BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Dwight C. Mann, 2021 BCSECCOM 429 Date: 20211103

Dwight Cameron Mann and the Investment Industry Regulatory Organization of Canada

Panel	Gordon Johnson	Vice Chair
	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner
Hearing dates	July 5, 2021	
Submissions completed	July 5, 2021	
Decision date	November 3, 2021	
Appearing		
David McLellan Stacy Robertson	For Investment Industry Regulatory Organization of Canada	
Patrick Sullivan Savannah Hamilton	For Dwight Cameron Mann	

Decision

I. Introduction

[1] This is an application for a hearing and review brought by the Investment Regulatory Organization of Canada (IIROC Staff) pursuant to section 28(1) of the *Securities Act*, RSBC 1996, c. 418 (the Act).

[2] The decision for which review is sought is a sanctions decision dated November 21, 2020 (Decision) made by a hearing panel of IIROC (IIROC Panel). The Decision, which is reported as *Re Mann*, 2020 IIROC 43 followed a merits decision (*Re Mann*, 2020 IIROC 6) making various findings of misconduct against Mann.

[3] In the Decision, the IIROC Panel imposed financial sanctions on Mann and ordered compliance audits of Mann's operations, but did not order a suspension of any kind. The primary issue submitted to us for review by IIROC Staff is their assertion that the IIROC Panel's failure to impose a suspension is unreasonable. IIROC Staff submit that it is appropriate for the Commission to intervene and to add a period of suspension to the sanctions and costs which have already been imposed against Mann.

[4] IIROC and Mann each made written submissions and appeared at the Commission hearing. The executive director elected to not make submissions or attend the Commission hearing.

II. Factual background

[5] Many of the key facts relevant to this proceeding were agreed to between the parties in a formal agreed statement of facts (Agreed Statement of Facts). Most of the other relevant facts are undisputed. To the extent that we use our own language rather than specific wording adopted by the parties or the IIROC Panel we do so for reasons of brevity and convenience.

[6] Mann graduated from the University of British Columbia in 1993. He has had no other occupation since university other than investment advisor**.**

[7] Over the years Mann built an extremely successful practice. His clients generally held a conservative mix of high quality investments. Mann, in the opinion of those who worked closely with him, is a very passionate, hardworking advisor who is motivated to do a good job for his clients**.** His clients have generally achieved good financial returns and investment stability. Mann's approach resulted in him building a thriving, profitable advisory practice. During the Relevant Period (defined below), Mann worked for IIROC member referred to herein as Employer 1.

[8] During the period between January 2015 and March 2018 (Relevant Period), Mann commenced and continued a pattern of conduct which contravened a number of IIROC Rules. Certain clients were, for one reason or another, disappointed with a transaction or investment return. In a number of cases, Mann reacted to the clients' dissatisfaction by promising them that he would guarantee a specific rate of return for a future period of time (Guarantees).

[9] Mann honoured the Guarantees by engaging in two types of account related misconduct. This misconduct was described by the IIROC Panel as follows:

> 24. The evidence establishes that:
>
> a) The Respondent commenced employment with [Employer 1] in 2000.
>
> b) The transactions relevant to contraventions two and three all took place between January 2015 and March 2018.
>
> c) During the Relevant Period:
>
> i) The Respondent had discretionary trading authority over the majority of his client accounts.

ii) He administered assets in excess of $700 million in over six hundred family and thousands of individual accounts. He did this with the assistance of a team of approximately ten registered representatives, portfolio managers, investment representatives, and administrative support staff that reported to him.

iii) The majority of the accounts managed by the Respondent were fee based.

d) [Employer 1] had a policy for correcting situations in which an advisor had failed to execute a trade on behalf of a client.

i) For up to 30 days following such an error, the advisor was allowed to execute the trade at the current market price.

ii) In the client account, the transaction would be registered at the price at which the original trade should have occurred.

iii) Any cost difference arising from a price differential between the intended and actual trade dates would be charged to the advisor.

e) During the Relevant Period, the Respondent executed 29 such backdated transactions under false pretences.

i) He misrepresented to Employer 1 that the transactions were required to correct failures to execute trade orders, when his real purpose in backdating them was to improve the performance of certain client accounts.

ii) This was achieved by buying securities that had increased in value between the supposed and actual purchase dates, effectively gifting the account with an appreciation in value it would not otherwise have enjoyed.

iii) Alternatively, the Respondent sold securities that had decreased in value between the supposed and actual sell dates, thereby insulating the account from a loss in value it would otherwise have suffered.

iv) The effect of the 29 falsified backdated transactions was to confer at least $83,420 in economic value from the Respondent to the benefit of 14 different client accounts.

f) [Employer 1] also had a policy for correcting orders that had been mistakenly executed in the wrong client account.

i) The policy permitted an advisor to cancel the erroneous transaction and transfer the security position to the correct account at the original price.

ii) The economic effect of a "cancel and correct" transaction was to return both accounts to the capital positions they should have occupied but for the mistaken order execution.

iii) An advisor did not incur any charges or costs from a cancel and correct transaction.

g) During the Relevant Period, the Respondent executed 103 cancel and correct transactions under false pretences.

i) He misrepresented to [Employer 1] that the transactions were required to correct orders that had been executed in the wrong client accounts. In reality, the transfer of securities positions was orchestrated to benefit certain client accounts.

ii) 18 account holders received a total of $145,885 in economic value by virtue of cancel and correct transactions that transferred unrealized gains and losses between accounts.

