ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re O'Brien, 2020 ABASC 160 **Date: 20201015**

Michael Francis O'Brien
Appeal of Investment Industry Regulatory Organization of Canada Decision

Panel:	Tom Cotter Kari Horn
Representation:	Jeffrey N. Thom, Q.C. and Christopher Jones for the Appellant, Michael Francis O'Brien Tayen Godfrey for the Respondent, Investment Industry Regulatory Organization of Canada
Submissions Completed:	May 27, 2020
Decision:	October 15, 2020

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I. INTRODUCTION

[1] This was an appeal (the **Appeal**) brought to the Alberta Securities Commission (the **ASC**) by Michael Francis O'Brien (**O'Brien**), a financial advisor registered with the Investment Industry Regulatory Organization of Canada (**IIROC**). He appealed from disciplinary decisions rendered against him by an IIROC Alberta District Hearing Panel (the **IIROC Panel**).

[2] IIROC is a self-regulatory organization recognized by the ASC pursuant to s. 64 of the *Securities Act* (Alberta) (the **Act**). IIROC is therefore under the oversight of the ASC in Alberta, and appeals from IIROC decisions may be brought to the ASC pursuant to ss. 36 and 73 of the Act.

[3] As set out in our order issued June 4, 2020 and for the reasons discussed below, we allowed the Appeal in part.

II. PROCEDURAL HISTORY

[4] On February 21, 2019, IIROC enforcement staff (**IIROC Staff**) issued a Notice of Hearing (the **NOH**) and Statement of Allegations against O'Brien. The specific contraventions alleged were as follows:

> **Contravention 1**
>
> Between May and September of 2017, [O'Brien] engaged in personal financial dealings with a client, without the knowledge or approval of his firm, contrary to Dealer Member Rule 43.
>
> **Contravention 2**
>
> In September 2017 and April 2018, [O'Brien] made misleading representations regarding client dealings, contrary to Dealer Member Consolidated Rule 1400.

[5] With the exception of two particulars, O'Brien admitted Contravention 1 in the Response to Statement of Allegations he was required to file in accordance with IIROC's Consolidated Enforcement, Examination and Approval Rules (the **IIROC Rules**). He contested Contravention 2.

[6] The hearing into the merits of the allegations was held in October 2019 (the **Liability Hearing**). On December 31, 2019 (amended January 15, 2020), the IIROC Panel issued its decision on liability, cited as *Re O'Brien*, 2019 IIROC 33 (the **Liability Decision)**. With the exception of one particular concerning Contravention 1, the IIROC Panel found that both contraventions had been proved: over a period of approximately four months in 2017, O'Brien borrowed more than $156,000 from a client who was an elderly widow, and made a number of misleading statements about the loan and the surrounding circumstances to investigators from IIROC and the fraud detection group at the client's bank (**RBC Fraud Detection**).

[7] O'Brien filed a Notice of Appeal with the ASC on January 27, 2020.

[8] An IIROC penalty hearing was conducted on March 11, 2020 (the **Penalty Hearing**). The IIROC Panel issued their decision on March 26, 2020 (the **Penalty Decision**, cited as *Re O'Brien*, 2020 IIROC 10). The Penalty Decision included orders:

(a) prohibiting O'Brien's registration with an IIROC Dealer Member firm for two years (the **Suspension**);

(b) requiring O'Brien to pay IIROC a fine of $100,000 (the **Fine**) and costs of $20,000;

(c) requiring O'Brien to rewrite and pass the Conduct and Practices Handbook (CPH) examination following the conclusion of the two-year suspension period; and

(d) requiring that O'Brien be subject to strict supervision for the first 18 months following his re-entry to the investment industry;

(collectively, the **IIROC Orders**).

[9] The IIROC Orders came into immediate effect on March 26, 2020.

[10] O'Brien filed an Amended Notice of Appeal with the ASC on March 31, 2020 (the **Amended Notice of Appeal**). The Amended Notice of Appeal stated that O'Brien was appealing both the Liability Decision and the Penalty Decision on various grounds. The grounds included alleged errors of fact and law by the IIROC Panel, denial of O'Brien's right to natural justice, and imposition of penalties that he submitted were "excessive and not warranted in the circumstances of the case".

[11] On April 1, 2020, O'Brien filed an application for an interim stay of the Penalty Decision pending the ASC's decision on the Appeal. IIROC Staff opposed the stay.

[12] After consideration of the written submissions and the oral submissions made by the parties at a hearing held on April 24, 2020, we dismissed the stay application for the reasons set out in a ruling cited as *Re O'Brien*, 2020 ABASC 54 (the **Stay Ruling**).

[13] After we received the record of the proceedings before the IIROC Panel (the **Record**), written Appeal submissions were filed by O'Brien on May 8, 2020, written response submissions by IIROC Staff on May 19, 2020 and amended May 20, 2020, and reply submissions by O'Brien on May 22, 2020. We heard oral argument on the Appeal from the parties on May 27, 2020 (the **Appeal Hearing**).

[14] On June 4, 2020, we issued an order (the **Appeal Order**, cited as *Re O'Brien*, 2020 ABASC 76) allowing the Appeal in part and varying the IIROC Orders by reducing the Suspension from two years to nine months commencing March 26, 2020 and expiring December 26, 2020, and reducing the Fine from $100,000 to $50,000. We confirmed all other aspects of the IIROC Orders.

III. DETAILS OF THE ALLEGATIONS AND RESPONSE TO THE ALLEGATIONS

[15] Additional background facts, the particulars of the allegations, and an overview of the positions of the parties were set out in IIROC Staff's Statement of Allegations and O'Brien's Response to Statement of Allegations.

[16] According to the Statement of Allegations and the Liability Decision, O'Brien began working as a financial advisor in 2002, and became an "Approved Person" and a "Registered Representative" (as defined in IIROC Rule 1.1) in 2008.

[17] The conduct that is the subject of the allegations occurred while O'Brien was registered with IIROC Dealer Member RBC Dominion Securities Inc. (**RBC Securities**), which he joined in 2012. He was terminated by RBC Securities in November 2017 due to this conduct, and as of the date of the Statement of Allegations, he was working as a Registered Representative with another Dealer Member, Raymond James Ltd. (**Raymond James**), which he joined in December 2017.

[18] The Statement of Allegations further alleged:

(a) O'Brien served the subject client (to whom we will refer as **Ms. H**) and her husband as their financial advisor beginning in approximately 2002. Ms. H's husband passed away in 2010, and O'Brien remained her financial advisor. In 2017, Ms. H was 81 years old.

(b) Until May 2017, Ms. H employed another individual to assist her with day-to-day affairs, including helping to manage her daily finances.

(c) O'Brien admitted that he started to borrow money from Ms. H in June 2017. Between May and September 2017, he borrowed over $156,000 from her, without the knowledge or approval of his firm. Payments were made from her bank account to his credit cards and line of credit, his mother-in-law's line of credit, and his Canada Revenue Agency (**CRA**) account. In addition, he was issued a credit card on Ms. H's Visa account and incurred various expenses.

(d) RBC Fraud Detection identified the transactions as suspicious activity, started an investigation, and notified RBC Securities that O'Brien had been borrowing money from his client. (The Liability Decision added that on October 6, 2017, O'Brien was interviewed by RBC Corporate Investigation Services (the **RBC Interview**), but he was not under oath.)

(e) At the direction of RBC Securities, O'Brien repaid all of the borrowed money.

(f) During the investigations conducted by both RBC Fraud Detection and IIROC, O'Brien made misleading representations and failed to act in a candid and forthcoming manner. (According to the Liability Decision, RBC Securities reported the matter to IIROC, which opened its own investigation. O'Brien was interviewed by IIROC investigative staff on April 4, 2018 (the **IIROC Interview**), under oath and in the presence of counsel.) The particulars alleged were:

    (i) Despite working in the industry since 2002, O'Brien stated he was not aware that he needed his firm's approval to borrow money from a client.

    (ii) O'Brien stated that he borrowed the money to repair storm damage to his home. However, his credit card and line of credit statements from the relevant time did not disclose any expenses related to home repairs. Instead, the statements showed expenditures for trips to London, Paris, and Las Vegas.

(iii) During a telephone conversation on September 25, 2017, O'Brien falsely told RBC Fraud Detection that he held a power of attorney for Ms. H. Later, he falsely told IIROC Staff that he had not said this.

(iv) When asked about a certain payment, O'Brien was evasive and not forthcoming, and did not disclose that it was a payment to his mother-in-law's line of credit.

(v) O'Brien was evasive and failed to adequately explain the circumstances surrounding a $24,000.00 payment Ms. H made to the CRA on his behalf.

[19] As mentioned, in his Response to Statement of Allegations, O'Brien admitted Contravention 1, except that he denied that Ms. H's employee assisted with her daily finances or that he advised anyone else that she had. He denied all allegations of misleading representations. With respect to the $24,000 paid to CRA, O'Brien stated that he did not request the payment and did not owe money to CRA at that time. Ms. H made the payment in error, and it was reversed by CRA.

[20] As to the particulars of the misrepresentation allegations, the Response to Statement of Allegations claimed that O'Brien "cooperated in all investigations and answered all questions honestly and to the best of his ability and recollection". The Response to Statement of Allegations further stated:

(a) O'Brien thought that because Ms. H had loaned money to other people, it was acceptable for her to loan money to him. However, he acknowledged that he did not confirm this with RBC Securities and should have done so.

(b) O'Brien acknowledged that he told IIROC Staff he borrowed the money because he needed to repair his home, and said that he used the money to "free up capacity on his credit facilities to allow repair charges to go through when they occurred". Therefore, he did not deny that credit card charges were incurred for expenses other than home repairs.

(c) To the best of his recollection, O'Brien did not tell anyone he held a power of attorney for Ms. H on September 25, 2017, and he advised IIROC Staff accordingly. However, he conceded that "[i]f there is a recording that indicates otherwise, [he] defers to that recording".

(d) O'Brien answered the questions asked of him about the payment to his mother-in-law's line of credit, including responses to written interrogatories.

(e) O'Brien answered the questions asked of him about the erroneous payment to CRA, and IIROC Staff had the opportunity to ask further questions if they considered the explanation provided to be inadequate; they chose not to do so.

