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Citation: Debus (Re), 2021 ONSEC 22
Date: 2021-08-31
File No. 2019-16

IN THE MATTER OF
JOSEPH DEBUS

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

Review:	January 27 and 28, 2021	
Decision:	August 31, 2021	
Panel:	M. Cecilia Williams	Commissioner and Chair of the Panel
Appearances:	Dalbir Kelley Mark Persaud	For Joseph Debus
	Kathryn Andrews Sally Kwon	For Staff of the Investment Industry Regulatory Organization of Canada
	Alexandra Matushenko	For Staff of the Commission

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REASONS AND DECISION

I. OVERVIEW

[1] Joseph Debus is an investment advisor, previously licenced with Macquarie Private Wealth Canada and regulated by the Investment Industry Regulatory Organization of Canada (**IIROC**). Macquarie is now known as Richardson GMP Ltd. (**Richardson**).

[2] In a decision issued on March 18, 2019 (the **Merits Decision**)[1], an IIROC panel found that Mr. Debus had engaged in the following misconduct:

a. in 2009, he recommended that clients AP and DB purchase shares of MyScreen Mobile Inc. (**MyScreen**) outside of their accounts held with him, without disclosing this activity to his Dealer Member firm, contrary to IIROC Dealer Member Rule 29.1 (**Contravention 1**);

b. between August 2009 and August 2012, he effected unauthorized trades in the account of client AP, contrary to IIROC Dealer Member Rule 29.1 (**Contravention 2**);

c. between June 2009 and February 2013, he engaged in discretionary trading in client PE's account, without the account having been accepted and approved as a discretionary account, contrary to IIROC Dealer Member Rule 1300.4 (**Contravention 3**); and

d. between December 2011 and February 2013, he failed to use due diligence to ensure that recommendations made for client PE were suitable for PE, based on PE's investment objectives and risk tolerance, contrary to IIROC Dealer Member Rule 1300.1(q) (**Contravention 4**).

[3] In a subsequent decision issued on June 25, 2019 (the **Penalty Decision**)[2], the IIROC panel ordered that Mr. Debus:

a. pay the following fines:

i. $40,000 for Contravention 1;

ii. $20,000 for Contraventions 2 and 3 together; and

iii. $5,000 for Contravention 4;

b. disgorge $10,000 with respect to Contraventions 2 and 3;

c. be suspended from registration for nine months;

d. be placed under strict supervision by his Dealer Member firm for 12 months upon any re-registration with IIROC;

e. successfully rewrite and pass the Conduct and Practices Handbook examination within six months of any re-registration with IIROC; and

f. pay costs of $30,000.

[1] *Debus (Re),* 2019 IIROC 5
[2] *Debus (Re)*, 2019 IIROC 18

[4] On April 16, 2019, Mr. Debus applied to the Ontario Securities Commission (the **Commission**) for a hearing and review (a **Review**) of the Merits Decision and the Penalty Decision.

[5] Mr. Debus seeks an order setting aside the Merits Decision and any related sanctions and costs order and substituting a decision that there is insufficient evidence to sustain any of the allegations.

[6] IIROC Staff asks that Mr. Debus's application be dismissed.

[7] For the reasons set out below, although I find the IIROC panel erred in one minor instance in its reasoning on Contravention 2, I find that Mr. Debus has not established the grounds to warrant my interference in either the Merits Decision or the Penalty Decision.

II. HISTORY OF THE PROCEEDING

[8] Mr. Debus filed his application for a Review on April 16, 2019. On August 26, 2019, I scheduled the Review for March 23 and 24, 2020.

[9] Mr. Debus subsequently received the following extensions and adjournments, resulting in the Review being scheduled for January 27 and 28, 2021:

a. at Mr. Debus's request, due to his counsel's health, on January 14, 2020, he was granted an extension for filing of his Review materials, on consent of the parties, to February 14, 2020;

b. on February 24, 2020, to accommodate my request for written submissions on Mr. Debus's request that I issue a summons to a third party for delivery of certain documents, I extended the deadline for Mr. Debus to deliver his Review materials to April 23, 2020 and adjourned the Review to May 21 and 22, 2020; and

c. at Mr. Debus's request, also for reasons related to his counsel's health:

   i. on May 8, 2020 I issued an order granting an adjournment and scheduling the Review for July 29 and 30, 2020;

   ii. on July 28, 2020 I granted an extension of the time for Mr. Debus to deliver reply submissions, if any, to September 22, 2020 and scheduled the Review for September 29 and 30, 2020; and

   iii. on September 30, 2020, I granted the request for a further adjournment to January 27 and 28, 2021, and marked the dates as peremptory on Mr. Debus.

[10] On January 19, 2021 Mr. Debus requested a further adjournment of the Review. I heard the parties' submissions on the adjournment at the start of the Review on January 27, 2021. I declined to grant the requested adjournment, for reasons to follow. Those reasons can be found at Section III.B, below.

[11] The Review proceeded on January 27 and 28, 2021. On the last day of the Review, Mr. Debus advised that he would be bringing a motion for my recusal on the basis of a reasonable apprehension of bias against both him and his counsel,

Mr. Persaud. I heard that motion on February 19, 2021. In a decision and reasons issued separately on August 31, 2021,[3] I dismissed Mr. Debus's motion.

III. PRELIMINARY MATTERS

A. Motion for a summons to a third party for production of documents

1. Background

[12] At an attendance in this proceeding on February 11, 2020, Mr. Debus requested that I issue a summons for documents from a third party, his former employer Richardson.

[13] On April 9, 2020, I advised the parties that I declined to issue the summons, for reasons to follow in the reasons and decision of the Review. These are my reasons.

[14] The issue I must decide is: are the requested documents relevant and admissible in the Review?

[15] It is important to note that Mr. Debus did not consistently identify the documents he was seeking from Richardson. Mr. Debus referred to the same set of documents in each of:

a. a letter to Richardson dated February 11, 2020 in response to my order of the same date that Mr. Debus request documents directly from Richardson; and

b. Mr. Debus's affidavit, sworn on March 1, 2020 in support of his submissions on this issue, at paragraphs 20 and 27.

[16] However, in Mr. Debus's written submissions on this issue dated March 4, 2020, at paragraph 1,[4] in addition to the documents referred to in paragraph 15 a and b, Mr. Debus also sought:

a. from Richardson:

i. any attachments and SageACT! Notes to the emails referenced in paragraph 15; and

ii. all other relevant information; and

b. an order for IIROC to provide all documents in its possession relating to this matter that were not previously provided.

[17] SageACT! is customer relationship management software used by Mr. Debus's firm to track discussions advisors have with clients regarding trades in their accounts. A SageACT! Note reflects a particular conversation an advisor had with a client. This note can be reviewed by the advisor's branch manager or compliance personnel to give approval to a trade when an advisor is under close or strict supervision.[5]

[18] For the purposes of my analysis and decision I have not included the relief sought in paragraph 16(a)(ii) and 16(b) because:

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[3] *Debus (Re)*, 2021 ONSEC 21
[4] Written Submissions of Joseph Debus, dated March 4, 2020
[5] IIROC Hearing Transcript, Debus (Re), June 18, 2018, at 16 line 23 – 17 line 7

a. as a result of Mr. Debus's concerns during the IIROC merits hearing that not all of the relevant material from Richardson had been made available, the IIROC panel heard from representatives of Richardson and then ordered Richardson to produce a significant amount of additional information. To make a further, broad request for "all relevant information" in this context would have been difficult for Richardson to comply with, and would likely have resulted in significant delay and a great deal of potentially duplicate material;

b. the purpose of this motion was to determine whether it was appropriate to issue a summons to Richardson for production of further documents. Therefore, an order to IIROC to provide all documents in its possession relating to this matter that were not previously provided was outside the scope of the motion; and

c. IIROC's position was that it had made full disclosure in accordance with its obligations and the issue of whether IIROC had made full disclosure was a matter for the Review, not the motion for a summons to a third party.