iii) The vast majority of these transfers involved accounts under the direction of Client 1, out of which $126,586 in value was transferred to other accounts through 84 cancel and correct transactions. It was agreed that this was done with Client 1's knowledge.

iv) In a July 30, 2018 letter originally tendered in previous related IIROC proceedings and entered into the hearing record by consent, Client 1 states that:

> "Mr. Mann has always had full discretionary authority and I have never had any issue with any of the trades in the accounts. This includes cancelling trades on a number of occasions. I didn't have any issue with the cancellations (and still don't) even though it meant foregoing paper gains. I had been pleased with Mr. Mann's advice and had been making good returns."

v) Nothing in the record suggests that Client 1, with whom the Respondent frequently spoke by telephone, was in any way misled about the cancel and correct transactions or the Respondent's purposes in implementing them.

vi) The remaining 19 cancel and correct transactions involved the transfer of $19,299 in value from accounts controlled by 18 other clients. Unrealized gains were transferred out of these accounts in 13 cancel and correct transactions that ranged between $115 and $3,335 in value; unrealized losses were transferred into the accounts in 6 transactions with values between $592 and $1,438.

[10] On one particular occasion, a person who held a power of attorney over the affairs of two clients who had benefited from the cancel and correct transactions, made a complaint to Mann. He alleged that Mann had engaged in unauthorized discretionary trading in those clients' accounts, as well as "know your client", "know your product" and suitability failures. Mann did not report the complaint as he was required to do. According to the Agreed Statement of Facts, Mann did not report the complaint at the time because it was not made by the clients themselves. He later recognized that it was a mistake.

[11] Eventually, Mann's improper activities were detected by Employer 1. Employer 1 terminated Mann's employment on April 18. 2018. At the time, Mann informed some members of his team at Employer 1 that his employment had been terminated and Mann took responsibility for his misconduct.

[12] Upon the termination of Mann's employment, Employer 1 delivered to IIROC a notice of Mann's termination. Employer 1 gave reasons for the termination as required by the relevant notice of termination form. In that form Employer 1 made reference to theft or fraud by Mann.

[13] Mann found alternative employment with an IIROC member who is referred to herein as Employer 2. Mann then began the process to obtain approval from IIROC to resume his career. IIROC registration staff commenced a suitability review. In the course of Mann's interactions with IIROC regarding his re-registration, Mann signed a letter and reviewed without dissenting another letter from Employer 2 describing his conduct in terms which understated what was eventually revealed as the full extent of Mann's misconduct.

[14] IIROC registration staff opposed re-registration. On August 15, 2018, IIROC's Pacific District Council Sub-Committee Panel rendered its decision on Mann's suitability. In its decision, the panel approved Mann's registration as a registered representative and portfolio manager with Employer 2 subject to the following terms and conditions:

(i) Mann was subject to 18 months of strict supervision.;
(ii) Mann was required to re-write the Conduct and Practices Handbook course; and
(iii) Mann was required to attend a seminar focused on the proper use of error accounts and of cancel and correct transactions.

[15] Due to implementation delays, Mann did not engage in licensed activities between April and December, 2018.

[16] Because of the strict supervision requirements, Employer 2 hired two additional supervision employees. One employee reviewed all of Mann's emails. The other employee reviewed all of Mann's trades. Mann paid 75% of the salaries of these Employer 2 employees.

[17] As of the date of the IIROC sanctions hearing, Mann had been on strict supervision since August of 2018 and Employer 2 has been submitting monthly supervision reports to IIROC since August 2018. No issues had been raised concerning Mann in any of the monthly supervision reports.

[18] Mann has no prior disciplinary history.

III. IIROC hearing history

[19] On or about March 26, 2019, IIROC issued a Notice of Hearing and Statement of Allegations against Mann. IIROC alleged the following:

> Contravention 1
> Between December, 2015 and January, 2018, [Mann] provided an unjustified promise of specific results in connection with his business, contrary to Dealer Member Rule 29.7(1)(b) and Consolidated Rule 1400 (Dealer Member Rule 29.1 prior to September 1, 2016);
>
> Contravention 2
> Between January, 2015 and March, 2018, [Mann] engaged in misleading, fraudulent and/or deceptive conduct with respect to backdated transactions, contrary to Consolidated Rule 1400 (Dealer Member Rule 29.1 prior to September 1, 2016);
>
> Contravention 3
> Between January, 2015 and March, 2018, [Mann] engaged in misleading, fraudulent and/or deceptive conduct with respect to cancel and correct transactions, contrary to Consolidated Rule 1400 (Dealer Member Rule 29.1 prior to September 1, 2016); and
>
> Contravention 4
> In October, 2015, [Mann] failed to report a client complaint, contrary to Dealer Member Rule 3100(I)(A)(1)(c).

[20] In Mann's Response to the Notice of Hearing and Statement of Allegations, he admitted that he committed alleged contraventions one to three, but disputed that he engaged in fraudulent, misleading or deceptive conduct or that he breached fiduciary obligations.

[21] On October 28, 2019, Mann entered into an extensive Agreed Statement of Facts with IIROC in which Mann admitted all four contraventions, and to engaging in misleading conduct when he committed contraventions two and three. However, he expressly disputed the allegation that contraventions two and three had involved fraudulent or deceptive conduct.

[22] The IIROC hearing into the merits of the allegations spanned four days. The only issue in dispute was whether Mann's conduct under contravention two and three was fraudulent. Both Mann and the IIROC investigator testified at the hearing.

