accounts"; and

b. Mr. Rudensky "wanted SA to be moved near him".

This evidence was relevant to assessing whether Mr. Rudensky knew RS was a client of RGMP for the purposes of determining if Mr. Rudensky had breached Rule 43. Mr. Rudensky relies on *R v H(JM)* for the principle that "it is an error of law to make a finding of fact for which there is no supporting evidence."[17]

[86] The IIROC Panel refers in the Merits Decision to Mr. Rudensky's testimony that he did not know at the relevant times that RS was a client of RGMP at its Calgary office. Mr. Rudensky submits that this reference in the Merits Decision is

[17] 2011 SCC 45 at para 25

inconsistent with the IIROC Panel's finding that Mr. Rudensky knew RS was a client of the firm. He argues that the IIROC Panel provided no explanation for the alleged inconsistency.

(b) IIROC Staff's Position

[87] With respect to the IIROC Panel's finding that Mr. Rudensky admitted that he knew SA was part of the team in Calgary that serviced RS's accounts, IIROC Staff submits that Mr. Rudensky's own testimony supports that conclusion. IIROC Staff relies on statements by Mr. Rudensky while he was being cross-examined and, in two instances, his responses to questions from the IIROC Panel.

[88] As regards the admission that Mr. Rudensky wanted SA moved near to him, IIROC Staff concedes that Mr. Rudensky did not make this admission. However, the IIROC Panel preferred the evidence of Mr. Kennedy, a former employee of RGMP and a colleague of Mr. Rudensky in their Toronto office, and Mr. King, both of whom testified that Mr. Rudensky wanted SA moved near to him. IIROC Staff submits that the IIROC Panel did not, therefore, err in law in making that finding.

[89] IIROC Staff relies on the testimony of Mr. Rudensky, Mr. Kennedy and Mr. King and the documentary evidence that was before the IIROC Panel, in support of the IIROC Panel's findings that RS was a client of RGMP, that Mr. Rudensky knew that RS was a client of RGMP and that RS knew his personal financial dealings were with RS.

(c) OSC Staff's Position

[90] OSC Staff took no position on this point.

(d) Analysis

[91] In the context of the Merits Decision, the IIROC Panel made a finding of fact that Mr. Rudensky knew RS was a client of RGMP at the time of the Brookfield loan and BAM.A Transaction.

[92] The IIROC Panel concluded, based solely on Mr. Rudensky's own testimony, that Mr. Rudensky's "assertion that he did not know that RS was a client of RGMP was improbable and not credible."[18] The testimony it referred to in coming to that conclusion included the two statements that were not made by Mr. Rudensky.

[93] The two statements are not, however, the only evidence supporting the IIROC Panel's finding that Mr. Rudensky knew RS was a client of RGMP. The IIROC Panel relied on other evidence from Mr. Rudensky: he knew SA was RS's girlfriend, he knew RS from 2013, he had invested in one of RS's companies, and he was interested in developing a brokerage relationship with RS.[19] In addition, the IIROC Panel relied on the evidence of Mr. Kennedy and, with some acknowledged reservation, the testimony of Mr. King.[20]

[94] The IIROC Panel considered the evidence before it and made findings of fact and assessments of credibility in concluding that Mr. Rudensky knew RS was a client

[18] Merits Decision at para 100
[19] Merits Decision at para 100
[20] Merits Decision at paras 97-99

of RGMP. The IIROC Panel was entitled to apply its knowledge and expertise to interpret the evidence and submissions and come to this conclusion.

[95] While the IIROC Panel did, in reaching that conclusion, erroneously refer to two statements Mr. Rudensky had not made, these were not the only facts it relied on. I find there was sufficient evidence supporting the IIROC Panel's conclusion, and the IIROC Panel did not contravene the proposition set forth in *R v H(JM)*. I find that the IIROC Panel did not make a reviewable error on this point that would warrant my intervention.