[19] The documents covered by this analysis, therefore, are all emails and their attachments exchanged between the parties listed below from July 2006 to March 2013:

a. between RN and clients PE, DB and AP;

b. between RN and AB and RN and TB (both AB and TB were Mr. Debus's managers);

c. between RN and AA (both RN and AA were Mr. Debus's assistants);

d. between AA and clients PE, DB and AP;

e. between AA and AB, and between AA and TB;

f. between JI (a former colleague of Mr. Debus's at Richardson) and clients AP and DB;

g. between Mr. Debus and AA; and

h. between Mr. Debus and RN (the **Requested Documents**).

2. Legal framework for issuance of a summons

[20] Commission summonses are issued under Rule 26(1) of the Commission's *Rules of Procedure and Forms*[6] *(***Rules**), which provides that "a Panel may issue a Summons….to require a person resident in Ontario to… produce any document or thing specified in the Summons at an oral hearing".

[21] The summons power in the Rules derives from s. 12(1) of the *Statutory Powers Procedure Act (***SPPA**).[7] That section provides that a "…tribunal may require any person, including a party, by summons…to produce in evidence at an oral or electronic hearing documents and things specified by the tribunal" that are relevant and admissible.

[22] Both Rule 26 and s. 12(1) of the SPPA refer to the production of documents at a hearing. Case law, Commission Staff submits and I agree, confirms that a

[6] (2019) 42 OSCB 9714
[7] RSO 1990, c S.22

summons to produce documents prior to the hearing may be issued under s. 12(1) of the SPPA because this reduces the need for adjournments and furthers the goal of ensuring just, expeditious and cost-effective proceedings.[8]

[23] Rule 26 should be interpreted in the same way as s. 12(1) of the SPPA has been interpreted because:

a. Rule 26 is derived from s. 12(1) of the SPPA;

b. the Commission's Rules are to be interpreted with reference to s. 2 of the SPPA, which provides that a tribunal's rules are to be "liberally construed to secure the just, most expeditious and cost-effective determination" of the proceedings;

c. similarly, the objective of the Commission's Rules is "to ensure that Commission proceedings are conducted in a just, expeditious and cost-effective manner"[9];

d. the Rules permit a panel to waive any of the rules to achieve that objective[10]; and

e. allowing a summons for pre-hearing production would reduce the need for adjournments, thereby furthering the objective of just, expeditious and cost-effective Commission proceedings.

3. Analysis

(a) Are the Requested Documents relevant and admissible in a review under s. 21.7 of the Securities Act[11]?

[24] Mr. Debus submits that the Requested Documents are credible, they could not have been obtained prior to the IIROC merits hearing, they will likely be conclusive of several issues in the Review, and he will suffer grave prejudice if he is unable to refer to them in the Review.

[25] In the context of this request for a summons, Mr. Debus also made submissions about several issues about the IIROC merits hearing (e.g. breaches of natural justice and procedural fairness, an improper IIROC investigation, insufficient disclosure by IIROC and ineffective assistance by Mr. Debus's previous representative). These submissions relate more properly to the main issues in the Review. I therefore did not consider them in the context of my decision not to issue the summons.

[26] IIROC Staff's position is that the Requested Documents are not relevant. Further, IIROC Staff submits that the Requested Documents were known or ought to have been known by Mr. Debus at the time of the IIROC merits hearing and, therefore, do not meet the "new and compelling" test for the introduction of new evidence in a Review.

[27] Commission Staff's position is that:

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[8] *Ontario (Human Rights Commission) v Dofasco Inc.* (2001), 57 OR (3d) 693 at para 51; *Davis v Toronto (City)*, 2005 HRTO 7 at para 17; *17-007223 v Wawanesa Mutual Insurance Company*, 2018 CarswellOnt 13678 at paras 4-5

[9] *Rules*, r 1

[10] *Rules*, r 3

[11] RSO 1990, c S.5 (***Securities Act***)

a. I may require the party seeking a summons to demonstrate the relevance of the documents sought; and

b. the appropriate relevance threshold for an applicant in a s. 21.7 review proceeding is that the material sought is arguably "new and compelling".

[28] Commission Staff does not take a position on whether a summons should be issued but does provide some observations on Mr. Debus's submissions, several of which I refer to below.

[29] While the parties agree I have the discretion to issue a summons in this instance, they disagree about the principles that should guide the exercise of that discretion.

[30] For the reasons stated below, I find that the predominant principle that should guide my discretion is whether or not the documents are new and compelling evidence.

[31] The Commission has held that the predominant considerations in determining whether to issue a summons should be:

> … procedural fairness, and specifically whether the Applicants are being afforded an opportunity to be heard, the relevance of the evidence to be provided by the witnesses, and whether the evidence provided will be unduly repetitious.[12]

[32] I address first the issue of relevance as my analysis of that factor impacts the analysis of the other two considerations.

[33] In the context of the issuance of a summons, the relevance threshold is "generally considered to be low".[13] The Commission has issued summonses where the anticipated evidence "appeared to be relevant to the hearing"[14] and where evidence was "arguably relevant"[15].

[34] Commission Staff submits, and IIROC Staff concurs, that relevance in the context of a Review should be interpreted with reference to the applicable legal standard for admissibility set out in *Canada Malting Co (Re)*[16].

[35] Mr. Debus accepts that *Canada Malting* is the general standard for admissibility of new evidence to be considered by a review panel. However, he argues that the general standard is not appropriate or applicable given the unique and compelling circumstances, including that he did not receive adequate disclosure at the inception of the IIROC case against him and that he continues to be precluded from obtaining the necessary disclosure to make full answer and defense. In my view, these arguments are more relevant to the substance of the Review and are not, therefore, relevant to the summons issue.

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[12] *Khan (Re)*, 2013 ONSEC 36, (2013) 36 OSCB 10485 (***Khan***) at para 33
[13] *Khan* at para 32
[14] *Axcess Automation LLC (Re)*, 2012 ONSEC 34, (2012) 35 OSCB 9019 at paras 53 and 58
[15] *Khan* at para 38
[16] (1986) 9 OSCB 3565 (***Canada Malting***)

[36] An SPPA summons may be issued for documents that are "relevant to the subject-matter of the proceeding and admissible at [the Review]".[17]

[37] In a proceeding under sections 8 and 21.7 of the Act, the standard for admissibility of additional evidence is, in accordance with *Canada Malting*, that it be "new and compelling". This is the standard the Commission has consistently applied when considering what additional evidence may be presented at a Review. To require production of documentation that would not then be admissible in the Review is inconsistent with the objective of ensuring just, expeditious and cost-effective proceedings.

(b) Are the Requested Documents "new and compelling"?

[38] I find that the Requested Documents are not new and compelling.

[39] The Commission has held that evidence is "new" if, absent persuasive explanatory evidence to the contrary, it was not known to the party at the time of the self-regulatory organization's decision, and is "compelling" if it would have changed the self-regulatory organization's decision had it been known at the time of the decision.[18]

[40] The Commission, in the context of a Review, takes a restrained approach to exercising its discretion to admit new evidence, including in the question of what was "known" to a party or what the party "ought to have known".[19]

[41] In summary, Mr. Debus's argument in support of issuing a summons for the Requested Documents is that:

a. much of the communication between Mr. Debus and his managers, AB and TB, and between Mr. Debus and clients AP, DB and PE, was facilitated through his assistants, RN and AA, who often acted according to his direction and likely possessed critical evidence about Mr. Debus's alleged contraventions; and

b. JI often contacted clients on Mr. Debus's behalf and JI therefore could also have provided evidence through his emails relating to the alleged contraventions.

[42] Commission Staff observes, and I agree, that Mr. Debus does not appear to contend that the evidence in the Requested Documents was not known to him at the time of the IIROC merits hearing. I also agree with Commission Staff's observation that Mr. Debus has not provided any facts about the content of any of the Requested Documents that would support his claim of their relevance.

[43] I find that any evidence involving Mr. Debus's assistants, RN and AA, his associate, JI, and his managers, AB and TB, was known or ought to have been known to Mr. Debus prior to the commencement of the IIROC merits hearing and is not, therefore, new.

[44] Mr. Debus had intended to call RN and JI as witnesses in the IIROC merits hearing and served and filed summaries of their anticipated evidence. Neither was called as a witness during the IIROC merits hearing.

