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Securities
Commission

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**IN THE MATTER OF
A REQUEST FOR A HEARING AND REVIEW OF THE DECISION
OF A HEARING PANEL OF THE INVESTMENT INDUSTRY
REGULATORY ORGANIZATION OF CANADA**

- and -

IN THE MATTER OF KRISHNA SAMMY

**REASONS AND DECISION
(Subsection 8(3) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: May 3, 2017

Decision: May 29, 2017

Panel:

Timothy Moseley	Commissioner and Chair of the Panel
Monica Kowal	Vice-Chair of the Commission
Robert Hutchison	Commissioner

Appearances:

David Mitchell	For Krishna Sammy
Robert DelFrate Elissa Sinha	For Staff of the Investment Industry Regulatory Organization of Canada
Christina Galbraith	For Staff of the Commission

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	STATUTORY FRAMEWORK.....	1
III.	THE IIROC DECISION.....	1
IV.	ISSUES.....	2
V.	ANALYSIS.....	3
A.	Alleged missing documents.....	3
1.	What evidence is there as to the existence of the documents described by Mr. Sammy?.....	3
2.	Did the IIROC panel err in making findings despite the evidence that the documents existed, and in the absence of the documents?	3
B.	Risk ratings of various securities	4
1.	What evidence was before the IIROC panel about the risk associated with the securities at issue?	4
(a)	Introduction	4
(b)	Securities that Mr. Sammy admitted were high-risk.....	5
(c)	Securities that DWM categorized as high-risk	5
(d)	Securities that were described as high-risk in the issuer’s public disclosure documents.....	6
2.	Does an IIROC panel require expert assistance in order to make a finding about the risk associated with a security?	6
3.	To the extent that the IIROC panel in this matter relied on Mr. Chen’s evidence, was that evidence an opinion of the kind that can be relied on only if from a qualified expert?	6
4.	Is there evidence to suggest that the IIROC panel’s conclusions about risk concentration in client accounts were incorrect?	7
VI.	STANDARD OF REVIEW	8
VII.	CONCLUSION.....	9

REASONS AND DECISION

I. INTRODUCTION

- [1] In 2016, a hearing panel of the Investment Industry Regulatory Organization of Canada (“**IIROC**”) made findings against Mr. Sammy, who had been an IIROC registrant until late 2012. The IIROC panel found that between 2009 and 2011, Mr. Sammy had, among other things, recommended the purchase of securities to several clients without using due diligence to ensure that the recommendations were in accordance with the clients’ risk tolerance and within the bounds of good business practice. The panel fined Mr. Sammy \$250,000, barred him from approval with IIROC for five years, and required him to pay costs of \$75,000.
- [2] Mr. Sammy asks the Commission to review the IIROC decision (the “**IIROC Decision**”).¹ In his amended Notice of Application, Mr. Sammy alleged approximately ten errors in the IIROC proceeding. In the hearing before us, Mr. Sammy pursued only two. He submits that the IIROC panel erred:
- a. by making its findings in the absence of records that Mr. Sammy says would have been in the possession of DWM Securities Inc. (“**DWM**”), the firm with which he was registered as a representative at the relevant time; and
 - b. in coming to its conclusions about the risk associated with various securities, by relying on the opinion evidence of an IIROC investigator who was not properly qualified to give expert evidence.
- [3] At the end of the hearing, we dismissed this application with reasons to follow. These are our reasons. As we explain below, we find that there is no basis for either of Mr. Sammy’s submissions. As a result, we have no reason to interfere with the IIROC Decision, and we confirm that decision.

II. STATUTORY FRAMEWORK

- [4] Mr. Sammy brings this application under subsection 21.7(1) of the *Securities Act* (“**Act**”), which entitles him, as someone directly affected by the IIROC Decision, to apply for this hearing and review.²
- [5] Subsections 8(3) and 21.7(2) of the Act provide that on a hearing and review such as this, the Commission may confirm the decision under review or may make such other decision as the Commission considers proper.

III. THE IIROC DECISION

- [6] In the IIROC Decision, the IIROC panel found that Mr. Sammy had engaged in conduct unbecoming an employee of a member firm, in that he had failed to disclose a conflict of interest in which he had put himself. Mr. Sammy does not challenge that finding.