4. Was the cross guarantee relevant?

(a) Mr. Rudensky's Position

[96] Mr. Rudensky submits that the IIROC Panel erred in law, proceeded on an incorrect principle and failed to consider material evidence by finding that evidence relating to a cross guarantee, involving other individuals, was irrelevant. An employee of GMP Securities (not RGMP), who was also a client of Mr. Rudensky's sales group at RGMP, was previously permitted to have a cross guarantee from a client of RGMP. Before the IIROC Panel, Mr. Rudensky pointed to the cross guarantee to suggest that his conduct was also permissible.

[97] Mr. Rudensky's submissions focus in particular on the language used by the IIROC Panel, at paragraph 139 of the Merits Decision: "If this was permitted, how would what the Respondent did be wrong?" The submission is this was not an argument advanced by Mr. Rudensky. The argument was in fact that his knowledge of someone else doing the same thing and it apparently being okay for that person to do it suggests that it was reasonable for Mr. Rudensky to believe what he was doing was okay.

(b) IIROC Staff's Position

[98] IIROC Staff submits that the IIROC Panel properly concluded that the cross guarantee was not relevant to its determination of whether Mr. Rudensky engaged in conduct in breach of the IIROC Rules.

[99] In addition, the IIROC Panel took note of numerous differences in the facts relating to the cross guarantee and Mr. Rudensky's conduct and relationship with RS.

[100] Further, IIROC Staff submits that there is no *mens rea* requirement to Rule 43 and evidence of Mr. Rudensky's (incorrect) understanding of the facts about the cross guarantee and its use is not relevant to a determination of whether Mr. Rudensky breached Rule 43.

(c) OSC Staff's Position

[101] OSC Staff took no position on this point.

(d) Analysis

[102] I find that the IIROC Panel was exercising its specialized competence in deciding what was relevant to its considerations, and that how someone else may have behaved was not relevant to their determination of whether the facts supported a conclusion that Mr. Rudensky breached Rule 43.

[103] In any event, even had it considered the cross guarantee as relevant, the IIROC Panel agreed with and adopted IIROC Staff's position on this point,[21] including the factors by which the cross guarantee was distinguishable from Mr. Rudensky's situation, which factors the IIROC Panel laid out in its decision.[22]

[104] For the reasons above, I find the IIROC Panel did not make a reviewable error on this point that would warrant my intervention.

5. Were the client's views about his need for protection relevant?

(a) Mr. Rudensky's Position

[105] Mr. Rudensky's position is that by rejecting as irrelevant the views of RS, a sophisticated client, about whether his arrangements with Mr. Rudensky created a conflict of interest, the IIROC Panel erred in law and proceeded on an incorrect principle.

[106] Mr. Rudensky argues that though he accepts that an informed client's view is not a complete answer on whether there was a conflict, the view should not have been rejected as irrelevant.

[107] Mr. Rudensky submits that the IIROC Panel, having rejected RS's views on the existence of a conflict, concluded that the Brookfield loan created a conflict between RS and both RGMP and Mr. Rudensky and that it constituted personal financial dealings with a client in contravention of Rule 43.

[108] Mr. Rudensky argues that the spirit of Rule 43 is to prevent conflicts of interest where an Approved Person is borrowing funds from a client, as opposed to the Dealer Member itself. If the definition of client includes all clients of the Dealer Member, Mr. Rudensky asks how a conflict can exist between a sophisticated client who does not believe a conflict exists and an employee who does not know the individual is a client of his firm.

[109] Lastly, Rule 43 is a principles-based rule that should be read in a flexible manner reflecting the spirit of the Rule.

(b) IIROC Staff's Position

[110] IIROC Staff submits that there is no reviewable error in the IIROC Panel's finding that the prohibition on personal financial dealing was broad and applied to this case.

[111] Rule 43 prohibits any personal financial dealings with clients and, as set out in IIROC Rules Notice 13-0162, draws no distinction between clients of the firm and clients of an Approved Person.

[112] Rule 43 is consistent with a registered firm's obligations to identify and respond to conflicts of interest, existing or potential.