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[17] *SPPA*, s 12(1)
[18] *Hahn Investment Stewards & Co (Re)*, 2009 ONSEC 41, (2009) 32 OSCB 8683 at paras 197-198
[19] *Northern Securities Inc (Re)*, 2013 ONSEC 48, (2014) 37 OSCB 161 at para 28

[45] Mr. Debus successfully argued that AB be summonsed to the IIROC merits hearing and then advised that he no longer wanted to call AB as a witness. AB had also participated in a lengthy cross-examination by Mr. Debus's previous lawyer in connection with a wrongful dismissal lawsuit by Mr. Debus against Richardson. The substance of AB's evidence must have been known to Mr. Debus as a result.

[46] During the IIROC merits hearing, Mr. Debus brought several successful production motions and received additional documentation from Richardson. They included emails:

a. between Mr. Debus and AB and TB involving clients AP, DB, PE, PE's corporate account, these clients' account numbers and variations of the name of the security MyScreen; and

b. between Mr. Debus and any and all of AB, TB and three named Richardson compliance personnel.

[47] The basis for the production requests was that this information was critical to Mr. Debus's ability to make full answer and defence to the allegations against him. Mr. Debus would have known or ought to have known at the time of making these requests that his assistants RN and AA and associate JI worked closely with him and dealt with his clients. The summaries of their anticipated evidence served and filed in advance of the IIROC merits hearing indicate that RN and JI worked closely with Mr. Debus's clients. However, as part of those successful production requests, Mr. Debus did not specifically seek production of the Requested Documents.

[48] From the materials provided to me for the summons issue, it is apparent that Mr. Debus was an active participant in his defence before the IIROC panel, including in the decisions about which witnesses to call. There was evidence before the IIROC panel that Mr. Debus intended to and did actually review the 19,000 emails produced by Richardson as a result of the production orders. One of the emails from that production that was discussed at the IIROC merits hearing was between assistant AA and manager AB, which is one of the categories of emails Mr. Debus asked me to summons from Richardson.

[49] No compelling explanation has been provided by Mr. Debus for why the evidence of his assistants, colleague and managers was not known to him at the time of the IIROC merits hearing. I conclude, therefore, that the Requested Documents are not "new".

[50] Having determined that the Requested Documents are not "new" there is no need to consider whether they would be "compelling".

[51] As mentioned above in paragraph 31, the other factors in determining whether to issue a summons are procedural fairness and whether the evidence in question would be unduly repetitious. Having found the Requested Documents have not met the admissibility standard of "new and compelling" there is no need to consider whether they would be unduly repetitious.

[52] With respect to procedural fairness, I agree with Commission Staff's position that fairness does not require the Commission to enable a party to obtain information that would not be admissible at a Review. Requiring Mr. Debus to meet the

standard for admissibility of new evidence for a Review is consistent with procedural fairness and does not improperly limit his right to be heard.

B. Request for an Adjournment on January 19, 2021

1. Mr. Debus's Position

[53] On January 19, 2021, counsel for Mr. Debus advised that, due to the Ontario government's ongoing COVID-19 response and the potential health dangers of physical association at this time, they were not able to prepare with Mr. Debus for the scheduled Review. Counsel for Mr. Debus therefore requested that the Review be adjourned to a date two weeks following the end of the then current emergency measures.

[54] Mr. Debus acknowledges the public interest in moving forward as expeditiously as possible. However, Mr. Debus submits that the unique circumstances of this case support a delay of a few months to allow him to safely prepare for the Review.

[55] In his submission, those unique circumstances include:

a. he cannot afford new counsel;

b. his counsel has been unable to prepare for the Review because of the extreme caution required to protect Mr. Debus's and his counsel's health; and

c. Mr. Debus's lead counsel, Mr. Persaud's, health issues have worsened.

[56] As a result of these unique circumstances, Mr. Debus submits that his counsel have been unable to physically sit with him, and each other, to review the voluminous materials in this matter to pinpoint all of the evidentiary basis for their case and to properly prepare for the Review.

[57] In oral submissions, Mr. Persaud advised that the adjournment his client was seeking was actually until August 2021 to allow Mr. Persaud to receive a recommended treatment and a COVID-19 vaccine.

[58] Mr. Debus submits that not granting the requested adjournment would prevent him from having the opportunity to properly prepare for the Review. He argues that not granting the adjournment would be contrary to the public interest, as it would result in a party not being heard and would, therefore, bring the administration of justice into disrepute.

2. IIROC Staff's Position

[59] IIROC Staff's position is that Mr. Debus's request does not meet the high bar of exceptional circumstances required under Rule 29(1).

[60] IIROC Staff submits that the adjournment should not be granted because:

a. the COVID-19 pandemic is no longer an exceptional circumstance. After at least ten months of operating under COVID-19-related restrictions, virtual hearings and the preparation required to participate in such hearings should be viewed as the norm;

b. nothing material has changed since written submissions were filed by the parties in June and July 2020. Mr. Debus has had six months to prepare and four months since the matter was marked peremptory. Mr. Debus

also filed no evidence in support of the adjournment request that indicates what attempts were made or what difficulties were encountered in preparing for the hearing;

c. the public interest in ensuring the Review proceeds in a timely fashion outweighs Mr. Debus's private interest in his choice of counsel and in preparing in a manner that he and his counsel might prefer; and

d. this request for a fifth adjournment continues a pattern of conduct that began at the IIROC merits hearing, which is evident in the IIROC record.

[61] IIROC Staff also raises the issue that if a further adjournment were to be granted, then I should revisit the stay of the sanctions. IIROC Staff asserts that its consent to the stay was given months ago on the understanding that the matter would proceed without delay.

3. Commission Staff's Position

[62] Commission Staff agrees with IIROC Staff that the request for an adjournment does not meet the test of exceptional circumstances.

[63] In addition, Commission Staff submits that it is in the public interest that Commission proceedings continue, as they have throughout the pandemic. Commission Staff asserts that this is consistent with the Commission's statutory mandate, which includes investor protection, fostering fair and efficient capital markets and ensuring confidence in the capital markets.

4. Analysis

[64] Rule 29(1) provides that every Commission proceeding shall proceed on the scheduled date unless the party requesting an adjournment "satisfies the Panel that there are exceptional circumstances requiring an adjournment."

[65] The issue I must decide is whether the circumstances underlying this request for an adjournment constitute exceptional circumstances justifying a delay of the Review.

[66] The Commission has ruled that the standard set out in Rule 29(1) is a "high bar"[20] that reflects the important objective set out in Rule 1, that Commission proceedings be conducted in a "just, expeditious and cost-effective manner". This objective must be balanced against parties' ability to participate meaningfully in the Review and to present their case.[21]

[67] The balancing of these objectives is necessarily fact-based and must consider the circumstances of the parties and the manner in which they have conducted themselves in the proceeding.[22]

[68] If an adjournment had been granted, it would have been the fifth time that the Review was delayed. A summary of those adjournments is set out in paragraph 9 above. When I granted the most recent adjournment on September 30, 2020, I ordered that the Review date was peremptory on Mr. Debus.

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[20] *Pro-Financial Asset Management (Re),* 2018 ONSEC 18, (2018) 41 OSCB 3512 at para 28
[21] *Money Gate Mortgage Investment Corporation (Re),* 2019 ONSEC 40, (2020) 43 OSCB 35 (***Money Gate***) at para 54
[22] *Money Gate* at para 54

[69] All of the adjournments have been at Mr. Debus's request, with one exception: when I rescheduled the Review to allow for written submissions on the summons issue discussed in section III.A above.

[70] I recognize that the intersection of health issues, COVID-19 restrictions and appropriate health and safety measures present challenging circumstances for Mr. Debus and his counsel. However, I do not find that, in these circumstances, they meet the high bar contemplated by Rule 29(1).

[71] Mr. Debus's written submissions were served and filed in June 2020. Considerable time has elapsed since then, during which efforts could have been made to prepare for oral submissions in support of those made in writing. No evidence was submitted detailing the efforts made by Mr. Debus and his counsel to attempt to prepare and what challenges they were not able to overcome during that lengthy period.

[72] Nor did Mr. Debus make a compelling argument about what work remains to be done to effectively prepare for the Review. He states the need to be able to physically sit with his counsel in order to review the voluminous record to pinpoint the evidentiary basis for the arguments in support of the application.