¹ *Re Sammy*, 2016 IIROC 04 (“**IIROC Decision**”).

² RSO 1990, c S.5.

[7] The IIROC panel found a second type of misconduct, and it is this finding that Mr. Sammy challenges before us. The panel concluded that:

...on many occasions, eight client accounts held significantly more risk than those clients stated, in their NAAFs [New Account Application Forms], that they were prepared to authorize. There can, therefore, be no doubt that the Respondent frequently failed to use due diligence to ensure that investments which he made for clients were in accordance with their risk tolerance.³

IV. ISSUES

[8] Mr. Sammy challenges the IIROC panel's finding on two bases.

[9] First, Mr. Sammy claims that there are "missing documents" relevant to the IIROC proceeding, which would have been in the possession of DWM, his former firm, but which were not produced to him by IIROC staff, or to the panel at the IIROC hearing. Mr. Sammy submits that these documents would have contradicted IIROC staff's submissions and would have contributed to his defence of the allegations against him. We must therefore determine the following issues:

- a. What evidence is there about the existence of the documents described by Mr. Sammy?
- b. If there was some evidence that the documents had existed, did the IIROC panel err in making findings despite that evidence, and in the absence of the documents described by Mr. Sammy?

[10] Second, Mr. Sammy says that the IIROC panel reached conclusions about the risk associated with various securities he recommended to his clients, and that these conclusions were improperly based on opinion evidence of Mr. Chen, an IIROC investigator who was not qualified as an expert witness. To resolve this objection, we must consider the following issues:

- a. What evidence was before the IIROC panel with respect to the risk associated with the securities at issue?
- b. Does an IIROC panel require expert assistance in order to make a finding about the risk associated with a security?
- c. To the extent that the IIROC panel in this matter relied on Mr. Chen's evidence, was that evidence an opinion of the kind that can be relied on only if from a qualified expert?
- d. Is there evidence to suggest that IIROC's conclusions were incorrect?

[11] We address each of these issues in turn.

³ IIROC Decision at para 54.

V. ANALYSIS

[12] We begin our analysis with Mr. Sammy's contention that there were missing documents not produced at the IIROC hearing.

A. Alleged missing documents

1. What evidence is there as to the existence of the documents described by Mr. Sammy?

[13] Mr. Sammy notes that many of the documents submitted by IIROC staff to the IIROC hearing panel originated from DWM,⁴ and must have been obtained by IIROC staff during their investigation. These documents included New Account Application Forms ("NAAFs") and account statements. However, Mr. Sammy points out, as he did during the investigation, that there would have been additional documents at DWM relating to interactions between him and his clients. In particular, Mr. Sammy refers to notes kept by him or his staff and stored in the firm's "Maximizer" system, as well as appointment summary sheets.

[14] In written and oral submissions, Mr. Sammy attempted to raise concerns about the fact that not all documents were produced to the IIROC panel. In doing so, Mr. Sammy made no allegation of misconduct on the part of IIROC staff, and we saw no evidence to suggest that there had been any misconduct. Mr. Sammy notes that "we" do not know specifically who at IIROC requested documents from DWM, and further that "we do not know what the requests were."

[15] There is no evidence to contradict Mr. Sammy's assertion that at some point, there were other records in DWM's possession. However, there is no evidence, and there was none before the IIROC panel, about what happened to any such records following Mr. Sammy's departure from that firm in December 2011. At the hearing before us, Mr. Sammy's counsel advised that Mr. Sammy has never asked DWM whether the documents still exist. We were given no reason why Mr. Sammy has not.

[16] Mr. Sammy's counsel also confirmed that there was no evidence as to whether the notes referred to by Mr. Sammy still existed at the time that IIROC made its request(s) of DWM for documents.

2. Did the IIROC panel err in making findings despite the evidence that the documents existed, and in the absence of the documents?

[17] Given Mr. Sammy's uncontradicted evidence that there were other documents at DWM when Mr. Sammy was with the firm, we must consider whether the IIROC panel erred in reaching the conclusions it did, in the absence of those documents.

[18] We begin by noting that neither Mr. Sammy nor his representative objected to the IIROC hearing continuing in the absence of the documents. The panel was not asked to consider the parties' positions about the issue now being raised, nor

⁴ DWM was formerly known as Dundee Securities Corporation, and is often referred to in the record as "Dundee".

to hear any evidence about who made what efforts to retrieve the missing documents.