[113] Therefore, IIROC Staff argues that the determination of whether Mr. Rudensky breached Rule 43 does not require consideration of RS's view about whether there was a conflict nor of Mr. Rudensky's knowledge of RS's status as a client.

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[21] Merits Decision at para 148
[22] Merits Decision para 176

(c) OSC Staff's Position

[114] OSC Staff took no position on this point.

(d) Analysis

[115] The IIROC Panel assessed the evidence in RS's affidavit, laying out in detail how it weighed, assessed relevance, or accepted at face value the various aspects of RS's evidence.[23]

[116] The IIROC Panel acknowledged that RS did not consider there to be a conflict of interest with respect to the loans. It further acknowledged that RS did not believe he required the protection of Rule 43.[24]

[117] The IIROC Panel's decision relating to the breach of Rule 43, however, rests on the analysis of RGMP's obligations and perspectives. It speaks to the "potential conflict of interest" from RGMP's position and the "differing interests" as between RGMP, Mr. Rudensky and RS.[25]

[118] In its analysis of Rule 43, the IIROC Panel outlined the obligations of the Dealer Member with respect to the identification and management of conflicts in IIROC Rules Notice 13-0162 and *National Instrument 31-103 (**NI 31-103***), Part 13, Division 2, s. 13.4.[26]

[119] By considering and weighing RS's evidence and making a decision that the member firm's perspective with respect to the existence of a conflict had greater weight than RS's evidence, the IIROC Panel was exercising its authority and expertise. I find that it is appropriate to defer to the IIROC Panel's decision and I find no error of law to warrant my interference on this point.

6. Was there a false and misleading statement?

(a) Mr. Rudensky's Position

[120] Mr. Rudensky submits that, in concluding that his statement that the funds were from a loan collateralized by his condominium was false and misleading, the IIROC Panel made several errors in law and proceeded on incorrect principles, including:

a. ignoring "material" evidence about Mr. King's characterization of his question to Mr. Rudensky about the loan;

b. finding that the Brookfield loan was not one that one would normally interpret as a "loan collateralized on my condo";[27]

c. there was no finding that Mr. Rudensky knew his representation was false;

d. by finding that an answer that wasn't full and complete was, therefore, false and misleading; and

e. by failing to consider Mr. Rudensky's and RS's evidence about their discussions about an undertaking to place a second mortgage on

[23] Merits Decision at paras 81-93
[24] Merits Decision at para 90
[25] Merits Decision at para 91
[26] Merits Decision at paras 118-119
[27] Merits Decision at para 105

Mr. Rudensky's condo and that the loan would not have been extended if there had not been equity in the condo.

[121] Mr. Rudensky submits that the IIROC Panel could not make a finding that the representation was false and misleading because the evidence from both Mr. Rudensky and RS was that they discussed the equity in the condo and agreed the condo would be put up as security. Therefore, Mr. Rudensky's response did not fit the legal definition of a "false representation".

[122] Mr. Rudensky argues that the IIROC Panel's finding that RGMP was misled was made in reliance only on Mr. King's assumptions, which were made on hearing Mr. Rudensky's response regarding the source of the funds: the loan came from BMO and Mr. Rudensky had access to other sources of collateral. There cannot be a claim of being misled if Mr. King made his own assumptions and did not share them with anyone.

[123] In August 2015, Mr. Rudensky was accused by RGMP of having received the loans from another client, not RS. Mr. Rudensky argues that to have been misled, RGMP would have had to believe that the loans came from BMO, which had been Mr. King's assumption, not from another client.

(b) IIROC Staff's Position

[124] IIROC Staff submits that Mr. Rudensky's condo was never taken as collateral for the $3 million promissory note from RS. The true source of the funds was RS, and they were loaned because of an unsecured promissory note and profit-sharing loan arrangement with RS. Therefore, IIROC Staff submits that the IIROC Panel properly found Mr. Rudensky's representation, that the source of funds was a loan collateralized on his condo, to be false and misleading.

[125] The IIROC Panel found that Mr. Rudensky's response should have been full and complete for the representation not to be false and misleading, which IIROC Staff argues did not amount to the IIROC Panel equating "full and complete" with "not false and misleading".