[73] The evidentiary record in this matter has not changed since IIROC provided disclosure of the IIROC record to Mr. Debus and his counsel in August and September 2019. More particularly, there have been no changes to the evidentiary record since Mr. Debus filed his written submissions in June 2020.

[74] As I noted in my May 21, 2020 reasons for the second adjournment, at the time I granted the first adjournment in January 2020, Mr. Debus had, at that time, had more than four months to prepare for the Review. There were no COVID-19 restrictions at that time and no indication of any other issue preventing Mr. Debus from preparing for the hearing. I noted then that I expected significant progress would have already been made for a Review that was, at that time, only two months away.[23]

[75] I acknowledge that Mr. Debus was seeking further documents, the subject of the summons issue, and later sought to introduce those same documents as new evidence in the Review. Had either or both those efforts been successful, the evidentiary record would have changed. As part of his new evidence motion, Mr. Debus also sought to call five witnesses to give oral evidence in the Review. As I previously indicated, had these efforts been successful Mr. Debus could have sought an adjournment to make whatever amendments were appropriate to his case.[24] However, this is not the case.

[76] As I noted in my August 18, 2020 reasons for the third adjournment, there are limits to the right of a party to be represented by their counsel of choice. The right to be represented by counsel does not include the right of a party to insist on adjournments due to the availability of counsel, where such adjournments would unreasonably delay the course of the proceedings.[25] At the time of the adjournment request it had been almost two years since IIROC issued the

[23] *Debus (Re),* 2020 ONSEC 13, (2020) 43 OSCB 4479 (**Debus Adjournment #1**) at para 25
[24] Debus Adjournment #1 at para 27
[25] *Debus (Re),* 2020 ONSEC 20, (2020) 43 OSCB 6577 (**Debus Adjournment #2**) at para 24

decisions that are the subject of this Review and almost a year since the Review was originally scheduled to be heard.

[77] Both Mr. Debus and his counsel have electronic versions of the evidentiary record. Mr. Debus advised that post-it and hand-written notes had supplemented the electronic version, which notes were not available to both Mr. Debus and his counsel. However, no explanation was provided for why Mr. Debus and his counsel could not, during the elapsed time, work virtually to review the record and any accompanying notes.

[78] While it may be beneficial to Mr. Debus to physically sit with counsel to review materials in advance of counsel making oral submissions on his behalf, this does not in my view constitute exceptional circumstances warranting a further delay of the Review until either an uncertain date two weeks following the end of COVID-19 restrictions (as originally requested) or until August 2021.

[79] For the reasons outlined above, I declined Mr. Debus's request for an adjournment of the Review.

C. Introduction of Mr. Debus's March 18, 2020 affidavit

[80] On the first day of the Review, Mr. Debus sought to introduce as evidence two affidavits he had sworn, dated March 1, 2020 and March 18, 2020, in connection with his motion for a third-party summons for documentation. My reasons for denying that motion appear in section III.A of these reasons. After discussion, Mr. Debus confirmed he was only seeking to introduce the March 1, 2020 affidavit. I did not allow the affidavit to be introduced for reasons that would follow and be included in the reasons for my decision on the Review. These are my reasons for that ruling.

[81] Mr. Debus submitted that sections of the affidavit were relevant to his argument that he had received ineffective assistance from Mr. Sabbah, the paralegal who represented him in the IIROC merits hearing. In particular, the affidavit evidence would cover Mr. Sabbah's alleged inexperience, failure to call an expert witness, failure to request critical additional evidence and inappropriate behaviour during the IIROC proceeding. Mr. Debus argued that much of the evidence on this point would have come from HP, a law student who had worked with Mr. Sabbah. However, my ruling on December 2, 2020, with reasons issued on January 18, 2021[26] denying the introduction of new evidence and witnesses, prevented Mr. Debus from leading HP's evidence.

[82] IIROC Staff and Commission Staff objected to the introduction of the affidavit as it was prepared in connection with an earlier motion and not for the purposes of the Review. They also objected on the basis that it appeared to be an attempt to introduce indirectly evidence which I had already ordered was not to be introduced in this Review.

[83] The affidavit was prepared and filed in connection with an earlier motion and not the Review itself. Therefore, I ruled that the affidavit could not be introduced as evidence in this Review.

[26] *Debus (Re)*, 2021 ONSEC 1, (2021) 44 OSCB 553

IV. ISSUE AND ANALYSIS

A. Introduction

[84] I turn now to the substantive issue raised by this application. Mr. Debus applies under s. 21.7 of the Act, which provides that a person directly affected by a decision of a recognized self-regulatory organization, such as IIROC, may apply to the Commission for a review of the decision.

[85] On an application such as this, the Commission may confirm the IIROC decision or make such other decision as the Commission considers proper.[27] The Commission's review of an IIROC 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.

[86] Although the Commission need not defer to the IIROC hearing panel's decision[28], the Commission has chosen as a matter of practice to limit the circumstances under which it will substitute its own decision for that of a self-regulatory organization such as IIROC. This choice is consistent with the requirement in the Act that the Commission have regard to the fundamental principle that the Commission should "use the enforcement capability and regulatory expertise of recognized self-regulatory organizations."[29]

[87] It is well established that the Commission will interfere with a decision of a self-regulatory organization only if:

a. the hearing panel proceeded on an incorrect principle;

b. the hearing panel erred in law;

c. the hearing panel overlooked material evidence;

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

e. the hearing panel's perception of the public interest conflicts with that of the Commission.[30]

[88] In his written submissions Mr. Debus submits that in reviewing IIROC's decisions I should be guided by the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*[31]. I disagree. That decision relates to the judicial review of administrative decisions. It does not apply to the Commission's review of an IIROC decision, which is governed by the statutory framework outlined above.

[89] The sole issue before me is whether Mr. Debus has established any grounds under *Canada Malting* for interfering with the Merits Decision and/or the Penalty Decision.

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[27] *Securities Act,* ss. 21.7(2) and 8(3)
[28] *Berry (Re),* 2009 ONSEC 37, (2009) 32 OSCB 8051 at para 69, citing *Boulieris (Re),* 2004 ONSEC 1, (2004) 27 OSCB 1597 at para 29
[29] *Securities Act,* s 2.1, para 4
[30] *Canada Malting* at para 24
[31] 2019 SCC 65

B. Has Mr. Debus established any grounds for intervening in the Merits Decision?

[90] Mr. Debus submits that the IIROC panel erred in law and that there is new and compelling evidence. He submits, therefore, that the *Canada Malting* standard is met in this case. My analysis below covers the alleged errors in law, which I've organized into two categories: whether the IIROC panel's alleged failure to address two alleged miscarriages of justice constituted errors in law, and the alleged errors in law related to each of the alleged contraventions of IIROC's rules. I previously considered Mr. Debus's submission that there was new and compelling evidence that had not been presented at the IIROC hearing, and in my December 2, 2020 order I ruled that the proposed witnesses and documentary evidence would not be admitted at the hearing. My reasons for that decision were issued on January 18, 2021.[32]

1. Alleged miscarriages of justice

[91] Mr. Debus submits that there has been a miscarriage of justice for two reasons: ineffective assistance by Mr. Sabbah, the paralegal who represented Mr. Debus in the IIROC proceeding; and IIROC Staff's failure to properly investigate the allegations against Mr. Debus and to provide full disclosure to Mr. Debus on a timely basis. I deal with each of these alleged miscarriages of justice in turn.

(a) Ineffective representation

[92] One of Mr. Debus's grounds for his application is that he was ineffectively represented by Mr. Sabbah at the IIROC proceeding. Mr. Debus submits that although the test for ineffective representation comes from the criminal setting, the fundamental doctrine is also applicable to a disciplinary setting such as a proceeding before an IIROC tribunal. While Mr. Debus cited three decisions of the Law Society Tribunal[33] supporting this assertion, he provided no authority to support the conclusion that the standard in criminal proceedings should also apply to IIROC proceedings, and I am not prepared to reach that conclusion. Having said that, for the purposes of my analysis below, I have referred to decisions relating to criminal proceedings.