[21] In addition, the Response to Statement of Allegations confirmed that Ms. H was repaid with interest in October 2017. It also indicated that on May 21, 2017, O'Brien had been in a motor

vehicle accident and sustained injuries that caused "ongoing cognitive inefficiencies in a number of areas, including memory, into 2018".

IV. ISSUES ON APPEAL

[22] The Amended Notice of Appeal cited as grounds of appeal from the Liability Decision that the IIROC Panel:

> (a) Committed errors of fact in finding . . . O'Brien made misleading representations [to] IIROC Enforcement Staff;
>
> (b) Committed errors of law in their interpretation and application of Consolidated Rule 1400; [and]
>
> (c) Committed errors of law in their finding that . . . O'Brien was under a positive obligation to disclose information even in the absence of direct questions from IIROC Enforcement Staff.

[23] The grounds of appeal from the Penalty Decision were that the IIROC Panel:

> (a) Denied . . . O'Brien's right to natural justice by:
>
> (i) Demonstrating bias;
>
> (ii) Considering irrelevant factors in arriving at the penalty imposed; and
>
> (iii) Imposing aspects of discipline not sought by IIROC Enforcement Staff, specifically a fine of almost double what had been proposed by either party, requiring a rewriting [of] the CPH examination, and imposing 18 months strict supervision, without any opportunity for . . . O'Brien to make submissions on those points; and
>
> (b) Impos[ed] penalties, specifically with respect to the duration of suspension and the amount of the fine imposed, which were excessive and not warranted in the circumstances of the case.

[24] O'Brien sought an order from this panel: (i) overturning the Liability Decision and the Penalty Decision; (ii) finding him liable for Contravention 1 but not Contravention 2; and (iii) imposing a reduced penalty. In the alternative, if we upheld the finding of liability on both contraventions, he sought a reduced penalty. In the further alternative, he sought an order remitting either or both the Liability Decision and the Penalty Decision to a different IIROC hearing panel for reconsideration.

V. STANDARD OF REVIEW

[25] We first considered the issue of the appropriate standard of review to be applied on this Appeal.

A. Arguments of the Parties

1. O'Brien

[26] O'Brien cited the Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019 SCC 65), which dealt with standards of review for courts reviewing or hearing appeals from administrative tribunals. He argued that *Vavilov* held that where there is a statutory right of appeal – as here, pursuant to s. 73 of the Act – unless the statute

specifies the standard of review to be applied, the standard is the same as it would be for a court hearing an appeal from a lower court.

[27] O'Brien also cited the recent decision of the Alberta Court of Appeal (the **ABCA**) in *Yee v. Chartered Professional Accountants of Alberta* (2020 ABCA 98), and argued that it confirmed that the same approach should be applied by administrative appeal tribunals. Findings of fact and inferences drawn from the facts should generally be respected. By contrast, because the appeal tribunal has expertise similar to that of the tribunal of first instance, it is equally well-positioned to determine issues engaging professional standards and questions of law arising from its home statute. Therefore, the appeal tribunal can intervene if it finds sufficient grounds, such as bias, an error of principle, potential injustice, or unreasonableness.

[28] O'Brien submitted that the standards of review adopted in *Yee* are the same as those from *Housen v. Nikolaisen* (2002 SCC 33): reasonableness and correctness. He emphasized that in his view, the ASC has at least the same expertise as that of the IIROC Panel on the matters in issue on Appeal, if not greater expertise – particularly on the questions of law – and therefore does not need to defer to the IIROC Panel's findings on those questions.

[29] As to the standards of review to be applied to his enumerated grounds of appeal, O'Brien submitted that the standard is reasonableness for issues of fact and mixed fact and law where there is no extricable legal question – here, whether the IIROC Panel erred in finding that O'Brien made the misrepresentations alleged and imposed penalties that were unwarranted in the circumstances, at least insofar as the latter did not involve errors of law. He further submitted that the standard is correctness for issues of law – here, whether the IIROC Panel interpreted Consolidated Rule 1400 correctly, erred in finding that O'Brien was under a positive obligation to disclose information in the absence of direct questions, and denied O'Brien natural justice.

2. IIROC Staff

[30] IIROC Staff argued that the standards of review we should apply when reviewing the decision of a self-regulatory organization were not changed by *Vavilov*. They noted that in *Yee*, the ABCA stated that *Vavilov* applies when a court is reviewing a decision of an administrative tribunal, while *Newton v. Criminal Trial Lawyers' Association* (2010 ABCA 399) applies when an administrative tribunal is reviewing the decision of another administrative tribunal. IIROC Staff then pointed to the following statement in *Yee* (at para. 35):

> When reviewing the decision of a discipline tribunal, the appeal tribunal should remain focused on whether the decision of the discipline tribunal is based on errors of law, errors of principle, or is not reasonably sustainable. The appeal tribunal should, however, remain flexible and review the decision under appeal holistically, without a rigid focus on any abstract standard of review . . .

[31] IIROC Staff argued that this approach is similar to that taken by the ASC in *Re Hemostemix Inc.* (2017 ABASC 14), an appeal from a decision of the TSX Venture Exchange, or **TSXV**. In that case, the panel cited the principles set out by the Ontario Securities Commission (**OSC**) in *Re Canada Malting Co.* ((1986) 9 OSCB 3565 at 3587) and more recently examined in *Re Hudbay Minerals Inc.* ((2009) 32 OSCB 3733 at para. 105), and held (at para. 63) that there are grounds warranting intervention where:

- the panel below proceeded on an incorrect principle;

- the panel below erred in law;
- the panel below overlooked material evidence;
- new and compelling evidence is presented to the ASC; or
- the ASC's perception of the public interest conflicts with that of the panel below.

[32] IIROC Staff noted that in *Yee*, the ABCA provided additional guidance to appellate tribunals by setting out a number of guidelines (at para. 35):

> (a) findings of fact made by the discipline tribunal, particularly findings based on credibility of witnesses, should be afforded significant deference;
>
> (b) likewise, inferences drawn from the facts by the discipline tribunal should be respected, unless the appeal tribunal is satisfied that there is an articulable reason for disagreeing;
>
> (c) with respect to decisions on questions of law by the discipline tribunal arising from the profession's home statute, the appeal tribunal is equally well[-]positioned to make the necessary findings. Regard should obviously be had to the view of the discipline tribunal, but the appeal tribunal is entitled to independently examine the issue, to promote uniformity in interpretation, and to ensure that proper professional standards are maintained;
>
> (d) with respect to matters engaging the expertise of the profession, such as those relating to setting standards of conduct, the appeal tribunal is again well-positioned to review the decision under appeal. The appeal tribunal is entitled to apply its own expertise and make findings about what constitutes professional misconduct: *Newton* at para. 79. It obviously should not disregard the views of the discipline tribunal, or proceed as if its findings were never made. However, where the appeal tribunal perceives unreasonableness, error of principle, potential injustice, or another sound basis for intervening, it is entitled to do so;
>
> (e) the appeal tribunal is also well-positioned to review the entire decision and conclusions of the discipline tribunal for reasonableness, to ensure that, considered overall, it properly protects the public and the reputation of the profession; [and]
>
> (f) the appeal tribunal may also intervene in cases of procedural unfairness, or where there is a reasonable apprehension of bias.

[33] IIROC Staff argued that the third and fourth points listed were made in the context of an internal appeal within the same organization, which was not the case here. They therefore relied on *Newton*, and the ABCA's list of factors for consideration in determining the standard of review to be applied by an appellate tribunal reviewing the decision of a tribunal of first instance. These include (at para. 43):

- the respective roles of the two tribunals;
- the nature of the questions in issue; and
- the expertise and position of the tribunal of first instance as compared to the expertise and position of the appellate tribunal.

[34] IIROC Staff observed that IIROC has specific expertise on the standards applicable to the dealer members and registrants it regulates, while the ASC's mandate is broader.

[35] In the result, IIROC Staff submitted that the principles in *Hemostemix* still apply. They submitted that those principles include:

- the ASC has broad discretion when reviewing the decision of a self-regulatory organization;
- the ASC should defer to the decision below unless: the panel below proceeded on an incorrect principle, erred in law, or overlooked material evidence; there is new and compelling evidence that was not before the panel below; or the ASC's perception of the public interest conflicts with that of the panel below; and
- the ASC should recognize the specialized expertise of IIROC as a self-regulatory organization.

[36] Finally, IIROC Staff argued that we should apply a standard of reasonableness and show deference to the IIROC Panel's findings of fact on whether O'Brien made the misrepresentations alleged, the IIROC Panel's interpretation of Consolidated Rule 1400, and the issue of whether the penalties ordered were excessive, in light of the IIROC Panel's expertise interpreting and applying IIROC Rules and standards of conduct. IIROC Staff maintained that we should review for correctness whether the IIROC Panel considered irrelevant factors in their penalty assessment, and whether O'Brien was denied the right to be heard. IIROC Staff also noted that a standard of review for reasonable apprehension of bias was inapplicable, because the issue was not raised before the IIROC Panel and they therefore made no findings on the point. Accordingly, the usual test for reasonable apprehension of bias should apply.

[37] O'Brien and IIROC Staff thus agreed on the applicable standards of review, except that IIROC Staff argued for reasonableness concerning the interpretation of Consolidated Rule 1400 in view of the IIROC Panel's expertise. IIROC Staff also did not agree that there was a finding that O'Brien was under a positive obligation to disclose information in the absence of direct questions. In their view, the IIROC Panel found that O'Brien purposely misled IIROC Staff, which was a finding of fact subject to a reasonableness review.

B. Analysis and Conclusion – Standard of Review

[38] In *Newton*, the ABCA held that the determination of the correct standard of review to be applied by an appellate tribunal to a tribunal of first instance "depends in large part on the exact wording of the [applicable] statute" (at para. 38). As already mentioned, this Appeal was brought pursuant to ss. 36 and 73 of the Act.

[39] Section 73 of the Act states in part:

> 73(1) . . . a person or company directly affected by a direction, decision, order or ruling made under a bylaw, rule, regulation, policy, procedure, interpretation or practice of a recognized . . . self-regulatory organization . . . may appeal that direction, decision, order or ruling to the [ASC].
>
> (2) Section 36 applies to an appeal made under this section.