- [19] Mr. Sammy submits that since he referred to the documents when he testified during the investigation, "IIROC Staff were on notice to deal with the issue." However, other than to say the IIROC panel erred under the circumstances, Mr. Sammy does not specify what he thinks ought to have happened differently in the IIROC proceeding.
- [20] At the hearing before us, Mr. Sammy's counsel asserted that IIROC was in a position to demand the documents from DWM, but that Mr. Sammy was not. We reject that submission. Mr. Sammy could have made a request of DWM (which he did not), and if his request was ignored or he received an unsatisfactory answer, he could then have sought the assistance of IIROC staff to obtain documents from one of IIROC's member firms. Further, prior to the hearing before us Mr. Sammy could have asked the Commission to issue a summons directed to DWM. He made no such request.
- [21] Mr. Sammy cannot now rely on his failure to try to obtain the documents, in support of a contention that the documents were available and that they should have been considered at the IIROC hearing.
- [22] Because of that, and in the absence of any allegation or evidence of impropriety in IIROC's investigation or documentary disclosure, we see no basis to find an error by the IIROC panel with respect to this issue.

B. Risk ratings of various securities

- [23] We turn now to Mr. Sammy's second ground; namely, that the IIROC panel improperly relied on unqualified expert evidence to reach its conclusions about the risk associated with the relevant securities. We begin by reviewing the evidence that was before the panel regarding those securities.

1. What evidence was before the IIROC panel about the risk associated with the securities at issue?

(a) Introduction

- [24] Mr. Sammy submits that "the evidence that there were too many high risk investments in Mr. Sammy's clients' accounts... came from Mr. Chen [the IIROC investigator]." This is only partially true. After a brief discussion of risk tolerance generally, the IIROC panel began its analysis of the specific securities at issue in this case with the following:

We have considered both the oral testimony of the Respondent's former clients and the substantial documentary evidence which is in the record. The documentary evidence includes records of the Respondent which were retrieved from the Member.⁵

- [25] The documentary evidence, which exceeded 3000 pages, included Mr. Sammy's testimony both during the investigation and at the IIROC hearing.

⁵ IIROC Decision at para 38.

[26] The panel then referred to the evidence given by Mr. Chen:

We have also weighed the testimony of Yu Chen. Mr. Chen analysed client account statements and determined the conformity of client holdings to the risk tolerances in their NAAFs. We accept his opinion as to the risk categories into which the various holdings fell. We also accept the methodology by which he formed his opinion about the risk concentrations at different times in the client accounts.⁶

[27] Mr. Chen testified that DWM's procedure was to assign a risk rating of low, medium or high to every security that the firm dealt with. Mr. Chen stated that in determining the risk associated with the securities at issue in this case, he first checked to see if he could determine from the available records the rating assigned by DWM. In many cases he was able to do so. When he was unable to determine DWM's rating, he did his own research. That research included consulting the issuer's own public disclosure documents, including prospectuses.

[28] Each security that was held in an account of a client of Mr. Sammy's during the relevant time, and that was described in the record before the IIROC panel as being high-risk, fell into one or more of three categories:

- a. Mr. Sammy explicitly admitted that the security was high-risk;
- b. DWM categorized the security as high-risk; and/or
- c. the security was described as high-risk in the issuer's public disclosure documents.

[29] We review each of these categories in turn.

(b) Securities that Mr. Sammy admitted were high-risk

[30] Five issuers accounted for a substantial portion of the holdings of Mr. Sammy's clients: Biosign Technologies Inc., Intertainment Media Inc., Mahdia Gold Corp., Northcore Technologies Inc., and Petroworth Resources Inc.

[31] On July 18, 2013, while testifying under oath during IIROC's investigation, Mr. Sammy was asked about each security individually, and explicitly stated that he regarded each of these five securities as being high-risk.

(c) Securities that DWM categorized as high-risk

[32] DWM categorized as high-risk each of the five securities referred to above, as well as at least fourteen other securities that were held by Mr. Sammy's clients.

[33] During his July 2013 testimony, the IIROC investigator asked Mr. Sammy whether he agreed with the risk level assigned by DWM, with respect at least to certain securities at certain points during the material time. Mr. Sammy confirmed in each instance that he did.