[126] There was enough evidence before the IIROC Panel to support its conclusion that the representation was false and misleading. IIROC Staff submits that the IIROC Panel clearly considered RS's evidence but gave it little weight when it conflicted with other testimony or raised unanswered questions that RS likely should have been able to clarify, if RS had testified in person.

(c) OSC Staff's Position

[127] OSC Staff took no position on this point.

(d) Analysis

[128] I find that it was within the IIROC Panel's expertise and authority to conclude that Mr. Rudensky's representation about the source of the loan was false and misleading, based on the evidence before it.

[129] I do not accept Mr. Rudensky's submission that the IIROC Panel failed to consider material evidence, being Mr. King's characterization of his question as "simple, normal, everyday" and not part of an investigation. How Mr. King characterized his question to Mr. Rudensky, in my view, in no way undermined the IIROC Panel's consideration of the evidence before them on which it based its findings of fact and decision on this point.

[130] The IIROC Panel appropriately considered and weighed the evidence in making its findings of fact and arriving at its decision, which included that RS loaned $3 million to Mr. Rudensky based on an unsecured promissory note with interest calculated as a percentage of the profit on the BAM.A Transaction.

[131] The IIROC Panel considered Mr. Rudensky's evidence and the information in RS's affidavit with respect to discussions about the equity in Mr. Rudensky's condo and that, if the loan remained outstanding longer than anticipated, Mr. Rudensky was willing to place a mortgage on his condo in RS's favour. However, the IIROC Panel found this to be a promise only and the loan was, in fact, not collateralized on the condo.[28]

[132] The IIROC Panel found that the profit sharing and RS as the lender were the central features of the loan, neither of which was disclosed to RGMP.[29]

[133] The IIROC Panel unequivocally found that the representation was false and misleading and set out the evidence on which it relied and the conclusions it drew from the evidence.[30] There was ample evidence before the IIROC Panel to support its finding.

[134] Further, I find the IIROC Panel did not err in law by finding that Mr. Rudensky's answer "should have been full and complete in order for the representation not to be false and misleading."[31]

[135] Included in the material before the IIROC Panel were IIROC Staff's submissions regarding expectations of an industry participant:[32] basic honesty is a requirement;[33] and Approved Persons must provide true and complete answers to questions from their Dealer Members.[34]

[136] The IIROC Panel also considered a member firm's obligation to identify and address existing or potential conflicts of interest under NI 31-103, s. 13.4, and the importance of a registrant's true and complete answers to the registrant's firm:[35]

> Because firms are required to address existing or potential conflicts of interest, it is essential that a registrant's answers to their queries are true and complete. This is particularly the case where a registrant solely possesses information about existing or potential conflicts of interest. The failure to provide true and complete disclosure prevents a firm from being able to fulfil its obligation to respond to existing or potential conflicts of interest, thereby exposing the firm to potential damages.

[137] In addition to the evidence referred to by the IIROC Panel, its decision adopts and incorporates the principles reflected in the materials before it, as articulated above, and supports the finding that Mr. Rudensky's response had to fully and

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[28] Merits Decision at para 105
[29] Merits Decision at para 106
[30] Merits Decision at paras 104-114
[31] Merits Decision at para 165
[32] Merits Decision at paras 124-126
[33] *Papp (Re)*, 2016 IIROC 41 at para 4
[34] *Scoten (Re)*, 2012 IIROC 6, at para 2
[35] Merits Decision at para 128

completely reflect the facts in order not to be false and misleading. I find no error warranting my interference on this point.

[138] Finally, I do not agree with Mr. Rudensky's submissions that the IIROC Panel erred in finding that RGMP was misled. In so finding, the IIROC Panel did not rely "only upon Mr. King's assumptions", as submitted by Mr. Rudensky. The IIROC Panel made the finding that RGMP was misled after reviewing the evidence it relied on in determining that Mr. Rudensky was deceiving RGMP,[36] and concluded that the representation was another step in the deception. I find there was sufficient evidence before the IIROC Panel to come to the conclusion RGMP was misled and there is no basis for my interference with its decision on this point.