[40] Subsection 36(3) of the Act provides that on an appeal, the ASC can:

> (a) make any decision that the person who heard the matter in the first instance could have made and substitute the [ASC's] decision for the decision of that person;
>
> (b) confirm, vary or reject the decision;

(c) direct the person whose decision is being appealed to re-hear the matter.

[41] Despite the scope of authority in s. 36(3), this does not mean that we should not give deference to the decision made by the adjudicator of first instance – in this case, the IIROC Panel (*Yee* at para. 33; *Newton* at para. 54, citing *H.L. v. Canada (Attorney General)*, 2005 SCC 25; *Zuk v. Alberta Dental Association and College*, 2018 ABCA 270 at paras. 71-72). As pointed out by the ABCA in *Yee*, "[t]hat would undermine the integrity of the first level of the disciplinary structure, and make the proceedings before the discipline tribunal an ineffectual waystation along the path to a final decision" (at para. 33).

[42] This is the approach that has long been taken by ASC panels hearing appeals under s. 73 of the Act (or its predecessor): we will not intervene "simply because we might have made a different decision had the matter been before us in the first instance" (*Re D'Addario*, 2009 ABASC 557 at para. 27; see also *Meyer v. Alberta Stock Exchange* (1995), 4 ASCS 3193 at p. 9 (aff'd. [1997] A.J. No. 237 (CA)); *TSX Venture Exchange Inc. v. McLeod*, 2005 ABASC 607 at para. 164 (aff'd. 2006 ABCA 231); *Re Lamontagne*, 2009 ABASC 490 at para. 42). Though section s. 36 confers broad authority, s. 73 provides that we are to hear appeals, "not to re-conduct the entire proceeding *de novo*" (*Yee* at para. 34).

[43] Considering the relevant factors set out in *Newton* for determination of the proper standard of review to be applied in this context – the respective roles, expertise, and position of the IIROC Panel and this panel, as well as the nature of the questions in issue – we are satisfied that the approach taken in *Hemostemix* remains appropriate and consistent with the relevant jurisprudence since it was decided. We were not asked to consider new evidence on the Appeal, and thus determined we would not disturb the decision of first instance unless we found that the IIROC Panel proceeded on an incorrect principle, erred in law, overlooked material evidence, or perceived the public interest differently (*Hemostemix* at para. 63; see also *D'Addario* at para. 27; *Meyer* at p. 8; *McLeod* at paras. 161-162). Unless one of those grounds is present, deference is warranted, and we would interfere only if we found that the impugned decision or finding was unreasonable (*Hemostemix* at para. 62).

[44] In assessing reasonableness, we were guided by the following considerations from *Vavilov* and earlier authorities:

- whether "there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived", since a decision, taken as a whole, "may satisfy the reasonableness standard if it is supported by a tenable explanation even if this explanation is not one that [we find] compelling" (*Law Society of New Brunswick v. Ryan*, 2003 SCC 20 at paras. 55-56);

- we were to consider the evidence that was before the IIROC Panel, but "refrain from 'reweighing or reassessing the evidence'" (*Vavilov* at paras. 106, 125; *Housen* at paras. 22-23);

- that "where a factual finding is grounded in an assessment of credibility of a witness", the IIROC Panel had the "overwhelming advantage" of having seen the witnesses testify (*Housen* at para. 24);

- that "[r]easonableness is a deferential standard" and "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47); and

- that fact-findings and inferences drawn from facts are "only unreasonable when they are completely unsupported by any evidence on which that particular fact could have been found" (*Lum v. Council of the Alberta Dental Assn. and College, Review Panel*, 2015 ABQB 12 at para. 120; *Housen* at 22).

[45] These principles are consistent with the ABCA's guidance in *Yee* (at para. 35). Further, we generally agree with IIROC Staff's submission that the ASC's role and expertise are somewhat different from those of the IIROC Panel. In *Hemostemix*, the panel observed that the TSXV has specialized expertise "in supervising the listing and trading of securities on the exchange it operates, and in administering the rules and policies it develops for that purpose" (at para. 62). We similarly observe that IIROC has specialized expertise in the standards of conduct expected of registrants under its oversight, and in the administration of its own rules and policies.

[46] Lastly, we note that the last guideline in *Yee* is that an appeal tribunal may intervene if there has been procedural unfairness or a reasonable apprehension of bias. The additional guidance given to reviewing courts on these two issues is also helpful for administrative appeal tribunals: issues of fairness and natural justice should be reviewed "to see whether the appropriate level of 'due process' or 'fairness' required by the statute or common law has been granted", and "the test on review for bias is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking things through, would have a reasonable apprehension of bias" (at para. 29).

[47] In summary, we concluded that IIROC decisions are owed deference unless one of the *Hemostemix* grounds warranting intervention obtains. In other words, a reasonableness standard applies unless there is a basis – including errors of law – for applying a correctness standard (*Hemostemix* at para. 59, citing *Dunsmuir* at para. 50). We note that this has been the approach taken by other Canadian jurisdictions as well; see *Investment Dealers Association of Canada v. Dass* (2008 BCCA 413 at para. 11); *Re Rudensky* (2019 ONSEC 24 at para. 32); and *Re Northern Securities Inc.* (2013 ONSEC 48 at paras. 49, 51).

VI. APPEAL FROM LIABILITY DECISION

[48] In light of O'Brien's admissions concerning Contravention 1 and his specific grounds of appeal, we do not need to summarize all of the findings made by the IIROC Panel in the Liability Decision. For convenience, we organized our summary of the relevant findings under the grounds of appeal set out in the Amended Notice of Appeal, followed by a summary of the positions of the parties and our analysis and conclusion on each ground.

A. Misleading Representations

[49] O'Brien's first ground of appeal was that the IIROC Panel erred in finding that he made misleading representations, and thus in finding him liable for Contravention 2.

1. IIROC Panel's Findings

[50] In the Liability Decision, the IIROC Panel summarized the four aspects of O'Brien's defence of the Contravention 2 allegations. First, he maintained that he answered all of the investigators' questions honestly and to the best of his recollection. Second, he argued that if it were found that he had not answered all of the investigators' questions honestly and to the best of his recollection, it was because the injuries he sustained in his May 21, 2017 motor vehicle accident (including a concussion) affected his memory. Third, even if he did not provide complete and honest answers to the investigators, the investigators were not misled because his responses were later corrected or completed with other information he provided. Fourth, if it were found that he made misleading representations, it was not a contravention of Consolidated Rule 1400.

(a) Impact of O'Brien's Accident Injuries

[51] The IIROC Panel considered O'Brien's claim of motor vehicle accident injuries as a distinct issue. They described the evidence of the witness O'Brien called to testify at the Liability Hearing, Dr. Arlin Pachet, who was qualified as an expert in clinical neuropsychology. According to the Liability Decision (at para. 144):

> Dr. Pachet opined that [O'Brien's] mental status in and around September 25 and October 6, 2017 would have been at increased risk for mistakes, errors, and poor judgement due to the quantum of his symptoms. In April 2018, his symptoms would have substantially improved but there could have been potentially some lingering post-concussive issues, although not to the same degree.

[52] The IIROC Panel found that while Dr. Pachet was a credible witness, he had not been informed that one of the primary issues in the Liability Hearing was whether O'Brien made misleading statements to investigators. As a result, the IIROC Panel found that he "did not address the issue of whether making potentially false statements or misleading representations could or would be caused or contributed to by accident sequelae" (Liability Decision at para. 209). They concluded that the most he could say was that "the accident sequelae put [O'Brien] at increased risk of mistakes, errors, and poor judgement" – but not that "the accident sequelae probably caused or contributed to mistakes, errors, and poor judgement, even in general, much less as regards any specific statements" that were the subject of the Statement of Allegations (Liability Decision at para. 210).

[53] Dr. Pachet acknowledged that he relies in part on client reporting in arriving at his opinions, and that O'Brien initially told him that he felt his accident injuries had affected his job performance and that was the reason RBC Securities fired him. In cross-examination, Dr. Pachet was confronted with "certain specific examples of underreporting, inaccuracies and not being forthright" on O'Brien's part, and he "conceded that these circumstances would require him to reconsider the accuracy of his opinions" (Liability Decision at para. 211). As a result, the IIROC Panel placed little weight on his opinion evidence.

(b) Firm Approval

[54] As mentioned, O'Brien admitted Contravention 1, which alleged that he breached IIROC Rule 43 by engaging in personal financial dealings with Ms. H without the knowledge or approval

of his firm. IIROC Rule 43 is titled "Personal Financial Dealings with Clients", and the relevant portion states:

> 43.1 An employee or Approved Person of a Dealer Member must not, directly or indirectly, engage in any personal financial dealings with clients.
>
> 43.2 Personal financial dealings include, but are not limited to, the following types of dealings:
>
> . . .
>
> (3) **Borrowing from clients**
>
> (i) Borrowing money or receiving a guarantee in relation to borrowing money, securities or any other assets from a client, unless:
>
> (a) The client is a financial institution whose business includes lending money to the public and the borrowing is in the normal course of the institution's business; or
>
> (b) The client is a Related Person as defined by the Income Tax Act (Canada) and the transaction is addressed in accordance with the Dealer Member's policies and procedures; and
>
> (c) In the case of Registered Representatives and Investment Representatives, the arrangement set out in sub-clause 43.2(3)(i)(b) is disclosed to and approved in writing by the Dealer Member, prior to the transaction.
>
> . . .

[55] Though O'Brien admitted contravening this rule by accepting loans from Ms. H, his Response to Statement of Allegations stated that he thought it was acceptable for her to loan money to him because she had loaned money to others. In the Liability Decision, the IIROC Panel noted that during the IIROC Interview, when asked if he had known that he needed firm approval to have personal financial dealings with a client, O'Brien said, "I wasn't aware of it", and:

> Yes, if I had read all of that, in hindsight, and I had asked for clarification, I -- I have signed or whatever -- emailed once a year with them, that I wouldn't have. So am I aware of it at the time, I -- it's -- it's a tough answer because when I had dealings with [Ms. H], I thought because she had lent money to other peoples [sic], that, you know, it was okay. And only afterwards, was it determined that it was not.