[23] On February 25, 2020, the IIROC Panel issued the merits decision. They found that Mann had committed the four contraventions as described in the Agreed Statement of Facts, but that his conduct under contraventions two and three was not fraudulent.

[24] At the sanctions hearing, Mann, his spouse, members of his team and an Employer 1 employee Mann previously worked with testified in person or provided affidavit evidence. The core disagreement between the parties at the hearing was whether a permanent ban was necessary to deter Mann and others from engaging in similar conduct in the future.

[25] At the end of the sanctions hearing, the IIROC Panel informed the parties that:

> THE CHAIR: All right. Thank you, everybody. We've considered the respective submissions of counsel. And as I mentioned before, they're appreciated. They both cover important territory, which we're going to examine and review and discuss in written reasons that we're going to prepare later in due course. But we can say that we're in a position to tell you today what kind of sanctions we think are appropriate in the circumstances of this case, which we agree with both counsel are highly unusual.
>
> The first thing to be said is we will not be ordering a permanent prohibition or a suspension of any kind against Mr. Mann. In our view the facts, given the nature of the circumstances and the nature of the misconduct, would warrant a two-year period of strict supervision. However, taking into account the time that the respondent was unlicensed from April to August 2018 plus the strict supervision he has been under since he was relicensed in August 2018, that period of time effectively means that he's already served that -- the appropriate period of strict supervision.
>
> We do think that the character of the misconduct justifies requiring a somewhat unusual sanction or approach, which is to say a compliance audit to be undertaken to cover the 12 months following immediately after the making of the sanctions order. This compliance audit that we're contemplating, we contemplate that it would have the following elements. First, it would be conducted by an independent outside person with appropriate qualifications. That person would be selected jointly by the respondent and Employer 2. The respondent would pay for the cost of the audit. The person selected by the respondent and Employer 2 and the breadth and depth of the review would be subject to the prior approval of IIROC enforcement.
>
> Now, discussing this compliance audit that we're of a mind to order, you can easily see the logistics of that are going to require some careful consideration. …

> As to the fine, we're of the view that $250,000 is the appropriate amount in this case. As for the costs order, the $71,000 amount that the staff has requested and that the respondent does not object, in our view that's appropriate…
> *[Emphasis added]*

[26] The IIROC Panel ultimately ordered the following sanctions against Mann:

a) a fine of $250,000
b) costs of $50,000, and
c) the appointment of a compliance auditor to review the Mann team's operations between July 1, 2020 and June 30, 2021.

[27] The IIROC Panel sets out its reasoning in the Decision as follows:

> ¶57 Both parties reviewed a substantial number of cases to support of their respective positions on sanctions. Unfortunately, the guidance provided by those precedents is of limited utility give the many unusual features of this case.
>
> ¶ 58 As mentioned, the risk to be addressed for specific deterrence purposes is the attitude of impunity that led the Respondent to treat the Rules as inconveniences to be skirted at his discretion, instead of the strict and principled directives they really are.
>
> (a) In that regard, the Panel considers it significant that no compliance problems were identified in any of the supervision reports filed by [Employer 2]. It is satisfied that the Respondent is properly aware that his career, income, and overall financial position very much depend on his continuing to follow the Rules scrupulously. Neither a suspension nor a period of further supervision is necessary.
>
> (b) The Panel is nonetheless of the view that the public interest requires that his activities remain subject to a degree of monitoring.
>
> (c) For that reason, the Panel ordered that a qualified auditor conduct a compliance audit of the Respondent's error correction practices and related matters for the period from July 1, 2020 to June 30, 2021, to the satisfaction of IIROC Enforcement Staff and at the Respondent's expense.
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> ¶ 59 In terms of general deterrence, the period of strict supervision the Respondent has already undergone was both appropriate and sufficient. As to the question of financial penalty, the crucial consideration as always is to determine an amount that accurately reflects the gravity of the misconduct and is sufficient to deter both the Respondent and others. After considering the respective positions of the parties, the Panel ordered that the Respondent pay a fine of $250,000.

> ¶ 60 The Respondent did not dispute the Staff's claim that he pay costs in the amount of $50,000, and the Panel so ordered.

IV. Positions of the Parties

A. IIROC Staff's Position

[28] IIROC Staff submit that this panel should overturn the Decision and, together with the existing sanction and other orders ($250,000 fine, $50,000 costs and compliance audit) impose a three to five year suspension from approval in any capacity.

[29] IIROC Staff submit that in failing to impose any period of suspension against Mann, the IIROC Panel:

(i) erred in law and proceeded upon incorrect principles in its application of sanction principles, including in applying the IIROC Sanction Guidelines, and by failing to adequately address general deterrence;

(ii) failed to consider material evidence that Mann had not been forthright or forthcoming with IIROC Staff on multiple occasions; and

(iii) imposed a view of the public interest that conflicts with the principle that sanctions should strengthen market integrity and improve overall business standards and practices.

[30] The suggested errors of law and applications of incorrect principles are that the IIROC Panel failed to properly apply the IIROC Sanction Guidelines, did not properly consider the need for general deterrence and failed to appropriately weigh relevant case law.

[31] The IIROC Sanction Guidelines list specific factors (see paragraph 45 below) that, if present, should lead a hearing panel to consider the imposition of a suspension. IIROC Staff suggest that although the merits decision and the Decision indicate that the IIROC Panel found that all but one of the enumerated factors were present, the IIROC Panel did not impose a suspension and did not indicate in the Decision that it had specifically applied these factors and considered if a suspension was justified in the circumstances.