[34] At no time in the course of that testimony before the investigator, during the extensive discussion of DWM's risk rating methodology and the ratings assigned to specific securities, did Mr. Sammy suggest any flaw in DWM's methodology. Similarly, at no time did he suggest any disagreement with a rating that DWM

⁶ IIROC Decision at para 39.

has assigned to a security. In any event, at the hearing before us, Mr. Sammy's counsel confirmed that Mr. Sammy accepted DWM's high risk ratings in all cases.

(d) Securities that were described as high-risk in the issuer's public disclosure documents

[35] For several other securities, there was no evidence cited as to DWM's rating or Mr. Sammy's view of the security's risk. As Mr. Chen testified, each of the securities in this category was described by its own prospectus as high-risk and/or highly speculative.

2. Does an IIROC panel require expert assistance in order to make a finding about the risk associated with a security?

[36] As a specialist tribunal, an IIROC hearing panel will have less need for expert evidence on matters within its own expertise than would a court of general jurisdiction.⁷

[37] An IIROC hearing panel is well placed to determine whether there is an issue before it about which it would need expert evidence. The determination of risk associated with particular securities, in the context of assessing compliance with IIROC rules regarding suitability, falls squarely within the expertise of IIROC hearing panels. Mr. Sammy did not articulate a basis on which we could find that the IIROC panel in this case was not qualified to reach its own conclusion on the risk of the securities at issue.

3. To the extent that the IIROC panel in this matter relied on Mr. Chen's evidence, was that evidence an opinion of the kind that can be relied on only if from a qualified expert?

[38] Mr. Chen was not qualified as an expert witness at the IIROC hearing. Mr. Sammy submits that the IIROC panel therefore erred by relying on Mr. Chen's opinion as to the risk associated with various securities.

[39] In the paragraph of the IIROC Decision quoted at paragraph [26] above, the IIROC panel twice refers to Mr. Chen's "opinion": first, with respect to "the risk categories into which the various holdings fell"; and second, "about the risk concentrations at different times in the client accounts."

[40] Despite the IIROC panel's use of the word "opinion", we do not accept the submission that Mr. Chen's evidence constituted opinion evidence of the kind that can be received only from a qualified expert. We consider the use of the word "opinion" in this context to have been imprecise and somewhat unfortunate, in that it leads to the confusion that gives rise to Mr. Sammy's submission. However, in our view the use of the word is not determinative. We must look to the nature of the evidence itself.

[41] As reviewed above, Mr. Sammy himself agreed that virtually all the securities at issue (those in the first two categories) were high-risk. To the extent that Mr. Chen described those securities as high-risk, he was merely confirming what Mr. Sammy had explicitly admitted. As Mr. Sammy's counsel fairly conceded at

⁷ *Re Northern Securities Inc.* (2013), 37 OSCB 161 at para 245; *Northern Securities Inc. v OSC*, 2015 ONSC 3641 at paras 32-33; *Re Lowe*, 2012 BCSECCOM 258 at para 57.

the hearing before us, Mr. Sammy therefore presents no real controversy about those securities.

[42] For the remaining few securities, the issuers' own documents described the securities as high-risk or highly speculative. The IIROC panel's basis for adopting that conclusion was factual. Mr. Chen merely reported these facts to the IIROC panel, based on his investigation, and the panel accepted his evidence. It is significant that Mr. Chen did not offer, and the panel did not seek, his judgment-based analysis of the risk of a security. The methodology he used to discover the facts does not lead to the conclusion that he was expressing an opinion of the kind that could only come from an expert witness.

[43] Further, even though Mr. Sammy challenges the method by which the IIROC panel reached its conclusions, he offers no different rating for any security, no contrary evidence that might undermine the panel's conclusions, and no alternative method by which the risk should be assessed. The conclusion that each security is high-risk is amply justified and is uncontradicted.

4. Is there evidence to suggest that the IIROC panel's conclusions about risk concentration in client accounts were incorrect?

[44] Having determined that the securities referred to above were correctly described as being high-risk, we turn to considering the IIROC panel's conclusion that Mr. Sammy "was offside risk tolerance on many occasions".