[93] For IIROC's decision to be set aside on the basis of ineffective assistance of counsel, if the criminal standard were to be applied, Mr. Debus must establish that counsel's acts or omissions constituted incompetence and that a miscarriage of justice occurred. The onus to establish incompetence lies with the party raising the issue. Incompetence is determined by a reasonableness standard and there is a strong presumption that counsel's conduct fell within a wide range of reasonable professional assistance.[34]

[94] Where a person chooses to be represented by an agent who is not a lawyer, they cannot argue that the conduct of the agent did not rise to the level of a

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[32] *Debus (Re)*, 2021 ONSEC 1, (2021) 44 OSCB 553

[33] *Law Society of Upper Canada v Rita Anne Hartmann*, 2010 ONLSAP 1; *Law Society of Upper Canada v Sriskanda*, 2015 ONLSTH 186; *Law Society of Upper Canada v Matthew Joseal Igbinosun*, 2007 ONLSAP 9

[34] *R v GDB,* 2000 SCC 22 (***GDB***) at para 27

competent counsel. What they must demonstrate is that the agent's conduct, perhaps combined with other events, produced a miscarriage of justice.[35]

[95] Mr. Debus submits that Mr. Sabbah failed to meet the standard of a competent paralegal as set out by the Law Society of Ontario, being one who has and applies the relevant knowledge, skills, and attributes appropriate to each matter undertaken on behalf of a client.[36]

[96] In *R v Bilinski,* the Court was "not persuaded that the [Law Society of Ontario] providing a rule defining competent paralegals is determinative or of significant assistance in determining whether a paralegal's representation in criminal courts is deficient".[37] The Court went on to say that it was unable to find that the Law Society's regulating of paralegals and/or the Rules for Paralegals results in any specific standard of representation.[38]

[97] *Bilinski* concludes that where an appellant alleges that their representation by a paralegal was deficient to the extent that a new trial is required, they must establish: (1) the facts on which the claim is based, on a balance of probabilities; and (2) that the paralegal's conduct, perhaps combined with other events, produced a miscarriage of justice.[39] If there is no miscarriage of justice, there is no need to examine the paralegal's conduct.[40]

[98] I first consider whether Mr. Debus has established, on a balance of probabilities, the facts on which he bases his claim. I find, for the reasons set out below, that Mr. Debus has not met that test.

[99] Mr. Debus submits that Mr. Sabbah was ineffective because he failed to:

a. properly address the inadequacy of IIROC Staff's investigation;

b. call the necessary witnesses to corroborate and support Mr. Debus's defence; and

c. advance various defences prior to and during the IIROC merits hearing, that were highly relevant and would likely have changed the outcome.

[100] The IIROC record shows that Mr. Sabbah, on more than one occasion, raised the inadequacy of IIROC Staff's investigation with the IIROC panel. The IIROC panel heard submissions from the parties regarding these concerns. The crux of Mr. Sabbah's concern with IIROC Staff's investigation was that Mr. Debus had not received sufficient documents to allow him to mount a full and fair defence to the allegations against him.

[101] The IIROC panel found that Richardson had initially failed to make full production of relevant material to IIROC.[41] Mr. Sabbah's requests for additional documents from Richardson, made during the course of the IIROC proceeding, were largely

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[35] *R v Romanowicz* (1999), 45 OR (3d) 506 (CA) at paras 29 and 31
[36] Law Society of Ontario, *Paralegal Rules of Conduct,* r 3.01(1) and (4)
[37] *R v Bilinski,* 2013 ONSC 2824 (***Bilinski***) at para 79
[38] *Bilinski* at para 80
[39] *Bilinski* at para 83(iv)
[40] *GDB* at para 29; *Bilinski* at para 84
[41] Merits Decision at para 13

successful. The IIROC panel subsequently concluded that Mr. Debus had received sufficient disclosure to defend the allegations against him.[42]

[102] Mr. Sabbah also raised with the IIROC panel other questions about the nature and scope of IIROC Staff's investigation (e.g. whether IIROC Staff had investigated Richardson's close and strict supervision process and why certain Richardson personnel had not been interviewed during the investigation). The IIROC record shows that the IIROC panel heard submissions on each concern raised during the hearing and made rulings on those issues.

[103] In its decision dismissing Mr. Debus's motion for production of IIROC's investigation file, the IIROC panel states that it is its responsibility to determine if the allegations have been established and that the case before it is about those allegations and not how IIROC Staff conducted its investigation leading up to those allegations.[43] The record is clear that questions about IIROC Staff's investigation were raised by Mr. Sabbah and addressed by the IIROC panel.

[104] Regarding Mr. Sabbah's alleged failure to call the necessary witnesses to corroborate and support Mr. Debus's defence, Mr. Debus refers to paragraph 6 of the IIROC panel's decision in Debus's motion for production, which states, "[w]e also note that Mr. Sabbah has the ability to call other witnesses to give relevant information."[44] I do not agree that this comment provides any support for the conclusion that Mr. Sabbah failed to call the necessary witnesses. The IIROC panel, in this paragraph to which Mr. Debus points, is merely referring to Mr. Debus's right to call further witnesses if deemed appropriate.[45] The reference cannot be interpreted as suggesting that there were other relevant witnesses that should have been called.

[105] One of Mr. Debus's primary arguments at the IIROC merits hearing was that his managers knew about all of his trading activity, including the activity that was the subject of IIROC Staff's allegations, either because he told them or because he was under close or strict supervision, making the alleged activity impossible. Mr. Sabbah successfully requested that AB, one of Mr. Debus's managers, be summonsed to testify at the IIROC merits hearing. However, AB did not testify at the IIROC hearing. At the hearing, Mr. Sabbah clearly stated that the decision had been made not to call AB.[46]

[106] Mr. Debus had also filed summaries of anticipated evidence for his assistant RN and his colleague JI. Neither was called as a witness.

[107] There are any number of reasons why a decision may be made not to call a witness. There is insufficient information before me to conclude that the decision not to call AB, RN or JI as witnesses was the result of incompetence as opposed to a tactical choice made by Mr. Sabbah in consultation with his client during the course of the IIROC merits hearing. It is not the function of appellate courts to second-guess the tactical and strategic decisions of trial counsel.[47] This applies

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[42] Merits Decision at para 13
[43] *Debus (Re),* 2018 IIROC 39 at para 5
[44] Debus Motion for Production at para 6; Written Submissions of Joseph Debus, dated June 22, 2020 at para 51
[45] Debus Motion for Production at para 6
[46] IIROC Hearing Transcript, Debus (Re), December 11, 2018, at 132 lines 18-22
[47] *Mediatube Corp v Bell Canada*, [2018] FCJ No 679 at paras 29-34; *GDB* at para 27

equally to a Commission panel reviewing the decision of a self-regulatory organization.

[108] With respect to an expert witness, Mr. Debus submits that an expert would have provided critical contextual evidence about the alleged contraventions, including the calculation of risk for suitability assessments, the industry's use of a 10% "buffer" for market factors and volatility when calculating suitability, and industry practices relating to margin calls and discretionary trading.

[109] At a pre-hearing conference on January 19, 2018, Mr. Sabbah, in the context of seeking an adjournment of the IIROC merits hearing, argued that one of the reasons for the delay was the need to consult with his client to consider extra witnesses including an expert who might testify about whether trading suitability was an issue.[48] The IIROC panel set a date for Mr. Sabbah to give notice if he was calling an expert witness. Mr. Sabbah did not call an expert witness.

[110] Mr. Debus submits that Mr. Sabbah incorrectly advised him that LC, head of compliance for Mr. Debus's current employer, could provide evidence on industry practices. The IIROC record shows that Mr. Sabbah did initially attempt to ask LC questions about industry practices. However, it was established that he was a fact witness, not an expert witness and, therefore, could not provide evidence of that nature.[49]

[111] There are many reasons why a decision could have been made not to call an expert witness. They may include the inability to identify an appropriate expert, scheduling challenges for an expert, a strategic decision that an expert is not required to establish or contradict a point at issue, and the cost of retaining an expert. The fact that an attempt was made to use LC as an expert raises the possibility that a tactical decision was made not to call an expert.