[56] He also said during the IIROC Interview that Ms. H and her husband "had been in the business of loaning money to friends, family members and co-workers, and she was quite familiar with that" (Liability Decision at para. 172). Accordingly, he thought it would be acceptable if she loaned money to him too, and he did not feel that he had taken advantage of her because she was knowledgeable about making personal loans. With the benefit of hindsight, however, he acknowledged that Ms. H did not qualify as a "financial institution".

[57] The IIROC Panel rejected O'Brien's evidence that at the relevant time in 2017, he was unaware that he needed his firm's approval to borrow money from Ms. H, or that he honestly believed his firm would have permitted him to borrow the money "because she was as

knowledgeable and experienced as a financial institution" (Liability Decision at para. 278). They referred to several pieces of evidence that led to their conclusion.

[58] First, the IIROC Panel noted that in addition to other courses, O'Brien took the CPH examination in order to qualify to become a Registered Representative. He admitted that he was required to know the CPH standards, and that the CPH course teaches that a registrant should not have personal financial dealings with clients. He also signed an annual RBC Securities employee questionnaire or attestation in March 2017, in which he acknowledged that, "[a]s an IIROC licensed representative, I have read and been provided access to the . . . Conduct and Practices Handbook . . . for Securities Industry Professionals, including any updates". In the IIROC Interview, O'Brien admitted that he signed this attestation every year he was employed at RBC Securities.

[59] The Liability Decision (at para. 8) set out the following excerpt from the CPH, as it read at the relevant time:

> Personal financial dealings with clients: Subject to certain exceptions, registrants must avoid personal financial dealings with clients, including the lending of money to or the borrowing of money from them, . . . and sharing a financial interest in an account with the client. Dealer Members must have adequate policies and procedures and supervision in place to address personal financial dealings with clients.

[60] The IIROC Panel noted that at the Liability Hearing, O'Brien acknowledged that he was aware RBC Securities had a rules handbook and a policy dealing with conflicts of interest, and now understands that borrowing money from a client is a conflict of interest. The IIROC Panel also noted that one provision of the RBC Securities Compliance Manual stated that any real or perceived conflict of interest must be disclosed to RBC Securities management and compliance staff so the conflict could be managed.

[61] At the Liability Hearing, O'Brien was also referred to IIROC Rule 42, which states in part:

> 42.1. Responsibility to identify conflicts of interest
>
> (1) Each Dealer Member and, where applicable, Approved Person shall take reasonable steps to identify existing and potential material conflicts of interest between the interests of the Dealer Member or Approved Person and the interest of the client.
>
> (2) Where an Approved Person becomes aware of an existing or potential material conflict of interest, the existing or potential conflict shall be reported immediately to the Dealer Member.

[62] O'Brien testified that he did not have much familiarity with IIROC Rule 42. He also said that at the time he borrowed money from Ms. H, he did not consider it a conflict of interest, although he acknowledged that he should have asked for clarification. Similarly, he denied that he knew there was a rule prohibiting "conduct unbecoming".

[63] The IIROC Panel found that O'Brien's testimony on his understanding of the IIROC Rules pertaining to conflicts of interest and conduct unbecoming was "vague and unresponsive, as if he

was avoiding answering what was his present understanding of his obligations in order not to be taken to have had that same understanding in 2017" (Liability Decision at para. 281).

[64] In addition to his annual attestations that he had read the CPH, the IIROC Panel pointed to the evidence O'Brien gave at the RBC Interview to support their finding that O'Brien knew he could not borrow money from a client without his firm's permission. According to the interview transcript, he explained that Ms. H was aware of the storm damage to his home and that he had recently been in a car accident and was being treated for his injuries. She asked if she could help him by giving him money, and he reported that he said, "No, I'm not -- I can't -- [Ms. H], you're still a client. I cannot take or receive money from you." When she later repeated the offer, he said, ". . . again, I can't take anything from you", but eventually accepted on the condition that he would formalize the arrangement with an unsecured $100,000 promissory note that he drafted – or, as he described it, "we did it up as an official loan with an interest rate and everything else".

[65] As for O'Brien's contention that he had thought it was acceptable to borrow from Ms. H because she and her husband had loaned money to others many times in the past, the IIROC Panel interpreted this as an attempt to fit himself within the "financial institution" exception in IIROC Rule 43.2(3)(i)(a). They did not believe that Ms. H was a sophisticated businesswoman with experience making personal loans such that she could be considered a "financial institution", or that O'Brien ever thought this was the case.

[66] The IIROC Panel considered whether Ms. H was a vulnerable client, given her age, that she had no children and was estranged from her stepchildren, and that she had employed someone to help her with her daily activities until that person was fired in May 2017 (when O'Brien discovered that the employee had been putting personal expenses on Ms. H's credit card). The IIROC Panel found that at different times, O'Brien had given different responses about the employee and whether she had assisted Ms. H with her finances. During the RBC Interview, he described the employee as a "nanny", and said that she had helped Ms. H with bill payments and banking, but once she was fired, he took over that role. However, during his testimony at the Liability Hearing, he denied that the employee had ever been involved in Ms. H's banking. When confronted with his evidence from the RBC Interview in cross-examination, he denied that he said the "nanny" had been taking care of Ms. H's bill payments and banking, and said that the RBC investigator should have clarified the point.

[67] The IIROC Panel concluded that O'Brien's explanation at the Liability Hearing of the answers he gave at the RBC Interview was not credible. They rejected his argument that the questions asked at the RBC Interview were unclear or confusing, or that his motor vehicle accident injuries had affected his answers to the questions. They also rejected O'Brien's evidence that "he did not say or did not mean the answers" he gave in the RBC Interview (Liability Decision at para. 215). Instead, they concluded that it was more probable his answers at the RBC Interview accurately reflected what had occurred: the employee had helped Ms. H with her daily finances.

[68] The IIROC Panel also concluded that after Ms. H's employee was fired, it was probable that O'Brien "insinuated himself into Ms. H's home to sit beside her while she performed her banking on her iPad ostensibly to help her with her daily finances, but shortly thereafter to help him with his own financial concerns" (Liability Decision at para. 216). The revised version of events O'Brien presented at the Liability Hearing was untrue, which the IIROC Panel inferred was

"probably presented at the [Liability H]earing to bolster his evidence as to Ms. H's financial prowess as an experienced money lender" (Liability Decision at para. 218).

[69] Accordingly, the IIROC Panel found that O'Brien's statements to investigators that he did not know he was not permitted to borrow money from clients without his firm's permission "were untrue and were misrepresentations" (Liability Decision at para. 279). They found that his conduct indicated "he well knew that he was prohibited from borrowing [a] client's money without the approval of his firm" (Liability Decision at para. 285).

(c) Home Repairs

[70] The IIROC Panel noted that during both the RBC Interview and the IIROC Interview, O'Brien said that he borrowed money from Ms. H because his home had been damaged by a storm in May 2017, and he was expecting to incur uninsured repair costs of at least $100,000. Ms. H offered to help. His borrowing quickly exceeded that amount. O'Brien told the RBC investigator that he had recently advised Ms. H he had borrowed more than was reflected in the $100,000 promissory note, perhaps in the "150 range". When the investigator asked him why he had also recently said that he had only borrowed $90,000, he said that amount was "[j]ust for the renovations".

[71] Contrary to this evidence, the IIROC Panel found that the documentary exhibits from the Liability Hearing disclosed that as of the date of the RBC Interview, O'Brien had received repair quotes totalling less than $18,000, and had only paid approximately $8600 toward them. When the RBC investigator asked him why his credit balances were nevertheless so high, O'Brien said that he had recently incurred some "unfortunate" expenses, including costs relating to his possible separation from his wife, the cost of a trip to attend his grandmother's funeral, "and a few things, and so just some issues like that".

[72] When O'Brien was asked about the use of the loan proceeds during the IIROC Interview and whether he had incurred charges on his credit cards related to home repairs, he said that he had been using the money to free up capacity on his credit cards so that "these purchases" (presumably, the repair costs) could go through later – and that they had "since gone through", although the house was "still not fully fixed". The IIROC Panel noted his admission at the Liability Hearing that despite claiming he was clearing the balances for that purpose, his credit statements showed that he was running them right back up without paying for any home repairs. The IIROC Panel observed that nearly $70,000 in new charges were incurred between June and September 2017, none of which related to home repairs, but included travel expenses for trips to London, Paris, and Las Vegas.

[73] Ultimately, the IIROC Panel found that the evidence led at the Liability Hearing showed that between June 13 and September 4, 2017, O'Brien borrowed $77,437.84 from Ms. H, but did not make his first payment toward home repairs – a $3300 deposit for replacement windows – until September 5, 2017. O'Brien acknowledged at the Liability Hearing that his insurer had paid for some of the repairs after all, and he had personally contributed approximately $29,000.

[74] The IIROC Panel concluded that the explanation O'Brien gave to the RBC investigator for the reason his credit cards had such high balances that did not appear to relate to home repairs – i.e., "unfortunate expenses" – was deliberately misleading and did not accurately represent his

spending. Similarly, they found that his later explanation that he was paying off other charges so he could clear credit capacity for eventual home repairs was also deliberately misleading.

(d) Power of Attorney

[75] On September 25, 2017, Ms. H asked O'Brien to come to her home and help her by returning a call in response to a telephone message she had received from her bank regarding suspicious activity in her accounts. In her presence, he returned the call to RBC Fraud Detection (the **RBC Call**). The RBC Call was recorded and both the recording and a transcript of the recording were in evidence at the Liability Hearing.

[76] At the outset of the RBC Call, O'Brien indicated he was with Ms. H and was calling about suspected fraud in her account. He was asked, "Are you her power of attorney?" and he replied, "Yes." After providing Ms. H's client card number, he was asked again, "And, Michael, you said you are her power of attorney?" – to which he replied, "Correct." He was then told that he and Ms. H should attend Ms. H's local bank branch to discuss the matter further with a manager.

[77] During the IIROC Interview, O'Brien acknowledged that he did not hold a power of attorney for Ms. H. He was asked about the RBC Call with an open-ended question: ". . . tell us about the conversation. What did you guys talk about?" He responded:

> Well, they asked me specifically, Did I know of any fraudulent activity on [Ms. H's] account. And I said that, No, there was no fraudulent activity, that these were authorized payments at the time. And then the person asked me if I had had power of attorney, and I said no. They -- or they asked could we speak with the power of attorney, and at that time, I believed it to be [Ms. H's lawyer].