[32] In referencing general deterrence, IIROC Staff note that general deterrence is a key purpose of the IIROC Sanction Guidelines. IIROC Staff suggest that the IIROC Panel focused on specific deterrence but failed to give proper consideration to general deterrence. IIROC Staff also point to certain language in the Decision (reproduced in paragraph 27 of this decision) referencing the substantial book of business Mann had accumulated and the level of satisfaction of Mann's client base, and submit that Mann appeared to have avoided a suspension because he had a large book and most of his clients were satisfied with his work. IIROC Staff assert that this outcome sends the message to the industry that "a suspension is not warranted depending on the size and success of your book of business. It is not an appropriate regulatory message and does not meet the objectives of general deterrence."

[33] In referencing the case authorities, IIROC Staff submit that the lack of a suspension is inconsistent with relevant case law. They emphasize how commonly suspensions or permanent bans are imposed in circumstances where the conduct in question is part of a pattern and involved elements of deceit and concealment. IIROC Staff submit that the IIROC Panel failed in its "duty to impose a sanction that was demonstrably proportionate to the serious nature of the misconduct", when it failed to impose any suspension in the face of its own finding that Mann's conduct was deliberate and deceptive.

[34] The material evidence which IIROC Staff submit the IIROC Panel failed to consider is the series of communications between Mann and IIROC Staff at the time Mann was seeking to be re-registered. IIROC Staff submit that Mann vastly understated the number of instances and extent of his misconduct and was not at all forthcoming with IIROC's investigatory process. IIROC Staff note the Decision states that "In these proceedings, the Respondent has admitted his misconduct from the outset", suggesting that the IIROC Panel failed to consider Mann's apparent lack of candor at a key moment before the IIROC proceedings started.

[35] IIROC Staff also submit that the IIROC Panel considered the size of Mann's book of business to be relevant in determining sanction, which is not supported by the Sanction Guidelines or case law and is contrary to the public interest. IIROC Staff submit that "simply because Mann enjoyed a large book of business does not justify or mitigate his misconduct in any way. Nor does it mean that he should be able to avoid a suspension, by paying a significant fine".

B. Mann's Position

[36] Mann submits that the IIROC Panel made no error of law, principle or assessment of the public interest, and the Decision is fair and reasonable. Mann asserts that any hearing panel considering the imposition of sanctions has to carefully weigh and balance a series of factors. Those factors include general and specific deterrence as well as the seriousness of the conduct in question, and Mann's personal circumstances. The panel's task is to craft a decision which achieves the goal of protecting the public without imposing disproportionately harsh sanctions. Mann asserts that the IIROC Panel has achieved the proper balance in the Decision.

[37] Mann submits that any review of the Decision needs to consider the broader context. He submits that many or all of the factors and considerations which IIROC Staff allege are missing from the Decision are explicitly contained in the Decision, implicit in the Decision or shown to have been considered by the IIROC Panel when the larger context is objectively viewed. Mann submits that the process of review of an administrative decision is not a search for perfection but a review to show that the decision maker followed a proper chain of logic to arrive at a reasonable conclusion. Mann submits that it is improper for this panel of the Commission to substitute its own judgement for the discretion already exercised by the IIROC Panel. Mann asserts that IIROC Staff are

urging us to do just that by mischaracterizing certain aspects of the Decision to support our intervention.

[38] Mann submits that the Decision demonstrates that the IIROC Panel fully considered the evidence before it and applied the correct legal analysis. He says the evidence fully supports the conclusions reached by the IIROC Panel. Mann points to multiple references to general deterrence in the Decision and in the sanctions hearing. Mann also points to evidence before the IIROC Panel that given the nature of his profession, a significant suspension would be tantamount to a lifetime ban. Mann submits that the IIROC Panel carefully considered general deterrence and imposing a suspension and struck a reasonable balance which does not include a suspension. Mann submits that allowing the Decision to stand would not create a precedent which will encourage deceitful conduct by others. Mann submits that there are very particular circumstances to his case and those were fairly evaluated by the IIROC Panel.

V. Analysis and Conclusions

A. Applicable law

[39] The most relevant portion of BC Policy 15-601 *Hearings* is the following:

> **7.9 Form and scope of reviews of a decision under sections 28 and 165**
> **(a)** ***Where the review of a Recognized Entity decision proceeds as an appeal*** –
> The Commission does not provide parties with a second opinion on a matter decided by a Recognized Entity. If the decision under review is reasonable and was made in accordance with the law, the evidence, and the public interest, the Commission is generally reluctant to interfere simply because it might have made a different decision in the circumstances. For this reason, generally, the person requesting the review presents a case for having the decision revoked or varied and the Recognized Entity responds to that case.
>
> The Commission generally confirms the decision of the Recognized Entity, unless:
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> • the Recognized Entity has proceeded on an incorrect principle
> • the Recognized Entity has made an error in law
> • the Recognized Entity has overlooked material evidence
> • new and compelling evidence is presented to the Commission or
> • the Commission's view of the public interest is different from that of the Recognized Entity.