E. Have any of the factors from *Canada Malting* been satisfied with respect to the Sanctions and Costs Decision?

[139] Having concluded that Mr. Rudensky failed to establish that there was a basis for me to interfere in the substance of the Merits Decision, I now move to consider whether Mr. Rudensky established a basis under *Canada Malting* for me to interfere in the Sanctions and Costs Decision on the basis of the alleged errors described in the Overview section of these Reasons.

1. Did the IIROC Panel err in law by ordering disgorgement?

(a) Mr. Rudensky's Position

[140] Mr. Rudensky's position is that the loan from RS formed the basis for the IIROC Panel's finding of a personal financial dealing that breached Rule 43. The disgorgement order, however, related to the profits earned from the BAM.A Transaction that was connected to the loan.

[141] In support of this position, he refers to the last sentence of paragraph 161 of the Merits Decision:

> The Brookfield loan created a conflict of interest with RGMP and with the Respondent and was personal financial dealings of the Respondent with a client of RGMP contrary to Rule 43.

[142] Mr. Rudensky also submits that to consider the profit from the BAM.A Transaction, one would have to know what profit Mr. Rudensky would have made had he participated in the BAM.A Transaction without the loan. No such evidence was before the IIROC Panel.

[143] Mr. Rudensky also refers to IIROC Staff's opening statements in the IIROC Hearing; the argument being that when the proceeding against Mr. Rudensky commenced, the case he had to meet was that the Brookfield loan was contrary to Rule 43. The IIROC Panel found that the loan was contrary to Rule 43. The IIROC Panel then erred in law when, for the sanctions hearing, it changed or altered that finding to include not just the Brookfield loan, but also the BAM.A Transaction.

[144] Alternatively, Mr. Rudensky's position is that disgorgement was extended to any use made of the loan from a client, with no authority or analysis; which is an error of law.

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[36] Merits Decision at paras 105-112

(b) IIROC Staff's Position

[145] IIROC Staff's responding argument is that disgorgement is a vital means of achieving deterrence, as it ensures that a Member or an Approved Person does not retain any of the benefits obtained through violation of the IIROC Rules.

[146] In support of this position, IIROC Staff refers to Rule 20.33 of the IIROC Rules (the relevant rule given the conduct was prior to September 1, 2016), which authorizes an IIROC hearing panel to impose a fine of the greater of $1 million or three times the profit made by reason of a contravention.

[147] In addition, IIROC Staff cites the IIROC Sanction Guidelines, in particular the following excerpt:[37]

> Sanctions should ensure that a respondent does not financially benefit as a result of the misconduct.
>
> It is a fundamental tenet that wrong-doers should not benefit from their wrong-doing. Accordingly, in cases where the respondent benefited financially from the misconduct, the sanction, where possible, should include a disgorgement of the amount of any such financial benefit. Financial benefit would include any profits, commissions, fees, or any other compensation or other benefit received by the respondent, directly or indirectly, as a result of the misconduct.

[148] IIROC Staff states that the behaviour with which they took issue has always been the profit sharing and loan arrangement with RS, as referred to in the Statement of Allegations. Therefore, it was appropriate for the IIROC Panel to include disgorgement of the profits from the BAM.A Transaction in their Sanctions and Costs Decision.

[149] Further, undue emphasis is placed, IIROC Staff submits, on the IIROC Panel's use of the term "Brookfield loan" in paragraph 161 of the Merits Decision. The term, IIROC Staff argues, was used throughout the Merits Decision and it is clear that the "Brookfield loan" was a profit sharing and loan arrangement.

[150] IIROC Staff submits that they proved at the IIROC hearing, on a balance of probabilities, the amount Mr. Rudensky obtained because of his contravention of Rule 43. IIROC Staff relies on the decision in *Limelight Entertainment Inc. (Re)*[38] for the proposition that the risk of uncertainty in a disgorgement calculation falls on the wrongdoer, whose non-compliant behaviour gave rise to the uncertainty.