[78] IIROC Staff then asked again, "So you never told them that you were [Ms. H's] power of attorney?" and O'Brien answered, "I do not believe I did, no." He also said that during the RBC Call, he had identified himself as an RBC employee and as Ms. H's financial advisor.

[79] In the Liability Decision, the IIROC Panel pointed out that contrary to this evidence, the transcript of the RBC Call showed that O'Brien did not identify himself as an RBC employee or as Ms. H's financial advisor. Moreover, he was not asked if he knew of any fraudulent activity on Ms. H's account, did not tell RBC Fraud Detection the payments in question were authorized, did not deny that he held a power of attorney for Ms. H, and was not asked if they could speak with the attorney.

[80] The IIROC Panel observed that before hearing the recording of the RBC Call, O'Brien said that he did not believe he had told RBC Fraud Detection that he held a power of attorney for Ms. H. He explained that stating he did was an error, and he was not sure why he had said it as he did not recall having done so. He also testified that when he denied telling RBC Fraud Detection he held a power of attorney during the IIROC Interview, that response reflected his best recollection at the time.

[81] As set out in the Liability Decision, O'Brien argued that his statements about having a power of attorney were "an unintentional mistake", and that those statements did not mislead RBC Fraud Detection anyway "because he took steps the following day to withdraw the statement and straighten [everything] out . . ." Further, he argued that IIROC Staff had not been misled by his answers during the IIROC Interview – the investigator testified at the Liability Hearing that at the

time of the interview, he already knew what had occurred during the RBC Call and knew O'Brien was lying about what had been said.

[82] The IIROC Panel rejected O'Brien's contention that he had simply made a mistake during the RBC Call, and found that he had intentionally made two false statements about having a power of attorney. They considered the audio recording of the call and noted O'Brien's "congenial and confident" tone of voice, as well as his demeanour and testimony about the call at the Liability Hearing (Liability Decision at para. 219). They concluded that "[O'Brien's] testimony as to his prior knowledge of the reason for the call was internally inconsistent, he offered no reasonable explanation for making these false statements, and his contention that he had cured the effect of the false statements . . . conflicted with subsequent events" (Liability Decision at para. 221).

[83] The IIROC Panel also did not believe that until he heard the audio recording of the RBC Call, O'Brien did not recall having made those statements to RBC Fraud Detection, or, as mentioned, that his motor vehicle accident injuries caused or contributed to his having made the statements. In a letter dated November 17, 2017, RBC Securities terminated O'Brien's employment. The reasons given were that he had borrowed funds from a client, and that he had misrepresented that he held a power of attorney for that client, contrary to rules and regulations and RBC Securities' policies and procedures. The IIROC Panel did not believe that at the time of the IIROC Interview a few months later, he could have forgotten that RBC Securities had cited the power of attorney misrepresentation as a reason for his termination.

[84] Accordingly, the IIROC Panel concluded that it was:

> . . . probable that the reason [O'Brien] made the false statements on the phone call was because he knew that Ms. H was not capable herself of explaining to . . . RBC Fraud Detection on that day the many and various transactions from her bank account between June and September 2017, and he thought by attempting to clothe himself with the Power of Attorney authority, he could in that call put an end to the inquiries. (Liability Decision at para. 226)

[85] The IIROC Panel further concluded that O'Brien knew he had made a false statement during the call, but decided to deny it to anyone who asked. They did not believe that O'Brien corrected the statement in later communications, and did not believe that his memory of the RBC Call was faulty. When asked about the RBC Call at the IIROC Interview, O'Brien did not say he did not recall what he said – he "began with an unqualified, unconditional, clear and unequivocal statement that he did <u>not</u> say he was the client's Power of Attorney and included unsolicited additional false embellishments about the other contents of the phone call" (Liability Decision at para. 236; emphasis original).

[86] In the result, the IIROC Panel found that this particular of Contravention 2 had been proved by IIROC Staff: O'Brien's statement during the RBC Call that he held a power of attorney for Ms. H was deliberately false, as was his later denial during the IIROC Interview. The IIROC investigator's incredulity did not diminish O'Brien's intent to mislead. Based on their review of the transcripts, they found no unfairness in the conduct of either the RBC Interview or the IIROC Interview, or that the IIROC investigator's decision not to disclose his knowledge of the RBC Call to O'Brien affected the reliability or admissibility of the other evidence on the issue.

(e) Mother-in-Law's Line of Credit

[87] During the RBC Interview, when O'Brien was first asked about a TD line of credit, he identified it as "mine". When later asked about payments made to another individual, he acknowledged that that individual was his mother-in-law. He then said he would have to look up whether he had ever paid his mother-in-law's line of credit from Ms. H's account, but admitted that he did not have a TD line of credit of his own. As the IIROC Panel described it, "[a]fter several questions and indirect responses . . . , [O'Brien] eventually admitted that he made a payment to his mother-in-law's [TD] line of credit" from Ms. H's bank account (Liability Decision at para. 110).

[88] During the IIROC Interview, O'Brien was again asked about a payment to a "TD line". He said he believed the reference was to a line of credit, but did not volunteer that the line of credit belonged to his mother-in-law. The following exchange took place:

> Q MR. GODFREY: What would the amount of that line of credit be? Like, not what's drawn on it, but how much is the line of credit for?
>
> A Again, I would have to look at the statement, but I believe maybe $10,000.
>
> Q MR. CHOY: And what did you borrow $10,000 for?
>
> A No, I didn't borrow 10,000. It was 981.50.
>
> Q I mean the line of credit, the amount for the line of credit was --
>
> MR. GODFREY: That's the total amount he can draw on it.
>
> MR. CHOY: Oh, I see. I got it.
>
> A Yeah, I'm sorry. I think --
>
> Q MR. GODFREY: Is that correct, the full --
>
> A Yes.
>
> Q -- amount you can draw on it is --
>
> A Yeah, per --
>
> Q -- 10,000?
>
> A Yeah, it's a -- it's a reoccurring line.
>
> Q Right.
>
> A Sorry. I was confused.

[89] O'Brien's answers from the IIROC Interview were put to him in cross-examination at the Liability Hearing. He denied that he had been evasive on the subject, or that he was trying to give the impression that it was his line of credit because he knew it would look bad if he had used Ms. H's money for his mother-in-law's expenses.

[90] Based on the foregoing exchange during the IIROC Interview, the IIROC Panel did not accept that O'Brien had simply remained silent while the IIROC Staff investigator proceeded on a

misapprehension about the account holder's identity. They found that he had deliberately sought to induce IIROC Staff to believe the line of credit was his by phrasing his answers to their questions to imply that it was his. These answers, the IIROC Panel found, were both evasive and not forthcoming. Their finding was unaffected by the fact that the IIROC investigator already knew O'Brien had previously told the RBC investigator the line of credit was his mother-in-law's, or by the fact that O'Brien later produced documentation that disclosed its true owner.

(f) CRA Payment

[91] The final misrepresentation alleged in the Statement of Allegations was that O'Brien "was evasive and failed to adequately explain the circumstances surrounding the $24,000.00 payment [Ms. H] made to the CRA on his behalf". During the RBC Interview, he was asked if Ms. H had ever made a payment to his CRA account from her bank account. He admitted that she had, but said that it had been done in error, and he had requested that the error be corrected the very next day. CRA told him it would take 16 weeks to do so, but the money would be returned to the account from which it had been paid. O'Brien told the RBC investigator that he did not owe and had never owed any money to the CRA. When asked why he gave Ms. H his CRA details to add to her list of online banking payees, O'Brien said he was "not 100 percent certain".

[92] The same subject was canvassed during the IIROC Interview. O'Brien again explained that it was an error, and again stated that he was "not 100 percent certain" why his CRA account information had been added to Ms. H's bank account. However, he also said that the error was not caught until the end of September 2017, and that was when Ms. H personally asked the CRA to reverse it, without his help. He speculated that the CRA had returned the money to Ms. H's account in October 2017, but said he would have to ask Ms. H to be sure.

[93] The IIROC Panel noted that O'Brien gave conflicting evidence at the Liability Hearing as to the date he first discovered the erroneous payment, the date the CRA was asked to correct the error, and when and where the funds were returned. Although he said at the IIROC Interview that he thought the CRA had already returned the money to Ms. H's account, at the Liability Hearing, he admitted that he did not know if that had occurred. He also testified both that the CRA reversed the payment in July 2017 and that the error was not discovered until September 2017.

[94] The IIROC Panel found that in each of the RBC Interview, the IIROC Interview, and the Liability Hearing, O'Brien gave inconsistent responses about the discovery of the error and the repayment. They also found he was evasive and failed to adequately explain why his CRA account had been added to Ms. H's banking profile in the first place. Based on O'Brien's "continuous revisions of his various and internally inconsistent answers", the IIROC Panel concluded that "he was a witness who is careless with the truth and unreliable" (Liability Decision at para. 274).

[95] The IIROC Panel was ultimately satisfied from CRA documents that the $24,000 payment had been inadvertent, but found that IIROC Staff had proved that O'Brien misrepresented the surrounding circumstances.

(g) IIROC Panel's Conclusions on Contravention 2

[96] Given their findings on O'Brien's credibility and the other evidence led at the Liability Hearing, the IIROC Panel found that he intentionally gave misleading information to both RBC and IIROC investigators. They concluded that he had made misleading representations and failed to act in a candid and forthcoming manner during the investigations as alleged. Moreover, they

held that the conduct was not excused by the knowledge the IIROC investigator had that certain statements were misleading at the time of the IIROC Interview, as it was not necessary for IIROC Staff to prove that anyone was actually misled.

2. Arguments of the Parties

(a) O'Brien

[97] In his written Appeal submissions, O'Brien took the position that he fully cooperated with IIROC Staff during their investigation, answered all their questions, and provided copies of all documents requested. With respect to the specific misrepresentations alleged, he argued:

- *Knowledge that firm approval was required before borrowing money from a client*: His obligations under IIROC Rules applied whether or not he was aware of them, so it is irrelevant whether he knew he needed his firm's approval to borrow money from a client. Since he admitted to this misconduct under Contravention 1, he should not be punished for it a second time under Contravention 2.

- *Whether O'Brien borrowed the money for home repairs*: While his home repairs ended up costing less than originally anticipated, that does not mean that his original reason for borrowing money from Ms. H was false.