[112] The IIROC panel did state that expert evidence would have been helpful on Contravention 4, relating to the suitability of Mr. Debus's recommendations to PE.[50] However, the panel concluded that it did not need expert evidence to make its finding. The only evidence before the IIROC panel on this allegation was the calculation of risk conducted by IIROC Staff's investigator and an alternate calculation by Mr. Debus. Both calculations put the risk percentage of the portfolio in question above the client's 20% risk parameter. The IIROC panel stated that expert evidence would have been helpful in precisely quantifying the "overage" of high-risk investments. However, even in the absence of expert evidence and of evidence about Richardson's approach to risk ratings for determining suitability, the IIROC panel concluded that it had "sufficiently clear evidence to satisfy us on the balance of probabilities" that the account in question was offside its stated risk level.[51]

[113] I am unable to conclude that the failure to call an expert witness was due to Mr. Sabbah's ineffectiveness as opposed to a tactical choice made by Mr. Sabbah and Mr. Debus. Also, on the one issue where the IIROC panel felt expert evidence might have been of assistance, it was ultimately able to make conclusions based on the evidence before it.

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[48] IIROC Hearing Transcript, Debus (Re), January 19, 2018, at 19 lines 21-24
[49] IIROC Hearing Transcript, Debus (Re), December 11, 2018, at 187 line 23 - 188 line 8
[50] Merits Decision at para 105
[51] Merits Decision at paras 105-108

[114] On the issue of Mr. Sabbah's alleged failure to advance various defences for Mr. Debus, Mr. Debus is incorrect when he says these defences were not advanced. They were. The IIROC record shows that Mr. Sabbah did raise in submissions and through his questioning of Mr. Debus and other witnesses throughout the IIROC merits hearing the issues of: where responsibility lies for selling shares on a margin call, a firm's role in setting risk ratings, the role of supervisors and the compliance department in overseeing suitability issues, the alleged lack of full and fair disclosure to Mr. Debus and the alleged miscarriage of justice arising from that failure. I conclude, therefore that Mr. Sabbah raised the various defences Mr. Debus submits were not advanced, and the IIROC panel appears to have considered those defences in the Merits Decision and ultimately decided not to accept them.

[115] As I have found that Mr. Debus has failed to establish, on a balance of probabilities, the facts on which his claim of ineffective representation is based, there is no need for me to consider the second arm of the *Bilinski* test, which is whether there was a miscarriage of justice. Mr. Sabbah's representation of Mr. Debus at the IIROC hearing provides no basis for me to interfere with the IIROC panel's decision.

(b) IIROC Staff's conduct

[116] I turn now to Mr. Debus's submission that IIROC Staff's conduct resulted in a miscarriage of justice, which the IIROC panel erred in law by failing to address.

[117] Mr. Debus submits that IIROC Staff's failure to conduct a proper investigation and to make full disclosure to him resulted in a miscarriage of justice. He also submits that IIROC Staff's conduct resulted in an abuse of process. For the reasons set out below, I find no miscarriage of justice or abuse of process related to IIROC Staff's investigation or disclosure. I therefore find no error in law on this ground by the IIROC panel.

[118] The subject of an investigation is not entitled to dictate the nature and scope of the investigation.[52] I agree that IIROC Staff has discretion to put forward the case it deems appropriate. I also agree with the IIROC panel that it is the hearing panel's responsibility to determine if the evidence tendered by IIROC Staff establishes the allegations.[53]

[119] IIROC Staff's disclosure obligations are akin to the disclosure standard imposed on the Crown in criminal proceedings by *R v Stinchcombe.*[54] Under the *Stinchcombe* test, IIROC Staff is obligated to disclose all relevant information in its possession where there is a reasonable possibility that the information could assist the accused in making a full answer and defence.[55] *Stinchcombe* does not stand for the proposition that a prosecutor must seek all relevant information.

[120] It is clear from the IIROC record that IIROC Staff disclosed to Mr. Debus all of the documents that it had gathered in the course of its investigation. IIROC Staff

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[52] *Azeff (Re)*, 2012 ONSEC 16, (2012) 35 OSCB 5159 at para 284; *Proprietary Industries Inc. (Re)*, 2005 ABASC 745 at paras 104-111
[53] Merits Decision at paras 28-29
[54] [1991] 3 SCR 326 (***Stinchcombe***)
[55] *Stinchcombe* at para 22

made disclosure to Mr. Debus's original counsel in 2017 and then to Mr. Sabbah in 2018.

[121] However, it is also clear that Richardson had failed to provide to IIROC Staff all of the documents in its possession that were responsive to IIROC Staff's requests for information during the investigation.

[122] The IIROC panel, after hearing significant evidence from Richardson, agreed with Mr. Debus that there was additional documentation that should be produced by Richardson. The documents ordered were delivered and a 7-volume compendium of documents, including from Richardson's additional production, was filed, and referred to in Mr. Debus's defence.

[123] The fact that the IIROC panel determined it appropriate to order production from Richardson does not equate to a failure by IIROC Staff to make disclosure to Mr. Debus. IIROC Staff's disclosure obligation is limited to relevant documents in IIROC Staff's possession. The obligation does not extend to documents that IIROC Staff might have been able to obtain but did not. The issue of there being further relevant documentation at Richardson was raised during the merits hearing by Mr. Debus and addressed by the IIROC panel.

[124] I conclude that there was nothing about IIROC Staff's investigative decisions or its disclosure to Mr. Debus that resulted in a miscarriage of justice and, therefore, the IIROC panel did not commit an error in law regarding this ground.

2. Alleged errors in law associated with each contravention of IIROC's Rules

(a) Contravention 1 – Client DB

[125] The IIROC panel found that Mr. Debus had recommended that his client, DB, purchase shares of MyScreen through an account at another firm and that Mr. Debus failed to disclose that activity to his firm. Mr. Debus submits that the panel made errors in law in arriving at that conclusion, including that the panel had insufficient evidence to make a negative credibility finding against Mr. Debus and that it gave substantial weight to witness MS's testimony. I find no error in law on the IIROC panel's part.

[126] The underpinning for the first contravention was the decision by Mr. Debus's firm to prohibit him from promoting and later dealing with shares of MyScreen, a high-risk investment. DB had acquired shares of MyScreen through Mr. Debus at his firm prior to the prohibition being in place. During the prohibition, DB purchased shares of MyScreen in a dormant corporate account he maintained at Bank of Montreal Nesbitt Burns (**BMONB**).

[127] Before he moved his accounts to Mr. Debus's firm, DB held accounts at BMONB. MS was DB's advisor at BMONB. MS remained close friends with DB after he moved his accounts to Mr. Debus's firm and MS had a continuing professional relationship with members of DB's family.

[128] Mr. Debus testified that DB was keen to acquire more MyScreen shares. He did not recommend that DB buy the shares. Mr. Debus did tell DB that his firm's Compliance Department would not allow him to buy any further shares for DB. Mr. Debus also testified that DB and MS had called him and that he participated in the call to share the story about MyScreen with a fellow advisor in hopes that MS would take an interest in the stock. Mr. Debus's position at the IIROC merits

hearing was that DB had relied on MS's advice to buy MyScreen in his BMONB account.

[129] DB did not testify at the IIROC hearing. MS testified that he was aware DB already held shares of MyScreen and that he had seen information about the security at DB's home. MS also testified that Mr. Debus and DB had called MS to discuss DB's purchase of MyScreen shares in DB's dormant corporate account at BMONB. On that call, according to MS, Mr. Debus asked whether MS would also like to buy some MyScreen shares but MS declined because he had conducted no due diligence on the company.

[130] In addition, MS testified that on the call with DB, Mr. Debus was enthusiastic about the investment and that he discussed quantity and price. The IIROC panel found that in the three-way call, Mr. Debus made the recommendation to DB to buy more shares of MyScreen, DB relied on Mr. Debus's recommendation, and the call included a discussion about the amount, price and method of acquisition.

[131] MS testified prior to Richardson's production of trade blotters in response to one of the IIROC panel's production orders. During his testimony MS stated that after the three-way call with DB and Mr. Debus the MyScreen shares were acquired for DB through a cross trade with Mr. Debus's firm. It was clear from the trading blotter that no cross trade took place. MS did not have an opportunity to respond to this evidence. The IIROC panel found that MS put the order on the OTC pink sheet market where it was filled in the ordinary course.