[40] The leading judicial decision regarding the approach which should be taken in reviewing the adequacy of reasons for an administrative decision is *Canada (Minister of Citizenship and Immigration) v. Vavilov*, [2019] SCJ No. 65. That decision includes the following language:

> **91** A reviewing court must bear in mind that the written reasons given by an administrative body must not be assessed against a standard of perfection. That the reasons given for a decision do "not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would

have preferred" is not on its own a basis to set the decision aside: Newfoundland Nurses, at para. 16. The review of an administrative decision can be divorced neither from the institutional context in which the decision was made nor from the history of the proceedings.

…

94 The reviewing court must also read the decision maker's reasons in light of the history and context of the proceedings in which they were rendered. For example, the reviewing court might consider the evidence before the decision maker, the submissions of the parties, publicly available policies or guidelines that informed the decision maker's work, and past decisions of the relevant administrative body. This may explain an aspect of the decision maker's reasoning process that is not apparent from the reasons themselves, or may reveal that an apparent shortcoming in the reasons is not, in fact, a failure of justification, intelligibility or transparency. Opposing parties may have made concessions that had obviated the need for the decision maker to adjudicate on a particular issue; the decision maker may have followed a well-established line of administrative case law that no party had challenged during the proceedings; or an individual decision maker may have adopted an interpretation set out in a public interpretive policy of the administrative body of which he or she is a member.

…

102 To be reasonable, a decision must be based on reasoning that is both rational and logical. It follows that a failure in this respect may lead a reviewing court to conclude that a decision must be set aside. Reasonableness review is not a "line-by-line treasure hunt for error": *Irving Pulp & Paper*, at para. 54, citing *Newfoundland Nurses*, at para. 14. However, the reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived": *Ryan*, at para. 55; *Southam*, at para. 56. Reasons that "simply repeat statutory language, summarize arguments made, and then state a peremptory conclusion" will rarely assist a reviewing court in understanding the rationale underlying a decision and "are no substitute for statements of fact, analysis, inference and judgment": R. A. Macdonald and D. Lametti, "Reasons for Decision in Administrative Law" (1990), 3 C.J.A.L.P. 123, at p. 139; see also *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 750, 27 Imm. L.R. (4th) 151, at paras. 57-59.

[*Emphasis added*]

[41] Other important and recent judicial decisions include *Davis v. British Columbia (Securities Commission)*, 2018 BCCA 149, *Walton v. Alberta (Securities Commission)*, 2014 ABCA 273 and *Cartaway Resources Corp. (Re)*, 2004 SCC 26.

[42] In *Davis*, the respondent committed fraud by purporting to sell shares he did not own. The Commission ordered a permanent market ban, stating that it was "appropriate in fraud cases regardless of the circumstances of the offence or the offender". The British Columbia Court of Appeal allowed the appeal and remitted the matter back to the Commission, finding that the Commission must demonstrate a consideration of individual circumstances and feasibility of alternatives before imposing the strictest of sanctions.

[43] In *Walton*, the Alberta Securities Commission ordered trading bans and significant financial penalties after finding the respondents had engaged in insider trading. The liability and sanctions decisions were both overturned on appeal. Regarding the sanctions decision, the Alberta Court of appeal held that penalties must be proportionate and reasonable to a respondent's conduct and individual circumstances. Standing alone, the need for general deterrence is not a principle that can justify imposing unfit sanctions.

[44] In *Cartaway*, the Supreme Court of Canada gave the following guidance regarding the weight to be given general deterrence:

> [64] The weight given to general deterrence will vary from case to case and is a matter within the discretion of the Commission. Protecting the public interest will require a different remedial emphasis according to the circumstances. Courts should review the order globally to determine whether it is reasonable. No one factor should be considered in isolation because to do so would skew the textured and nuanced evaluation conducted by the Commission in crafting an order in the public interest. Nevertheless, unreasonable weight given to a particular factor, including general deterrence, will render the order itself unreasonable. Iacobucci J. in *Pezim*, supra, at p. 607, suggested that an example of such unreasonableness would be the exercise of the Commission's discretion in a manner that was capricious or vexatious.

[45] Some of the relevant provisions from IIROC's Sanctions Guidelines are the following:

> The primary purpose of IIROC disciplinary proceedings is to maintain high standards of conduct in the securities industry and to protect market integrity.
> …
>
> The determination of the appropriate sanction in any given case is a discretionary fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. Hearing panels retain the discretion to impose the sanctions they consider appropriate.
>
> The general principles and key factors set out in the Sanction Guidelines are not intended to fetter the discretion of a hearing panel in determine an appropriate sanction.
> …

> The purpose of sanctions in a regulatory proceeding is to protect the public interest by restraining future conduct that may harm the capital markets. In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence).
> …
>
> General deterrence can be achieved if a sanction strikes an appropriate balance by addressing a Regulated Person's specific misconduct but is also in line with industry expectations. Any sanction imposed must be proportionate to the conduct at issue and should be similar to sanctions imposed on respondents for similar contraventions in similar circumstances. The sanction should be reduced or increased depending on the relevant mitigating and aggravating factors.
> …
>
> **A suspension should be considered where:**
> - There has been one or more serious contraventions;
> - There has been a pattern of misconduct;
> - The respondent has a prior disciplinary history;
> - The contraventions involved fraudulent, willful and/or reckless misconduct; or
> - The misconduct in question has caused some measure of harm to investors, the integrity of a marketplace or the securities industry as a whole.

[46] Some of the Commission's decisions that are most helpful are *Re Johnston*, 2021 BCSECCOM 79 and *Re Tassone*, 2018 BCSECCOM 212.

[47] *Re Tassone* also involved an application by IIROC staff to review decisions of an IIROC panel. In *Tassone*, review was sought of both the liability and sanctions decisions.