- *Power of attorney*: He was simply mistaken when he told RBC Fraud Detection that he held a power of attorney for Ms. H, and when he told IIROC Staff that he did not believe he had made that statement to RBC Fraud Detection. He argued that being wrong or negligent did not necessarily warrant discipline and that, pursuant to the decision in *Re Zosiak & Brighten* (2012 IIROC 59 at paras. 59-60, citing *Re Octagon Capital Corp.* [2007] IDACD No. 16), the IIROC Panel had to find "aggravated negligence", or that he had "acted unethically or for an improper purpose", "had a conflict of interest", had a "dishonest motive", or engaged in "blameworthy conduct". Because the truth could have been easily discovered, he contended that he could not have intended to deceive anyone.

- *Payment to mother-in-law's line of credit*: O'Brien argued that the IIROC Panel seemed to have been more concerned with what he did not say as opposed to what he did say. Accordingly, he addressed this alleged misrepresentation under his ground of appeal that the IIROC Panel erred in law in finding that he had a positive obligation to disclose information even in the absence of direct questions – discussed later in these reasons.

- *Circumstances surrounding CRA payment*: He had speculated on the reason Ms. H was able to transfer money to his CRA account, and then explained his understanding of what happened when the funds were reversed from his account. It was unreasonable for the IIROC Panel to find him liable for not being able to explain something he does not know, and there was no other evidence as to what happened other than the CRA's verification that the transfer had been made in error and that the funds were removed from his account.

[98] Overall, O'Brien submitted that since he had had no intention to deceive, the necessary *mens rea* to find fault was absent. He pointed to the expert neuropsychologist's evidence to support this, arguing that Dr. Pachet had opined that sequelae from the brain injury O'Brien sustained in the motor vehicle accident "would likely have caused . . . mental disturbance" at the relevant time, which in turn "could explain his otherwise inexplicable statements".

(b) IIROC Staff

[99] IIROC Staff argued that the IIROC Panel's findings of fact on whether O'Brien made the misrepresentations alleged were based on their careful consideration of all of the evidence before them. They properly drew inferences based on the evidence, and arrived at reasonable conclusions. IIROC Staff further argued that these findings should be afforded significant deference, particularly where they engaged the IIROC Panel's assessment of O'Brien's credibility.

[100] Addressing the specific misrepresentations set out in the Statement of Allegations, IIROC Staff submitted:

- *Knowledge that firm approval was required before borrowing money from a client*: Although O'Brien argued on appeal that his knowledge of IIROC Rules was irrelevant, his knowledge was clearly relevant to the issue of whether he was making false representations to IIROC investigators by claiming he did not know that he should not borrow money from his clients.

- *Whether O'Brien borrowed the money for home repairs*: The IIROC Panel's finding that O'Brien misrepresented the original purpose of the loans – significant home repairs, not covered by insurance – was based on the evidence of his use of loan proceeds, and their rejection of his explanation for why his spending did not reflect that purpose. IIROC Staff also pointed out that O'Brien did not lead any independent evidence at the Liability Hearing to substantiate his claims about repair estimates or his insurer's changing position on coverage.

- *Power of attorney*: With detailed reference to the relevant evidence, the IIROC Panel clearly explained their reasons for not believing O'Brien's explanation that he had merely made errors or had lapses in memory when he told RBC Fraud Detection that he held a power of attorney for Ms. H, and when he told IIROC Staff that he had not made that claim. Their reasons included the minimal weight they gave to Dr. Pachet's opinions (the reasons for which they also explained), and the falsehoods and contradictions within O'Brien's evidence (which they specifically outlined).

- *Payment to mother-in-law's line of credit*: The IIROC Panel pointed to specific portions of the RBC Interview and the IIROC Interview, and concluded based on the context and the answers O'Brien gave to the questions he was asked that he had purposely attempted to induce investigators to believe the line of credit was his.

- *Circumstances surrounding CRA payment*: The IIROC Panel's finding that O'Brien was evasive and failed to adequately explain the circumstances surrounding the payment made from Ms. H's bank account to his CRA account was based on his

> conflicting evidence on the issue and, in particular, their rejection of his vague evidence as to how his CRA account information ended up on her account's list of payees. Given this evidence, the IIROC Panel's conclusion was reasonable.

3. Analysis and Conclusion – Misleading Representations

Did the IIROC Panel err in finding that O'Brien made misleading representations during the investigations?

[101] As discussed above, questions of fact, inferences drawn from the facts, and credibility assessments should be afforded significant deference on appeal unless they are unreasonable (*Yee* at para. 35). As long as the decision falls within a range of possible, acceptable outcomes (*Dunsmuir* at para. 47), we would not interfere – even if we might have made a different decision had we heard the matter in the first instance.

[102] Based on our close reading of the Liability Decision and our review of the evidence led at the Liability Hearing, we concluded that (with one exception in respect of one particular, as discussed below) the IIROC Panel did not err in finding that O'Brien made misleading representations during the investigations as alleged in Contravention 2. Their conclusions were reasonable, and reasonably founded on their assessment of the evidence before them. They weighed the evidence, specifically referenced that on which they based their conclusions and inferences, and explained why they accepted certain assertions but rejected others. We did not discern any material evidence overlooked by the IIROC Panel, and O'Brien did not direct us to any – for the most part, his arguments on Appeal on this issue were the same as the arguments he made at the Liability Hearing.

[103] The IIROC Panel's findings were largely based on their conclusion that O'Brien lacked credibility. The Liability Decision referenced the test for assessing credibility set out in *Faryna v. Chorney* ([1951] BCJ No. 152 at para. 11 (CA)), which is also frequently cited in ASC decisions:

> The credibility of interested witness[es,] particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. Only thus can a Court satisfactorily appraise the testimony of quick-minded, experienced and confident witnesses, and those shrewd persons adept in the half-lie and of long and successful experience in combining skilful exaggeration with partial suppression of the truth.

[104] The IIROC Panel noted that in assessing credibility, they also considered certain factors set out in *Re Northern Securities Inc.* (2012 IIROC 63 at para. 7), which they paraphrased as follows (Liability Decision at para. 201):

> . . . in assessing the credibility of a witness's evidence it [is] relevant to consider what he would hope to gain from the testimony and the outcome of the case, his appearance of sincerity and truthfulness, whether he was candid, frank and responsive to questions asked or evasive and hesitant, inconsistencies in his testimony, whether he had previously given a statement that is inconsistent with his testimony at trial and whether his personal demeanour carried the conviction of truth.

[105] It is apparent that the IIROC Panel applied these principles in making their determinations concerning O'Brien's credibility. They commented throughout the Liability Decision on these aspects of his testimony given at the RBC Interview, the IIROC Interview, and the Liability Hearing, as well as his demeanour during the Liability Hearing. We saw no error in their approach or conclusions, and remained mindful that the IIROC Panel had the "overwhelming advantage" (*Housen* at para. 24) of having seen and heard O'Brien directly. Although O'Brien's oral and written Appeal submissions reasserted many of the explanations and excuses he had given to the investigators and to the IIROC Panel for his alleged misrepresentations, we found no basis on which to conclude that the IIROC Panel erred in rejecting them.

[106] As to each of the specific misrepresentations alleged, the IIROC Panel explained why they did not accept O'Brien's explanations or believe his version of events – again, with detailed reference to the evidence. For example, on his use of the loan funds, the IIROC Panel cited the documentary evidence of O'Brien's spending, and explained why they rejected the reasons he gave for spending such a small proportion of the total loan on home repairs. On the power of attorney issue, the IIROC Panel pointed to the evidence that undermined O'Brien's contention that he had simply made a series of mistakes or had forgotten what he said previously: his tone and demeanour during the RBC Call, the RBC Securities termination letter, and his inconsistent testimony.

[107] The IIROC Panel gave cogent and intelligible reasons for rejecting each of O'Brien's defences to the misrepresentation allegations, including his reliance on the impact of his motor vehicle accident injuries. While O'Brien had argued that he could not be found liable for the misrepresentations alleged because he had not had the intent to mislead anyone – an argument he repeated on this Appeal – the IIROC Panel set out the evidence of his conduct that led them to conclude otherwise. O'Brien argued on Appeal that according to *Zosiak*, to find that he had made misleading representations, the IIROC Panel had to find "aggravated negligence", or that he had "acted unethically or for an improper purpose", "had a conflict of interest", had a "dishonest motive", or engaged in "blameworthy conduct". Virtually all of those findings were made in the Liability Decision, and the IIROC Panel explained why they made them.

[108] The IIROC Panel's conclusion on the question of O'Brien's intent was summarized near the end of the Liability Decision: "[w]e are satisfied on an objective test of all the evidence that when [O'Brien] made assertions that were misleading or omitted information that misled the investigators, he was intending to do so" (at para. 288). In the next sentence, they connected that conclusion to their rejection of O'Brien's defence that no one was misled by his representations, either because they were corrected later or because they were not believed in the first place: "[i]n arriving at that finding, we conclude that it was not necessary to prove whether or not the RBC investigator, the IIROC investigator or anyone at . . . RBC Fraud Detection were in fact misled" (at para. 288).

[109] There are obvious policy reasons for this position. It is essential to a regulator's ability to fulfill its mandate to protect the public (and, for that matter, a bank's ability to protect itself and its clients from fraudulent transactions) that it be able to investigate suspected misconduct under its jurisdiction thoroughly and efficiently. It cannot do so if its efforts to discover the facts are obstructed by lies and half-truths, even temporarily. At best, the result is delay. At worst, the result is an investigation sent in the wrong direction.

[110] In *Re Tassone* (2017 IIROC 53), a penalty decision, the respondent similarly argued that the misleading information he initially provided to investigators was corrected within a few weeks, and that this should be seen as a mitigating factor. The hearing panel stated (at para. 14):

> There can only be one reason for deliberately lying to IIROC investigators: to mislead or distract them. If the deception is successful, the result is to "delay, frustrate, harm or impede" the investigation. If this happens, that is obviously an aggravating consideration. It cannot be the case, however, that if the lying is unsuccessful and does not produce the intended result this is a mitigating factor, for that would be to reward the liar for his or her failure. This makes no sense to us.