[151] IIROC Staff also submits that there was opportunity, during both the merits and sanctions and costs hearings, for Mr. Rudensky to lead evidence that all or some of the profits from the BAM.A Transaction could have been made without the Brookfield loan. In the absence of any such evidence, Mr. Rudensky's submissions on this point are speculative.

[152] Lastly, IIROC Staff states that the Commission has recognized a purposive reading of "profit" in determining the quantum of a sanction, referring to

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[37] IIROC Sanction Guidelines, Investment Industry Regulatory Organization of Canada online: https://www.iiroc.ca/industry/enforcement/Documents/IIROCSanctionGuidelines_en.pdf at Part I, Guideline 4

[38] 2008 ONSEC 28, (2008) OSCB 12030 at paras 48-49

Dennis (Re)[39] *and X Inc (Re).*[40] IIROC Staff also refers to *Boulieris*, in which the Commission held that a registrant who has willfully facilitated a market manipulation "should face severe consequences, including removal from a marketplace for an appropriate period and disgorgement of moneys received as a consequence of his conduct."[41]

(c) OSC Staff's Position

[153] OSC Staff concurs with IIROC Staff's position regarding the principles underlying disgorgement decisions and submits that the Commission should not take an unduly restrictive view of the meaning of disgorgement.

[154] In considering the disgorgement remedy available under the Act, the Commission has stated that the remedy is intended to ensure that respondents do not retain any financial benefit from their breaches of the Act and to provide specific and general deterrence.[42] OSC Staff submits that the same principles should inform the Commission's review of the IIROC Panel's disgorgement order.

(d) Analysis

[155] I do not find that the IIROC Panel made any error of law or proceeded on an incorrect principle in ordering disgorgement in their Sanctions and Costs Decision.

[156] I do not accept Mr. Rudensky's position that the IIROC Panel found the Brookfield loan to be the cause of the breach of Rule 43. Such a conclusion focuses too narrowly on discrete statements in IIROC Staff's opening statement at the IIROC hearing and on a single sentence in the Merits Decision.

[157] The IIROC Panel clearly understood IIROC Staff's position to be that the breach of Rule 43 was broader than the Brookfield loan itself, as set out in the "Summary of the Staff's Position" in the Merits Decision:[43]

> Staff's position was that the Brookfield loan with interest tied to a percentage of [Mr. Rudensky's] profit from purchasing and shorting Brookfield shares was a profit sharing and loan arrangement which constituted personal financial dealings with a client of RGMP contrary to Rule 43.

[158] In its findings of fact, the IIROC Panel further indicated that it understood the case against Mr. Rudensky to be broader than just the loan when it found that the "profit sharing arrangement and RS as lender were the central features of the loan and this was not disclosed."[44]

[159] The IIROC Panel further indicated this view when it discussed whether "entering into a profit sharing and loan arrangement like the Brookfield loan if done with a third party, whether or not a client, not registered in the securities industry would be just plain wrong". The IIROC Panel is clear this was not alleged in Mr. Rudensky's case and, therefore, was not a factor in its decision. But it is

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[39] 2012 ONSEC 24, (2012) 25 OSCB 7374 at para 43
[40] 2010 ONSEC 5, (2010) 33 OSCB 11369 at para 37
[41] *Boulieris*, at para 50
[42] *Sabourin (Re)*, 2010 ONSEC 10, OSCB 5399 at para 65
[43] Merits Decision at para 14
[44] Merits Decision at para 106

further evidence that the IIROC Panel did not consider Mr. Rudensky's breach of Rule 43 to relate to only the loan itself.[45]

[160] For the reasons above, I conclude that the IIROC Panel's decision to order disgorgement was not based on an altered or changed finding.

[161] Mr. Rudensky's argument in the alternative is that the IIROC Panel "extended disgorgement to any use that is made of a loan from a client" without authority or analysis, which was an error in law.