[48] The primary arguments made by IIROC staff to vary the sanctions decision in *Tassone* were that the IIROC panel had placed insufficient emphasis on general deterrence and had failed to follow similar sanctions precedents. In response to the general deterrence argument, the Commission panel found:

> [83] We are not aware of a legal principle that requires a specific balance or weighting of the principles of specific and general deterrence (let alone the myriad of other factors that must be taken into account). A failure to explicitly consider a specific factor in reaching a decision or a decision based solely on one sanctioning factor may provide the basis for an argument that an error of law has been made. However, the particular weight attached to a particular factor in sanctioning is difficult to conceive as an error in law (that is not to say that it might not be unreasonable on some other grounds). Given that the panel in this case expressly considered the issue of general deterrence, we do not consider that the IIROC hearing panel made an error in law in its consideration of the principle of general deterrence.

[49] In response to the argument related to the application of precedents, the Commission panel found:

> [86] First, IIROC's submission that the above represents an error of law stands on shaky ground on the basis that the previous regulatory decisions provided for the panel to consider do not have precedential effect in the same manner as certain common law jurisprudence does. That does not denigrate from the laudable goals of consistency, fairness and transparency that sanctions outcomes that are logically consistent with previous sanctions decisions help promote. However, the argument that the panel committed an error of law by not following previous decisions is difficult to accept in this context.
>
> [87] Secondly, a review of the IIROC panel's reasons does not support an interpretation that it simply disregarded the previous decisions provided for its consideration. The reasons suggest that the panel:
>
> > a) understood that these cases set out a range (or bookends) within which suspensions for this type of misconduct have fallen;
> >
> > b) understood that there were a variety of factors that appear to influence the length of suspensions within this range; and
> >
> > c) considered that determining the appropriate length of the suspension for Tassone, within the totality of sanctions to be imposed upon him, such that the package of sanctions was appropriate in the circumstances, was more important that engaging in an exercise of very precisely trying to place his misconduct relative to all of the other respondents in all of the other cases.
>
> …
>
> [92] Where Commission panels are asked to overturn a decision in a hearing and review on the basis that it should take a different view of the public interest, they should be cautious about doing implicitly what Policy 15-601 and the Nichols decision say expressly that they should not do – substitute their own view for that of the decision-maker in first instance. That is particularly true in the case of a requested review of a penalty decision which, by necessity, involves the balancing of various factors and for which there should be considerable deference.

[50] In *Johnston*, it was noted that the Commission always retains the jurisdiction to apply a correctness standard on a hearing and review application such as this one, but absent a reason to do otherwise a panel will generally apply the approach set out in BC Policy 15-601.

B. Application of the law

[51] We address the parties' submissions and our analysis under the following subheadings.

(i) Was there an error of law or incorrect principle, failure to apply IIROC Sanction Guidelines or address general deterrence?

[52] We agree that the IIROC Sanction Guidelines place considerable emphasis on the need for public protection and that the IIROC Sanction Guidelines require that consideration and weight be given to the objective of general deterrence. We also agree, as both parties conceded, that the Sanction Guidelines are intended to be applied in a flexible manner. As the IIROC Panel found at paragraph 44 of the Decision, the IIROC Sanction Guidelines provide the analytical framework for decisions such as whether a permanent prohibition is necessary to deter Mann and others from engaging in similar misconduct. However, the analysis must be a careful and objective balancing of all relevant factors. We agree with the IIROC Panel's description of the sanctions deliberation process as an exercise in calibrated risk management.

[53] IIROC Staff submits that the IIROC Panel placed little or no weight on the importance of general deterrence. In this regard IIROC Staff notes that the IIROC Panel included little discussion of general deterrence in the Decision. IIROC Staff note that the IIROC Panel did not explicitly consider imposing a suspension even though the circumstances were present which would have justified it and even though a suspension would have been the appropriate sanction to support the objective of general deterrence.

[54] Our own review of the Decision and the context indicates that the IIROC Panel did consider and give weight to the issue of general deterrence.

[55] The IIROC Panel noted in the Decision that the core disagreement between the parties was whether a permanent prohibition was necessary to deter Mann and others from engaging in similar misconduct in the future – in other words, was a permanent ban necessary to achieve both specific and general deterrence. The need to deter Mann "and others" is explicitly mentioned in the Decision, particularly at paragraphs 26, 43 and 44. The IIROC Panel's "duty to determine a penalty that properly addresses general deterrence in a manner proportionate and appropriate to the particular circumstances of the case" is explicitly stated in paragraph 13 of the Decision. From this we know that the IIROC Panel was alive to the consideration.

[56] We know from paragraph 59 of the Decision that the IIROC Panel specifically considered general deterrence in fashioning Mann's sanctions. In concluding that the period of strict supervision imposed on Mann was sufficient in terms of general deterrence, and that the $250,000 fine imposed on Mann is sufficient to deter him and others, the IIROC Panel is in effect saying that neither a permanent ban nor a suspension is necessary to achieve general or specific deterrence in this case.

[57] We also know that the IIROC Panel specifically considered the imposition of a suspension, from the explicit references to it in the IIROC Panel's statement to the parties at the end of the sanctions hearing (see paragraph xx above), and in paragraph 58(a) of the Decision.

[58] In addition to these explicit references by the IIROC Panel to general deterrence, when we look at the broader context to evaluate what the IIROC Panel considered, there are other indications that the IIROC Panel considered general deterrence which are not directly recorded in the Decision but which are relevant.