[111] We agree. At the time he made certain of his misleading representations, O'Brien was not aware that the IIROC investigator had learned the truth independently. The investigator's knowledge did not affect O'Brien's intent to mislead. Even where O'Brien corrected an earlier misrepresentation, that did not negate his initial intent to mislead – as the IIROC Panel put it in the Liability Decision (at para. 308), "his subsequent documentation or reversals did nothing to extinguish the misconduct we have found". We perceive no error here: those required to cooperate with regulatory investigations conducted in the public interest must understand that there is no room for dishonesty, even if it is temporary.

[112] However, as mentioned, we are of the view that the IIROC Panel erred in respect of one Contravention 2 particular: the allegation that "[d]espite working in the industry since 2002, [O'Brien] claim[ed] he was not aware he needed his firm's approval to borrow money from his client" (emphasis added). This is related to Contravention 1, where O'Brien admitted the allegation that he "engaged in personal financial dealings with a client, without the knowledge or approval of his firm, contrary to Dealer Member Rule 43" (emphasis added).

[113] When asked at the IIROC Interview, "what I'm trying to figure out is were you aware, whether it be either an IIROC [R]ule or a policy with the firm, whether or not if you were going to have personal financial dealings with your clients, you needed your firm to approve that?", O'Brien answered, "I wasn't aware of it". However, we saw no evidence or legal authority in the Record or referenced on this Appeal that Rule 43 includes any requirement to obtain firm approval. The sole exception we could discern for which firm approval allows an employee or Approved Person of a Dealer Member to borrow from a client is in IIROC Rule 43.2(3)(ii)(b) and (c), where the client is a "Related Person as defined by the *Income Tax Act* (Canada)". There was no suggestion anywhere in the material before us that Ms. H was a Related Person.

[114] At the Appeal Hearing, we asked counsel for both parties why O'Brien was alleged to have made a misrepresentation in saying that he did not know he needed his firm's permission to borrow from a client when IIROC Rule 43 does not appear to include that requirement. IIROC Staff were only able to direct us to the exceptions at IIROC Rule 43.2(3). They acknowledged that IIROC Rule 43 does not stipulate a requirement to obtain a firm's permission, but noted that it is mentioned in other cases.

[115] We reviewed all of the cases referred to the IIROC Panel and to us by the parties, and noted that there are several IIROC decisions finding registrants liable for engaging in personal financial dealings with a client without their firms' knowledge or consent, or approving settlement agreements in which the registrants admitted to borrowing money from a client without their firms'

knowledge or consent: e.g., *Re Turenne* (2015 IIROC 38), *Re Azancot* (2014 IIROC 44), *Re Little* ([2007] IDACD No. 24), *Re Gebert* (2016 IIROC 44), and *Re Dass* (2009 IIROC 22).

[116] However, each of these cases was brought under former IIROC Rule 29.1, which was (as discussed in the next section of these reasons) a broad rule governing business conduct. Rule 43 is a narrower rule specifically prohibiting personal financial dealings with clients. Apart from *Re Michetti* (2017 IIROC 22), the more recent IIROC cases brought under Rule 43 do not mention knowledge or consent of the registrant's firm: e.g., *Re Bridgman* (2018 IIROC 14), *Re Rudensky* (2018 IIROC 28 and 2018 IIROC 38), and *Re Coccimiglio* (2019 IIROC 27). The contravention in *Michetti* – a decision approving a settlement agreement – was brought under Rule 43 and was phrased similarly to Contravention 1 in this case.

[117] Apart from references in some decisions to the policies and requirements of the registrant's firm, there is no discussion in any of these cases of the basis for a requirement to obtain firm permission as an exception from the prohibition on personal financial dealings with clients.

[118] In further response to our queries on this subject at the Appeal Hearing, IIROC Staff noted that the prohibition against borrowing from clients is rooted in the conflicts of interest rule (see also *Rudensky* (ONSEC) at para. 112 and *Dass* at para. 30). Perhaps this explains why O'Brien was questioned about his knowledge of IIROC Rule 42 during the Liability Hearing, because that rule requires Approved Persons to report existing or potential conflicts of interest to their firms so they can be addressed and managed.

[119] However, there was no allegation that O'Brien contravened IIROC Rule 42. Even though IIROC Rule 42 contemplates that certain conflicts of interest can be managed, this does not implicitly authorize a firm to permit a Registered Representative to engage in conduct that is prohibited without qualification under another rule – such as client borrowing under IIROC Rule 43 where the client is neither a financial institution nor a "Related Person" under the *Income Tax Act*.

[120] As for sources outside the IIROC Rules, none cited to us or contained in the Record set out any requirement to obtain firm approval or suggest that firm approval could cure a breach of IIROC Rule 43. This includes the portion of the CPH quoted by the IIROC Panel and the excerpt from the RBC Securities Compliance Manual in evidence. Even O'Brien's testimony about his initial reaction to Ms. H's offer of a loan – that he could not "take anything" from her because she was a client – is not evidence or the proper basis for an inference that he knew of a requirement *for firm permission*. It is at most evidence or the basis for an inference that he knew he was prohibited from taking money or borrowing from her.

[121] If the allegation had been that O'Brien made a misleading representation by claiming that despite working in the industry since 2002, he was not aware he was not permitted to have personal financial dealings with a client, we would have found the IIROC Panel's conclusion on the point reasonable and supported by the evidence. However, based on the material before us and the fact that even IIROC Staff counsel could not identify a firm permission requirement, we did not see how O'Brien could reasonably be found liable for saying he was not aware of it. If that obligation exists, the Record disclosed no evidence of it.

[122] Because it was unsupported by law or evidence and was therefore unreasonable, we set aside the IIROC Panel's finding that O'Brien made a misrepresentation by falsely claiming he was not aware he needed his firm's approval to borrow money from his client. In all other respects, we found no errors and would not disturb the IIROC Panel's findings that O'Brien made the misrepresentations alleged. Their reasons were transparent and intelligible, and their conclusions were both reasonable and reasonably founded on the evidence such that they were well within the range of possible, acceptable outcomes given the facts and law.

[123] It bears mentioning that our construction of IIROC Rule 43 does not affect O'Brien's admission to Contravention 1. We considered the phrase "without the knowledge or approval of his firm" to be superfluous to his core admission that he engaged in personal financial dealings with Ms. H contrary to Rule 43.

B. Consolidated Rule 1400 – Interpretation and Application

[124] O'Brien argued that even if he made the misrepresentations alleged, this was not a breach of Consolidated Rule 1400. His second ground of appeal was that the IIROC Panel erred in law in their interpretation and application of Consolidated Rule 1400.

1. IIROC Panel's Findings

[125] Consolidated Rule 1400 was set out in full at paragraph 7 of the Liability Decision. It is titled "Standards of Conduct", and subrule 1401(1) states that it "sets out the general standards of conduct that apply to Regulated Persons". Subrule 1402 states:

> (1) A Regulated Person
>
> (i) in the transaction of business, must observe high standards of ethics and conduct and must act openly and fairly and in accordance with just and equitable principles of trade, and
>
> (ii) must not engage in any business conduct that is unbecoming or detrimental to the public interest.
>
> (2) Without limiting the generality of the foregoing, any business conduct that:
>
> (i) is negligent;
>
> (ii) fails to comply with a legal, regulatory, contractual, or other obligation, including the rules, requirements, and policies of a Regulated Person;
>
> (iii) displays an unreasonable departure from standards that are expected to be observed by a Regulated Person; or
>
> (iv) is likely to diminish investor confidence in the integrity of securities, commodities or derivatives markets
>
> may be conduct that contravenes one or more of the standards set forth in subsection 1402(1).

[126] In the Liability Decision, the IIROC Panel explained that the predecessor to Consolidated Rule 1400 was IIROC Rule 29.1, entitled "Business Conduct". IIROC Rule 29.1 stated in part:

> 29.1 Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

[127] Given the similarities in the language of the two rules, the IIROC Panel noted that several prior decisions interpreting IIROC Rule 29.1 had been cited to them as guidance in interpreting Consolidated Rule 1400.

[128] *Northern Securities* (ONSEC) and *Re Gareau* ([2005] IDACD No. 25) were cited for the proposition that even if a regulated profession does not have a definition of "misconduct" – or, by extension, "business conduct", or "conduct unbecoming" – a disciplinary tribunal can apply its own expertise in the profession to determine whether an individual has breached the profession's objective standards (see *Northern Securities* (ONSEC) at paras. 256-257).

[129] *Re Deeb* (2013 IIROC 8) was cited for the proposition that each case is fact-dependent, and that to find a contravention of IIROC Rule 29.1, "there must be some element of wrongdoing or falling below the standard of conduct reasonably accepted in the securities industry in order to maintain the public trust in the members who handle the public's money" (*Deeb* at para. 99). In *Deeb*, the hearing panel found that whether the respondent knew or thought the conduct was unbecoming was irrelevant, as the issue of whether conduct is unbecoming pursuant to IIROC Rule 29.1 must "be determined on an objective basis by each panel on a case[-]by[-]case basis, having regard to principles of interpretation and prior case law precedent" (*Deeb* at para. 94).

[130] *Re Pariak-Lukic* (2014 IIROC 1) was cited for the proposition that members of the securities industry must be "'held to a very high standard of financial probity'" because they must be trusted to handle other people's money. Therefore, they must be seen to be trustworthy, and any conduct that "'could even appear to cast doubt upon that probity . . . could be detrimental to the public interest and constitute conduct unbecoming'" (*Pariak-Lukic* at para. 92, citing *Little* at para. 42; see also *Deeb* at para. 93). As summarized in the Liability Decision (at para. 197), the *Pariak-Lukic* hearing panel found that (at para. 89):

> . . . even though the respondent honestly believed she was not obligated to disclose her recommendations to her employer or seek its approval, as a registrant, she had an obligation to know and understand the policies and procedures of her employer and the obligations and duties imposed on registered representatives by the by-laws and the rules of the applicable regulatory organizations. Her ignorance or misunderstanding of the rules . . . was no excuse.

[131] In reliance on the direction in *Northern Securities* (ONSEC) and *Gareau*, the IIROC Panel applied their own judgment in deciding whether O'Brien's conduct fell within Consolidated Rule 1400. They concluded that the rule has a broad application, and "provides for a standard that is able to encompass misconduct not directly captured by the Rules" (Liability Decision at para. 294). Thus, they held that the objective test to be applied was, "'what would a reasonably informed person with knowledge of the investment industry think of the propriety of the conduct in question?'" (Liability Decision at para. 296).