[132] The IIROC panel found that the error in MS's testimony was something the witness had been uncertain about at the time, and that it was minor and not critical to the central evidence about the telephone call with DB and Mr. Debus.[56] I find no error in law in the IIROC panel's decision to not give weight to this aspect of MS's evidence but to rely on other aspects of his evidence that it found to be credible.

[133] Mr. Debus testified that he later told his firm about DB's acquisition at BMONB in case DB subsequently wanted to move his holding into the firm. There was also evidence about a meeting in 2010 with Mr. Debus, DB and his family, and AB, during which DB complained about the significant losses he and his family had incurred in MyScreen. Mr. Debus's position was that because the loss discussed at that meeting was significantly larger than would have been possible based on DB's holdings at his firm, AB must have realized that DB held stock elsewhere. The IIROC panel disagreed and also found that even if AB had come to that realization during the 2010 meeting, it did not amount to Mr. Debus advising his managers about DB's trading in MyScreen at another firm.

[134] The IIROC panel devotes a significant portion of the Merits Decision to its assessment of Mr. Debus's credibility. It conducted that assessment in accordance with the well-established principle that credibility is tested by the consistency of the evidence with the preponderance of the probabilities presented by the case.[57]

[135] The IIROC panel chose not to accept Mr. Debus's evidence about DB's trade at BMONB or about whether he told his managers about the trade. Mr. Debus

[56] Merits Decision at para 46
[57] Merits Decision at para 14

submits that the IIROC panel erred in law because IIROC Staff's investigation was flawed and the panel, therefore, had insufficient evidence on which to base its assessment of Mr. Debus's credibility. As I stated earlier, the nature and scope of IIROC Staff's investigation is at its discretion. A review of the IIROC record indicates that the IIROC panel considered all of the evidence, including Mr. Debus's testimony, and made the credibility assessments it deemed appropriate and consistent with the other evidence before it. I find no error in law regarding its decision on this issue.

(b) Contravention 1 – Client AP

[136] Mr. Debus's client AP also purchased shares of MyScreen during the period Mr. Debus was prohibited by his firm from having any dealings in MyScreen shares. AP testified at the IIROC merits hearing. Mr. Debus argues that the IIROC panel erred in law because IIROC Staff failed to produce evidence to support a finding that Mr. Debus had recommended AP buy shares of MyScreen through another firm. I disagree.

[137] The IIROC panel accepted AP's evidence that Mr. Debus had recommended he buy shares of MyScreen and advised him that he would also have to buy it elsewhere as Mr. Debus had been told by his firm that he could not buy any more for his clients. AP bought three tranches of 50,000 MyScreen shares in his BMO Investorline account. AP's evidence was that Mr. Debus recommended the first two purchases but that AP made the third purchase on his own.

[138] AP testified that he had numerous conversations about MyScreen with Mr. Debus, including one in which Mr. Debus recommended that AP hold on to the stock as the stock's price declined. The IIROC panel found this evidence to be consistent with Mr. Debus's testimony that he counselled clients to stay in the stock irrespective of their losses because Mr. Debus had personal faith in the investment on a long-term basis. The IIROC panel found AP's evidence more consistent with the other evidence before it. Where AP's testimony was challenged on cross-examination, it withstood that challenge.

[139] AP testified that Mr. Debus told him that Mr. Debus would arrange with the MyScreen founders for shares to be available for him to purchase. Mr. Debus submits that IIROC Staff failed to provide any evidence that he had the ability to arrange a block trade of MyScreen shares for AP.

[140] In my view, this point is irrelevant. IIROC Staff's allegations make no reference to a block trade. The alleged misconduct that is the subject of the IIROC proceeding was that Mr. Debus recommended that AP buy shares of MyScreen and that he told him that the purchase had to be made at another firm. The IIROC panel accepted AP's evidence that Mr. Debus recommended the stock and that the purchase had to occur elsewhere. The evidence was that as a result, AP did buy shares of MyScreen through his BMO Investorline account on two occasions. These findings of fact by the IIROC panel are in no way undermined by AP's recollection that Mr. Debus said he could arrange a block trade, which Mr. Debus denied, and that there was no evidence at the hearing that a block trade involving Mr. Debus or his firm occurred.

(c) Contraventions 2 and 3 – Unauthorized and Discretionary Trading, Clients AP and PE

[141] The IIROC panel concluded that Mr. Debus had:

a. effected unauthorized trades in AP's account between August 2009 and August 2013, contrary to IIROC Rule 29.1; and

b. engaged in discretionary trading in PE's account between June 2009 and February 2013, contrary to IIROC Rule 1300.4.

[142] Mr. Debus submits that the IIROC panel, in coming to those conclusions, made the following errors in law:

a. accepting the uncontradicted evidence regarding trades made following the close and strict supervision protocols;

b. failing to address the important contradictory statements of PE regarding his trade in Cott Corp;

c. concluding that margin call transactions conducted by Mr. Debus's firm were unauthorized or discretionary trades conducted by Mr. Debus;

d. ignoring the fact that Richardson's refusal to provide SageACT! Notes, which Mr. Debus submits would have been exculpatory, was inconsistent with its record keeping obligations under IIROC's rules; and

e. ignoring Richardson's conduct and IIROC Staff's lack of a proper investigation.

[143] IIROC Staff submits that the IIROC panel did not make an error in law on these two allegations. The IIROC panel, IIROC Staff submits, accepted PE's and AP's evidence, the documentary evidence, and the evidence of IIROC Staff's investigator where it conflicted with Mr. Debus's evidence on this issue.

[144] With one minor exception, I find that the IIROC panel did not commit an error in law regarding Contraventions 2 and 3.

i. Close or Strict Supervision

[145] Mr. Debus's position at the IIROC merits hearing was that since he was under supervision for much of the time period for these allegations, he could not have executed trades for AP and PE without first obtaining approval from his managers. Mr. Debus also argued before the IIROC panel that he documented his discussions with AP and PE in SageACT! Notes, which he attached as screenshots to his requests for pre-approval of the trades. The IIROC panel did not accept Mr. Debus's testimony as it was inconsistent with the documentary evidence.[58]

[146] The Merits Decision details the IIROC panel's analysis of the trading conducted during the various periods of Mr. Debus's close or strict supervision.[59] Its analysis demonstrates that it did not, as Mr. Debus submits, accept uncontroverted evidence about the close and strict supervision protocols.

[147] The IIROC panel concluded on the evidence that:

a. as a general matter it did not, for reasons articulated in the Merits Decision,[60] accept Mr. Debus's blanket defence of being supervised throughout his time at Macquarie;

[58] Merits Decision at para 81
[59] Merits Decision at paras 82-89
[60] Merits Decision at paras 22-25 and 80-93

b. AP and PE had had conversations with Mr. Debus during which they gave him discretion to trade in their accounts without their specific authorization, and were not aware that he was not entitled to exercise that discretion;

c. Mr. Debus's close supervision (February 26, 2009 to June 10, 2010) did not require him to have trades pre-approved and, consistent with that conclusion, there was no evidence of emails seeking approval or details of any client authorizations during that period, including for the 43 trades for AP and the 35 trades for PE made by Mr. Debus during that period;

d. while Mr. Debus was under his first period of strict supervision (June 11, 2010 to June 11, 2011), he was required to have trades pre-approved and there was evidence of him seeking such approval for the majority of trades during this period;

e. during the period Mr. Debus was not under any supervision (June 12, 2011 to October 26, 2011), he was not required to obtain pre-approval and there was no evidence of Mr. Debus seeking approval or receiving instructions from his clients;

f. Mr. Debus likely started making and incorporating SageACT! Notes during his second period of strict supervision; and

g. during Mr. Debus's second period of strict supervision (October 27, 2011 until he left Macquarie on March 8, 2013), there were 9 small trades for AP to satisfy margin calls and 22 trades for PE. The IIROC panel concluded that 5 of the trades for AP were unauthorized as the timing and details of the trades differed from the information Mr. Debus recorded in SageACT! Notes for those trades. It also concluded that it preferred PE's evidence that Mr. Debus had not discussed the trades with him.

ii. PE's contradictory statements

[148] In his evidence, PE testified that of the 22 of his trades at issue during Mr. Debus's second period of strict supervision, Mr. Debus only discussed one stock, Canada Lithium, with PE prior to conducting the trade. Subsequent to PE's testimony, Mr. Debus located, among further production received from Richardson, an email where PE appears to approve a purchase of Cott Corp.