[162] I do not agree with this submission. The IIROC Panel clearly refers to the IIROC Sanctions Guidelines, which state that "[s]anctions should ensure that a respondent does not financially benefit as a result of the misconduct".[46] The IIROC Panel found the financial benefit from Mr. Rudensky's misconduct to be the net profit from the BAM.A Transaction and ordered that it be disgorged.

[163] I accept IIROC Staff's position that there was ample opportunity for Mr. Rudensky to make submissions with respect to what the financial benefit would have been had he entered into the BAM.A Transaction without the loan. The IIROC Panel did not err in law by not speculating about what that amount might have been when ordering disgorgement of the financial benefit from that transaction.

2. Did the IIROC Panel err in law by ordering both a significant fine and a suspension?

(a) Mr. Rudensky's Position

[164] Mr. Rudensky submits that the IIROC Panel erred in law and proceeded on an incorrect principle by, at paragraphs 55 and 56 of the Sanctions and Costs Decision, relying upon the size of the financial impact a suspension would have as a basis for determining whether a significant fine was warranted, in addition.

[165] In the alternative, Mr. Rudensky submits that the IIROC Panel erred in law and proceeded on an incorrect principle by finding, without any supporting evidence, that a suspension for a respondent who is not currently in the industry would not have a sufficient financial impact on that individual. Mr. Rudensky also submits that there is no analysis or consideration from the IIROC Panel as to what it understood the financial impact of the suspension would be.

(b) IIROC Staff's Position

[166] IIROC Staff submits that a suspension was appropriate. It balances specific deterrence, general deterrence and the public interest.

[167] IIROC Staff further submits that the IIROC Panel viewed sanctions as a whole and recognized that to achieve general and specific deterrence, and considering the public interest, in some cases, such as this, where the conduct was egregious and compromised the integrity and reputation of the securities industry, both a suspension and a fine are warranted.

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[45] Merits Decision at para 164

[46] Sanctions and Costs Decision at paras 35 and 43

(c) OSC Staff's Position

[168] OSC Staff submits that the IIROC Panel neither erred in law nor proceeded on an incorrect principle by considering the overall deterrent effect of the package of sanctions on Mr. Rudensky.

[169] An IIROC panel may consider the total impact of the sanctions ordered in light of the respondent's particular circumstances, rather than considering each sanction in isolation. The rationale for different sanctions may vary depending on the professional and financial circumstances of the respondent.

[170] The IIROC Sanction Guidelines expressly consider that the same sanction might have a different effect on different types of respondents. The guidelines also indicate that sanctions should be adjusted as appropriate to achieve specific and general deterrence, given the characteristics of the respondent.

[171] Imposing sanctions that the IIROC Panel believed would, in total, provide enough deterrent for the conduct in the context of Mr. Rudensky's personal circumstances did not, in OSC Staff's submission, amount to an error in law or proceeding on an incorrect principle.

(d) Analysis

[172] I do not find that the IIROC Panel relied upon the size of the financial impact a suspension would have "as a basis for determining whether a suspension was warranted or not", as submitted by Mr. Rudensky.[47]

[173] The IIROC Panel reviewed the precedent cases submitted by both parties and the IIROC Sanction Guidelines, concluding that the sanctions it was ordering were within the range of reasonableness suggested by the cases and consistent with the guidelines.[48]

[174] The IIROC Panel concluded that "[a] two year suspension is consistent with similar regulatory decisions and is warranted given the intentional and dishonest nature of [Mr. Rudensky's] misconduct."[49]

[175] I agree with Mr. Rudensky's submission that in *Pariak-Lukic*, the Commission added a two-year suspension to sanctions ordered by IIROC, including a significant fine, without expressly considering the financial impact of the suspension or how that financial impact should affect the substantial fine already imposed.

[176] However, I disagree that *Pariak-Lukic* stands for the proposition that a panel cannot consider the financial impact of a sanctions decision when determining specific and general deterrence of that decision in a particular circumstance.

[177] Mr. Rudensky submitted that the IIROC Panel erred by concluding, without evidence, that a suspension for someone not currently in the business would not have enough financial impact.