[59] First, the IIROC Panel began the sanctions hearing by declining to admit expert evidence on what impact the severity of sanctions has on general deterrence. The IIROC Panel concluded that it had the appropriate expertise to evaluate that factor and would not be assisted by an expert. The clear implication of this is that the IIROC Panel was alive to the need to consider general deterrence and intended to evaluate that as a factor.

[60] Second, IIROC Staff sought a permanent ban against Mann and did not seek a temporary suspension, although IIROC Staff did mention that the factors which supported consideration of a temporary suspension as described in the IIROC Sanction Guidelines had been made out. The nature of the relief sought and the focus by IIROC Staff on a permanent ban might well have influenced the IIROC Panel to focus the Decision on the argument explicitly before it and so it is not surprising that the extent of discussion of a suspension is less than what might be expected if that relief had been explicitly requested from the IIROC Panel.

[61] Finally, before writing the Decision the IIROC Panel informed the parties, as quoted in more detail above in paragraph 25, that they would not be ordering "a permanent prohibition or a suspension of any kind against Mr. Mann".

[62] Aside from the IIROC Panel's explicit references to general deterrence and the contextual factors we mention above, there are other elements of the Decision which indicate that the IIROC Panel came to its conclusion in an appropriate manner and has justified its thinking to an appropriate degree.

[63] In its analysis, the IIROC Panel discussed the harm caused by Mann's misconduct, the seriousness of that misconduct, and the risks he might pose in the future, as well as the evidence that: Mann is a good person, highly regarded by his team and clients, his intentions to benefit his clients, he is unlikely to reoffend, and has already faced significant consequences in regard to his damaged career and reputation. In addition, Mann testified before the IIROC Panel that a 3-month suspension would lead to a loss of 50% of his client base and a 6-month suspension would lead to a loss of all his clients. What these elements of the Decision demonstrate is that even though the IIROC Panel fully understood the seriousness of Mann's conduct and the IIROC Sanctions Guidelines the IIROC Panel found that there were other factors which justified the exclusion of a suspension. We see this balancing by the IIROC Panel of a recognition of the seriousness of the conduct with a reference to other factors most particularly in paragraphs 48 and 56 of the Decision which read as follows:

48. The misconduct was deliberate. But integral to the Respondent's deliberations was that the improper transactions be orchestrated in a manner that insulated his clients from their economic consequences, which he clearly intended were to be borne either by himself or Client 1. The very point of his misconduct was to enhance, not harm, the performance of client accounts.

56. On balance, however, the Panel cannot conclude from the evidence as a whole that the Respondent presents such a danger that the public interest requires the termination of his career.

(a) The harm his misconduct imposed on the reputation of the securities industry was real and relied on a pattern of deception that was contrary to its ethical standards. Nonetheless, it must also be acknowledged that the misconduct involved relatively few client accounts, represented barely a sliver of the assets under his management, and caused limited measurable harm to clients.

(b) It must also be recognized that the Respondent's talent at business development was not the only reason that he was able to build such a large client base. It is in the nature of investment advising that the size of a book of business is, necessarily, also a reflection of the value an investment advisor is able to deliver to clients. Although the Respondent's misconduct was indisputably wrong, it must be assessed against the legitimate service he appears to have been able to provide to the satisfaction of a large number of clients over many years.

(c) Since he resumed licensed activities in December 2018, there has been no suggestion that he has engaged in any kind of impropriety.

[64] Taken together, the words used in the Decision and the context surrounding the Decision support our conclusion that the IIROC Panel considered general (and specific) deterrence in the larger balance which it struck in setting the sanctions imposed.

[65] How much weight was given by the IIROC Panel to general deterrence is not clear, but on this point we adopt the analysis from the *Tassone* decision quoted above. We would not characterize uncertainty about the weight explicitly given by the IIROC Panel to one factor as an error of law.

[66] In our view, the IIROC Panel properly described and followed the legal framework and principles that should govern its deliberations. It recognized that its duty was "to determine a penalty that properly addresses general deterrence in a manner proportionate and appropriate to the particular circumstances of the case" at paragraph 13 of the Decision. We agree with Mann's submissions that the Decision on its face was thoughtful, measured and included a careful consideration of a set of sanctions that would advance general and specific deterrence and that is proportionate to the circumstances in the context of the evidence led.

[67] We turn to some of the specific submissions made to us by IIROC Staff.

[68] Regarding the submission that the IIROC Panel gave insufficient weight to the precedents regarding sanctions, our review of the precedents indicates that they have potential relevance but not because they are a close factual match to the conduct of Mann. The potential relevance of the precedents is to demonstrate that activities involving a pattern of misconduct over time with steps taken to conceal the misconduct is serious and should be treated as serious misconduct for the purpose of considering sanctions. To take this point a step further, based on the precedents presented to the IIROC panel the IIROC Panel should have concluded that Mann's conduct was serious and should be treated as such in the crafting of appropriate sanctions. We find that the IIROC Panel did reach the conclusion that the conduct in question was serious and the IIROC Panel did take the degree of seriousness into account. We see this, for example, at paragraphs 42 and 45 of the Decision which read as follows:

> 42. There was nothing inadvertent or incidental about the Respondent's misconduct. Abusing [Employer 1's] error correction policies over an extended period of years required planning, deliberation, and repeatedly misrepresenting the true purpose of trades from his firm. Central to the misconduct was the discretionary authority vested in the Respondent as a portfolio manager. It was this that made it possible for him to arbitrarily move positions in and out of selected accounts without prior client notice or approval. The Respondent's misconduct starkly contradicted the transparency and trust that are the twin pillars of the securities industry. Behaviours that threaten the cardinal objectives of regulation demand a deterrent response that is commensurate with the danger they represent.
>
> 45. Serious misconduct is evidence that a person is capable of making harmful choices. The purpose of specific deterrence is to protect the investing public and the securities industry by neutralizing a respondent's proven potential for dangerously faulty judgment. Tailoring sanctions that are both adequate and proportionate to this task requires a hearing panel to assess the objective danger a respondent actually represents. Determining the motive behind misconduct, insofar the evidence permits, is an important element of this exercise.