[45] We begin by noting that in some cases, the risk tolerance recorded on a client's NAAF explicitly allowed for a variance of +/- 20% for each category (high, medium or low), which variance appeared to have been authorized by the client. Mr. Sammy's position that this allowance applied to each of his clients could not be substantiated in all cases by documentary evidence, but was uncontradicted.

[46] The IIROC panel reviewed charts prepared by IIROC staff showing in each account the concentration of the five securities referred to in paragraph [30] above, as well as the concentration of other high-risk securities. We reviewed the same charts.

[47] Even if only the five commonly-found securities are considered, and even assuming an allowable 20% variance in the case of every client, the concentration of high-risk securities regularly exceeded stated tolerances. This occurred in at least the following instances:

- a. in client N.A.'s margin account, for 12 out of 24 month-ends during 2010 and 2011;
- b. in client N.A.'s Registered Savings Plan ("**RSP**") account, for 18 out of 24 month-ends;
- c. in client W.B.'s RSP account, for 8 out of 16 month-ends (there were no data available for some of the month-ends);
- d. in client C.M.'s Locked-In Retirement Account ("**LIRA**"), for 13 out of 24 month-ends; and
- e. in client J.P.'s margin account, for 12 out of 24 month-ends.

- [48] The problems become more numerous and more severe once the other high-risk securities are taken into account. For example (there are other instances) the stated tolerance is exceeded:
- a. in client N.A.'s margin account, for 14 out of 24 month-ends;
 - b. in client N.A.'s RSP account, for 19 out of 24 month-ends;
 - c. in client W.B.'s RSP account, for 14 out of 16 month-ends; and
 - d. in client C.M.'s LIRA, for 22 out of 24 month-ends.
- [49] In many instances, the concentration of high-risk securities greatly exceeded the declared risk tolerance. For example:
- a. in client N.A.'s RSP account, a tolerance of 40% high-risk was declared, but for 10 out of 24 month-ends, the concentration of high-risk securities exceeded 80%; and
 - b. client W.B.'s RSO account had a stated tolerance for high-risk securities of 40%, but for 6 out of 16 month-ends the actual concentration of high-risk securities exceeded 90%.
- [50] Finally, we note that the characterization of Mr. Chen's testimony as impermissible opinion evidence was Mr. Sammy's only challenge to the IIROC panel's conclusions about the risk makeup of the client accounts. Mr. Sammy asserted no calculation or similar error.
- [51] This is not a close call. The evidence fully supports the conclusion reached by the IIROC panel that "on many occasions" the high-risk securities in client accounts exceeded the allowable limit. We have no basis to conclude that the panel erred with respect to this issue.

VI. STANDARD OF REVIEW

- [52] At a preliminary appearance, a panel of the Commission asked the parties to be prepared to make submissions regarding the standard of review to be applied by the Commission in respect of a decision of a self-regulatory organization such as IIROC. The panel observed that the decisions often relied on, which are typically traced back to *Re Canada Malting Co.*,⁸ have not referred to either:
- a. the 2012 decision of the Court of Appeal for Ontario in *Johal v. Board of Funeral Services*, in which the court considered statutory language similar to that applicable in this case, and concluded that the reviewing tribunal need show no deference to the inferior tribunal, given the reviewing tribunal's authority to "substitute its opinion" for that of the inferior tribunal;⁹ or
 - b. section 2.1 of the Act, which states that in pursuing the purposes of the Act, the Commission shall have regard to the fundamental principle that the Commission "should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations."

⁸ (1986), 9 OSCB 3566.

⁹ 2012 ONCA 785.

- [53] Mr. Sammy, IIROC staff, and Commission staff addressed the question in their written submissions. All parties took the position that the standard as set out in *Re Canada Malting Co.* should remain undisturbed.
- [54] We appreciate the parties' submissions. However, given our conclusion that the IIROC panel did not err in its conduct of the hearing or in its decision, we need not revisit the circumstances under which the Commission would interfere with a decision of a self-regulatory organization, and we decline to consider that question.

VII. CONCLUSION

- [55] We conclude that the IIROC panel made no error in its conduct of the proceeding or in the conclusions set out in the IIROC Decision. Mr. Sammy's application for a hearing and review of that decision is therefore dismissed.

Dated at Toronto this 29th day of May, 2017.

"Timothy Moseley"
Timothy Moseley

"Monica Kowal"
Monica Kowal

"Robert Hutchison"
Robert Hutchison