[178] The IIROC Panel noted that a suspension of someone who is active in the industry disrupts or destroys the person's book of business, which is not the case

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[47] Applicant's Memorandum of Fact and Law, February 8, 2019 at para 107
[48] Sanctions and Costs Decision at paras 47-48
[49] Sanctions and Costs Decision at para 54

for someone already out of the business.[50] However, I find their decision with respect to sanctions was based on an overall assessment of specific and general deterrence in Mr. Rudensky's specific circumstances and this was only one of several factors that the IIROC Panel considered.

[179] With respect to Mr. Rudensky's submission that the IIROC Panel should have provided some analysis as to what the financial impact of suspension would be for Mr. Rudensky, I disagree. The IIROC Panel reviewed the cases and the IIROC Sanctions Guidelines, and considered the seriousness of Mr. Rudensky's behaviour, before coming to its decision to suspend him.[51] I find no error of law or proceeding on an incorrect principle that would warrant my interference on this point.

3. Did the IIROC Panel err in law by finding there was harm to market integrity?

(a) Mr. Rudensky's Position

[180] Mr. Rudensky's position is that the IIROC Panel made an error in law by finding that there was harm to market integrity, without hearing any evidence of such harm.

(b) IIROC Staff's Position

[181] The IIROC Panel found that Mr. Rudensky's conduct was dishonest and deceptive. IIROC Staff relies on *Suleiman (Re)* for the proposition that it is obvious that such behaviour causes harm to the integrity of the market and to its reputation.[52] Therefore, in their submission, there was no error in law.

(c) OSC Staff's Position

[182] OSC Staff took no position on this point.

(d) Analysis

[183] I agree with IIROC Staff's position on this issue. Although *Suleiman* and the cases referred to therein involve forgery, I agree that they stand for the broader concept that dishonest and deceptive behaviour, by its very nature, causes harm to the integrity of the market and to its reputation.

[184] The IIROC Panel adopted the principle laid out in *Scoten (Re)* that "the investment industry by necessity operates in an atmosphere of trust", including "trust between the Approved Person and his or her employer".[53]

[185] In addition, the IIROC Panel cited *Wong (Re)* for the concept that the investment industry is based on trust and disclosure and that lying to one's Member Firm strikes at the heart of the principles on which the industry is built.[54]

[186] I find no error of law warranting my interference with the IIROC Panel's conclusion, based on their analysis of the decisions before them, that

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[50] Sanctions and Costs Decision at paras 55-56
[51] Sanctions and Costs Decision at paras 52-54
[52] *Suleiman (Re)*, 2016 IIROC 27 at para 8(d) (***Suleiman***)
[53] Sanctions and Costs Decision at para 5; *Scoten (Re)*, 2012 IIROC 67 at para 21
[54] Sanctions and Costs Decision at para 6, citing *Wong (Re)*, 2010 IIROC 50 at para 32

Mr. Rudensky's misconduct and lack of honesty harmed market integrity and the reputation of the marketplace.

V. CONCLUSION

[187] For the above reasons, Mr. Rudensky's application for hearing and review is hereby dismissed. I conclude that:

a. the Merits Decision included analysis that constituted an error of law with respect to the interpretation about whether Rule 29.1 remained in effect in these circumstances. However, upon conducting and substituting my own analysis, I reach the same finding as the IIROC Panel. Rule 29.1 remained in effect in these circumstances;

b. as the evidence supporting the IIROC Panel's finding with respect to the availability of Rule 29.1 was completely separate from the evidence supporting the IIROC Panel's decision regarding whether Mr. Rudensky had breached Rule 43 and Rule 29.1, I considered as a separate issue if Mr. Rudensky had established any grounds warranting my interference in the substance of the Merits Decision and I found that Mr. Rudensky had failed to do so; and

c. Mr. Rudensky failed to establish any grounds warranting my intervention in the Sanctions and Costs Decision.

Dated at Toronto this 9th day of July, 2019.

"*M. Cecilia Williams*"
M. Cecilia Williams