[69] All of the above factors are the types of factors which, consistent with paragraph 94 of *Vavilov* as quoted above, are indicative that the IIROC Panel followed an appropriate reasoning process in reaching its conclusions even though some aspects of its reasoning were not as fully and explicitly discussed in the Decision as might have otherwise been appropriate.

[70] The IIROC Panel also considered the evidence of Mann's intentions and evaluated the scale of harm to clients and the degree of intent to cause loss to clients. In light of those factors and the other circumstances specific to Mann, it is not unreasonable for the IIROC Panel to conclude that a suspension is not necessary or proportionate in the specific circumstances of this case notwithstanding the precedents cited by IIROC.

[71] To sum up, although the IIROC Panel could have been more clear in explaining some of its conclusions, the discussion contained in the Decision demonstrates that the IIROC Panel has brought a thoughtful and nuanced analysis to a complex situation.

[72] Regarding the submission that the IIROC Panel erred in placing undue emphasis on the size of Mann's book of business, again we are not persuaded. We have above quoted subparagraph 56(b) of the Decision in which the IIROC Panel referenced the size of Mann's book of business. Read fairly, the Decision references the size of Mann's book and the number of transactions processed in any period of time primarily for the purpose of putting the scale of Mann's misconduct in context alongside Mann's significant lawful conduct in the industry. We do not read the passages in question as a suggestion that Mann's success was a significant factor in justifying a lower sanction. We reach that later conclusion in part based upon a reading of the Decision as a whole, which at various locations discusses factors such as Mann's cooperation, his contrition and the time away from the industry that Mann had already experienced. It follows that the entire range of factors were considered by the IIROC Panel, without exclusive reliance on subparagraph 56(b) of the Decision. There is a reasonable interpretation of the Decision other than the one submitted by IIROC Staff, which we describe above. We conclude that the reasonable interpretation is the appropriate reading to give to the Decision.

[73] In summary, on this issue we do not see a basis to conclude that the Decision is based upon an error of law or proceeded on an incorrect principle.

(ii) Was there a failure to consider material evidence that Mann was not forthright with IIROC Staff?

[74] In the Decision at paragraph 40(c), the IIROC Panel noted that "[i]n these proceedings, [Mann] had admitted his misconduct from the outset". The IIROC Panel did not comment on the extent of Mann's cooperation after his misconduct was uncovered against Mann's less than forthcoming disclosure of his misconduct when Mann was seeking to be registered at his new firm before IIROC commenced disciplinary proceedings against him.

[75] Mann's explanation to the IIROC Panel for his earlier lack of candor was primarily that he was influenced by his new firm who was assisting him in developing his responses to IIROC and that he felt the information provided was correct given the information he had at the time (at the time he did not have the detail at hand which was summarized and available at a later stage). Mann was cross examined on this testimony during the IIROC hearing and the credibility of Mann's answers was the subject of submissions. The IIROC Panel chose not to provide its analysis of how important it considered these issues. The IIROC Panel instead emphasized Mann's subsequent admissions.

[76] We agree with Mann's submission that it is not necessary for a hearing panel to explicitly address every piece of evidence or argument presented. There is no indication from the Decision that the IIROC Panel doubted Mann's explanation on why his early responses were understated. The Decision is lengthy and it reflects a balancing of what the IIROC

Panel considered to be the main issues after hearing a considerable body of evidence and detailed submissions. Even if the evidence of this conduct was overlooked as IIROC Staff submit, we do not view the omission to be material in the context of the other significant misconduct which the IIROC Panel expressly evaluated.

[77] We find that IIROC Staff have not met the onus to establish that the IIROC Panel overlooked material evidence.

(iii) Does the IIROC Panel's view of public interest diverge from what should be identified as the public interest?

[78] IIROC Staff submit that Decision's lack of consideration of a suspension, lack of imposition of a suspension and emphasis on the large book of business which Mann had demonstrates that the IIROC Panel had a different view of the public interest than is proper. IIROC Staff suggest that the public interest requires a suspension in order to support the goals of general deterrence and protection of the public.

[79] We do not agree. We see this argument as a reframing of the arguments that the IIROC Panel erred in law or applied an incorrect principle, and we have already addressed each of those arguments. Although there may be cases where a decision of a self-regulatory body contains no error of law or incorrect principles but is based on a view of the public interest which is inconsistent with our own, this is not such a case.

[80] We find that the Decision is reasonable and made in accordance with the law, the evidence and the public interest. We confirm the Decision and dismiss the application.

VI. Order

[81] The application is dismissed.

November 3, 2021

For the Commission

Gordon Johnson
Vice Chair

Judith Downes
Commissioner

Audrey T. Ho
Commissioner