[149] Mr. Debus submits that the IIROC panel made an error in law by failing to directly address this contradiction. I disagree. In the Merits Decision, the IIROC panel discusses the contradictory evidence, concluding that PE was likely in error about Cott Corp. but that it did not diminish his evidence on the other stocks in question, for which there was no similar documentary evidence.[61]

iii. AP's margin call transactions

[150] I find that the IIROC panel erred when it concluded that AP did not speak to Mr. Debus at all about most, if not all, of the 9 margin call trades in AP's account during Mr. Debus's second period of strict supervision. However, that error is not sufficient to warrant my interference with the Merits Decision.

[61] Merits Decision at paras 92-93

[151] The IIROC panel recognized that by the terms of a margin account, the firm was entitled to proceed with a margin trade without the authorization of a client.[62] The panel then discussed contradictory testimony by Mr. Debus about how many of these 9 margin call trades were made by the firm or by Mr. Debus, including Mr. Debus's evidence that in some instances, despite his having spoken with the client, it was too late and the firm had sold the stock.[63] The IIROC panel then concluded that the more likely explanation is the one given by AP; *i.e.*, that AP did not speak to Mr. Debus at all about most if not all of these trades.

[152] In the evidence before the IIROC panel, on at least four occasions during this period, there were notes from Mr. Debus indicating he had spoken with AP and stock was being sold to clean up or cover margin calls, with accompanying emails to a manager seeking and obtaining approvals for the trades. In three of those instances, the trade blotter reflects the trade with a note indicating "forced contracting without approval".[64]

[153] The IIROC panel did not explain how it concluded that given Mr. Debus's firm's authority to execute margin call trades without client authorization, it was in fact Mr. Debus rather than his firm that conducted the trades. Further, there is no analysis about how Mr. Debus, executing margin call trades in a client's account under the authority granted by the margin agreement, was trading without authorization.

[154] These margin trades represented only 9 of the 70 alleged unauthorized trades in AP's account during the period in question. I find that the IIROC panel's error regarding this small number of the trades at issue does not warrant my coming to a different conclusion with respect to the IIROC panel's overall conclusion regarding Contravention 2.

iv. Richardson's record-keeping

[155] Richardson's record keeping was not an issue before the IIROC panel. I therefore find no error in law in the IIROC panel not addressing that issue.

v. Richardson's and IIROC Staff's conduct

[156] I find no error in law on the IIROC panel's part regarding Richardson's conduct or IIROC Staff's investigation. In the Merits Decision, the IIROC panel clearly states that initially, Richardson did not make full production of the relevant material to IIROC Staff.[65] The IIROC panel, in response to Mr. Debus's motion for production, heard significant evidence from Richardson and ordered further production. The IIROC panel concluded that Mr. Debus received sufficient disclosure to defend the allegations against him.[66] I addressed IIROC Staff's investigation in paragraphs 116-124 above.

(d) Contravention 4 – Suitability

[157] Mr. Debus submits that the IIROC panel erred in law by finding that he had failed to ensure his recommendations for PE were suitable because the IIROC panel:

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[62] Merits Decision at para 88
[63] Merits Decision at para 89
[64] Exhibit 18, IIROC Staff's Compilation Brief re AP and PE, Tabs 8-11
[65] Merits Decision at para 13
[66] Merits Decision at para 13

a. failed to recognize it is the dealer member firm, not IIROC, that decides if a suitability issue has arisen in a client account;

b. had no evidence from IIROC Staff of any concerns PE might have had about suitability, any suitability inquiries about PE's account from the firm's compliance department or any restrictions on PE's account for suitability purposes;

c. made its decision without dealing with IIROC Staff's failure to address whether the firm had internal software controls related to suitability;

d. failed to hear expert evidence about industry or firm suitability standards; and

e. failed to consider the evidence that Mr. Debus was required to obtain management approval for every client trade and to send confirming emails to all clients the day after each trade.

[158] IIROC Staff submits that whether Richardson questioned the suitability of these trades or holdings in PE's account is irrelevant; advisors have an independent obligation to ensure their recommendations to clients are suitable. Also, IIROC Staff submits that the sufficiency of Richardson's supervision was not an issue before the IIROC panel. IIROC Staff further submits that the fact that PE did not complain about the trades in question does not determine suitability. Lastly, IIROC Staff submits that the IIROC panel determined it had sufficiently clear evidence to satisfy itself on the balance of probabilities that PE's account contained more than 20% high risk investments, contrary to the account's agreed risk allocation, without the need for expert evidence.

[159] I find no error in law with respect to the IIROC panel's decision on Contravention 4. I addressed the issue of expert evidence in paragraphs 108-113 above. Mr. Debus acknowledged that he had an independent obligation with respect to the suitability of trades in his clients' accounts.[67] The appropriateness of Richardson's supervisory systems was not before the IIROC panel. The fact that during different periods Mr. Debus was required to obtain approvals for trades and that clients were to be sent emails after every trade does not detract from Mr. Debus's obligation to ensure that his recommendations to PE were within PE's stated risk parameters and therefore suitable.

C. Has Mr. Debus established any grounds for intervening in the Penalty Decision?

[160] Mr. Debus submits that the sanctions imposed by the IIROC panel were grossly excessive, were overly punitive and should be set aside. In addition, Mr. Debus submits that he was under firm-imposed close and strict supervision for an extended period of time, that he never breached any dealer rules, protocols or procedures and that he had never been found liable for any offence. In these circumstances, Mr. Debus argues, the Penalty Decision is excessive and improper.

[67] Merits Decision at paras 24 and 96

[161] In support of his submission that the Penalty Decision should be set aside, Mr. Debus cites two cases: *Chappell v. Midland Doherty Ltd.*[68] and *Ontario Securities Commission v. Tiffin*[69]. In my view, neither of these cases is relevant.

[162] In *Chappell,* the Commission accepted the terms of settlement agreements between the Commission and Chappell, and the Commission and the dealer employing Chappell, for various regulatory breaches, including Chappell's discretionary trading and the dealer firm's failure to supervise. The Commission noted that while Staff had previously tended to take enforcement action against the particular individuals who had breached securities law, a greater focus on the conduct of the dealer employers is appropriate. Unlike the situation in *Chappell*, the conduct of the firm employing Mr. Debus was not the subject of the IIROC merits hearing and is not properly before me for the purpose of this Review.

[163] In *Tiffin,* the Ontario Court of Appeal found that a six-month custodial sentence for three offences under section 122(1) of the *Securities Act*, while not an error in law, was demonstrably unfit. A nine-month suspension from the industry is not, in my view, equivalent to a six-month custodial sentence. As I indicate below, I do not find the Penalty Decision to be demonstrably unfit.

[164] IIROC Staff submits that the sanctions were appropriate and that Mr. Debus fails to identify any error that would warrant my interfering with the Penalty Decision.

[165] I agree. The IIROC panel lays out in the Penalty Decision its analysis of the evidence, including mitigating and aggravating factors, and case law supporting each of its conclusions. Similarly, the IIROC panel lays out its analysis for determining that a suspension is appropriate, based on the guidelines, evidence and case law, and its rationale for ordering a nine-month suspension rather than twelve months, as IIROC Staff had requested.

[166] Although I find the IIROC panel erred with respect to its finding relating to 9 of the 70 unauthorized trades in AP's account, this is a small number of trades for relatively small amounts. It does not, in my view, warrant my intervention to modify the sanction for that contravention or the disgorgement order.

V. CONCLUSION

[167] For the above reasons, I find no justification to interfere with the Merits Decision or the Penalty Decision. Mr. Debus's application is dismissed.

Dated at Toronto this 31st day of August, 2021.

"M. Cecilia Williams"
M. Cecilia Williams

[68] (1987) 10 OSCB 4000
[69] 2020 ONCA 217