[132] Applying this test in the context of the wording of Consolidated Rule 1400, the IIROC Panel found that O'Brien "was engaged in business conduct as an IIROC registrant and . . . failed to act openly and fairly and in accordance with just and equitable principles of trade" by making false statements to RBC Fraud Detection during the RBC Call, "failed to observe high standards of ethics and conduct" in the transaction of business when answering questions posed during the RBC Interview and the IIROC Interview, and engaged in business conduct and practice that was "conduct unbecoming as well as conduct that is detrimental to the public interest" by "making false statements, evading answering questions pertaining to such issues, and not being forthcoming" (Liability Decision at para. 299; see also para. 309).

[133] The IIROC Panel concluded that even if O'Brien was not aware of the applicable rules and policies governing conflicts of interest, his ignorance was no excuse because "[i]t reflects no reasonable understanding of his duties and obligations and of the expectations of members of the investing public" (Liability Decision at para. 305). O'Brien breached the applicable standards of conduct by borrowing money from a client, and continued to breach his obligations in his subsequent dealings with RBC Fraud Detection and IIROC Staff. The IIROC Panel therefore concluded that Contravention 2 had been proved on a balance of probabilities with clear, convincing and cogent evidence.

2. Arguments of the Parties

(a) O'Brien

[134] O'Brien argued that the focus of Consolidated Rule 1400 is on "the transaction of business" and "business conduct", which does not include a regulated person's conduct during an investigation or conduct that is otherwise outside "the transaction of business" within the ordinary meaning of the phrase. If there had been an intention to include conduct during an investigation, the IIROC Rules would have been drafted to that effect.

[135] O'Brien contrasted Consolidated Rule 1400 with s. 221.1 of the Act, which expressly prohibits making misleading or untrue statements to ASC staff. He also contrasted Consolidated Rule 1400 with the rule it replaced, IIROC Rule 29.1. In his submission, since IIROC Rule 29.1 included language broad enough to capture conduct unrelated to "business" or "the transaction of business" and Consolidated Rule 1400 does not, the latter omission must have been deliberate. He therefore disputed the applicability of any cases that interpreted IIROC Rule 29.1, at least as they concern a respondent's conduct during an investigation.

[136] O'Brien argued that he did not contravene Consolidated Rule 1400 because conduct during an investigative interview is not "business conduct" or conduct related to "the transaction of business". In his submission, Consolidated Rule 1400 only captures conduct involving the advisor and client relationship, as there is a completely separate section of the IIROC Rules that regulates enforcement proceedings and cooperation during investigations. IIROC Staff could have alleged a breach of one of those rules, but did not. Thus, Consolidated Rule 1400 has no application to Contravention 2. Moreover, the high, quasi-fiduciary standard of conduct required by Consolidated Rule 1400 for the advisor-client relationship should not be applied to an advisor's conduct during an investigation, as it would impede the advisor's ability to defend allegations of misconduct.

[137] In the alternative, O'Brien argued that even if Consolidated Rule 1400 applies to certain of the conduct at issue in Contravention 2, it does not apply to his dealings with anyone other than

IIROC – including RBC Fraud Detection. Those were "a step further removed from any connection to the scope of IIROC's investigatory powers". Allowing Consolidated Rule 1400 to have broader effect, he submitted, "would have the effect of appointing IIROC as a watchdog for regulated persons in respect of how they conduct their personal lives".

(b) IIROC Staff

[138] IIROC Staff argued that because Consolidated Rule 1400 replaced former IIROC Rule 29.1, the IIROC Panel was correct to have relied on past decisions when interpreting Consolidated Rule 1400. IIROC Staff submitted that both rules are business conduct rules, and both include the same key language imposing obligations on Registered Representatives to observe high standards of ethics and conduct in the transaction of business, and not to engage in any business conduct that is detrimental to the public interest. They also pointed out that IIROC Notice 16-0122 (issued with respect to the implementation of the Consolidated Rules in September 2016) states that while Consolidated Rule 1400 is limited to business conduct, so was IIROC Rule 29.1.

[139] IIROC Staff argued that based on the cases that considered IIROC Rule 29.1, the IIROC Panel correctly distilled the following principles:

> a. Rule 1400 has broad application and provides a standard that can encompass misconduct not directly captured by the rules;
> b. In the absence of a definition of "business conduct" or "conduct unbecoming" the panel is required to judge O'Brien's conduct by the objective standards of the profession, even when those standards are unwritten; [and]
> c. The test to apply is what would a reasonably informed person with knowledge of the investment industry think of the propriety of the conduct in question.

[140] IIROC Staff contended that O'Brien did not take issue with these findings on appeal, and that they are in keeping with the ABCA's decision in *Lysons v. Alberta Land Surveyors' Association* (2017 ABCA 7). In that decision, the ABCA held that "tribunals are expected to apply their expertise and their knowledge of the profession in deciding what conduct is acceptable", as "[n]ot all professional standards arise from statute; some are set by the practices of the profession" (at para. 6).

[141] IIROC Staff also argued that O'Brien's interpretation of Consolidated Rule 1400 – which they contended was an argument that all actions not directly related to the buying and selling of securities are excluded – is too narrow and unsupported by case law. The decisions the IIROC Panel relied on and the *Lysons* decision "all point to an expansive interpretation of business conduct". A narrow construction would undermine IIROC's ability to set professional standards for its members. O'Brien's interviews and interactions with RBC Fraud Detection and IIROC Staff pertained to his financial dealings with a client, so they were directly related to business conduct and business standards. Only strictly personal conduct that in no way relates to the profession – such as an impaired driving charge – is excluded and would not form the basis for professional disciplinary action.

[142] Addressing O'Brien's argument about the organization of IIROC's business conduct rules in section 1400 and the enforcement proceedings rules in section 8000, IIROC Staff submitted that the old rules were similarly organized: IIROC Rule 29.1 proscribed conduct unbecoming while IIROC Rule 19 pertained to cooperation during investigations. Allegations that a respondent misled IIROC Staff were still brought under IIROC Rule 29.1, whereas allegations that a

respondent failed to cooperate at all – such as by failing to attend for a scheduled investigative interview – were brought under IIROC Rule 19. Further, IIROC Staff argued that it is not appropriate to distinguish between the two sections because both serve IIROC's mandate to protect the investing public. O'Brien's conduct during the investigation by misleading investigators undermined its ability to do so, and in particular, its ability to protect Ms. H.

3. Analysis and Conclusion – Consolidated Rule 1400

Did the IIROC Panel err in their interpretation and application of Consolidated Rule 1400?

[143] In our view, the IIROC Panel did not err in law in their interpretation and application of Consolidated Rule 1400. Even though the rule governs business conduct and conduct in the transaction of business, the IIROC Panel properly construed those terms broadly. As participants in an industry that is highly regulated in order to protect the public interest, Registered Representatives' interactions with their dealer members' compliance personnel, their regulator, and counterparty financial institutions are an integral part of their ordinary business conduct. It defies common sense to believe that in the daily performance of their duties, Registered Representatives have a reasonable expectation that their conduct will be subject to dramatically differing standards depending on who they communicate with.

[144] In any event, O'Brien's business conduct concerning Ms. H and his business relationship with her was directly and inextricably connected to the investigations by RBC Fraud Detection and IIROC Staff. It was not strictly personal conduct, as might have been the case if O'Brien had instead borrowed money from a friend or a relative who was not a client of RBC Securities.

[145] We also found no error in the IIROC Panel's conclusion that in language and purpose, Consolidated Rule 1400 is sufficiently similar to prior IIROC Rule 29.1 that cases construing the former rule can inform an analysis of the superseding rule. The two IIROC Rules impose substantially the same obligations, as is apparent when they are compared side-by-side (emphasis added):

Consolidated Rule 1400 **Standards of Conduct** (subrule 1402)	**IIROC Rule 29.1** **Business Conduct**
(1) A Regulated Person	Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member
(i) **in the transaction of business**, must observe **high standards of ethics and conduct** and must act openly and fairly and in accordance with just and equitable principles of trade, and	(i) shall observe **high standards of ethics and conduct in the transaction of their business**,
(ii) must not engage in any **business conduct that is unbecoming or detrimental to the public interest**.	(ii) shall not engage in any **business conduct** or practice **which is unbecoming or detrimental to the public interest**, and
(2) Without limiting the generality of the foregoing, any business conduct that:	(iii) shall be of such character and business repute and have such experience and training

(i) is negligent; (ii) fails to comply with a legal, regulatory, contractual, or other obligation, including the rules, requirements, and policies of a Regulated Person; (iii) displays an unreasonable departure from standards that are expected to be observed by a Regulated Person; or (iv) is likely to diminish investor confidence in the integrity of securities, commodities or derivatives markets may be conduct that contravenes one or more of the standards set forth in subsection 1402(1).	as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

[146] Arguably, Consolidated Rule 1400 more clearly captures O'Brien's misconduct than former Rule 29.1: he was not candid and truthful during the investigations into his business relationship with Ms. H, and therefore "fail[ed] to comply with a legal, regulatory, contractual, or other obligation, including the rules, requirements, and policies of a Regulated Person". Given the importance of public confidence and trust in the industry, O'Brien also "display[ed] an unreasonable departure from standards that are expected to be observed" by making the subject misrepresentations. As the IIROC Panel concluded, such conduct "is likely to diminish investor confidence in the integrity of securities, commodities or derivatives markets".

[147] The prescribed conduct standards are broad by design, and they are intended to be capable of application by a regulator familiar with their objective. We therefore found no error in the IIROC Panel's construction of undefined terms, including "business conduct", "high standards of ethics and conduct", and conduct "unbecoming or detrimental to the public interest" in Consolidated Rule 1400. They were entitled to use their expertise to determine whether O'Brien's conduct fell outside of the expected standards of the profession: *Northern Securities* (ONSEC) at paras. 256-257. As observed by the Ontario Court of Appeal in *Re Matthews and Board of Directors of Physiotherapy* ((1987), 61 OR (2d) 475, cited in *Northern Securities* (ONSEC at para. 256)):

> The absence of such a definition requires the board to judge the appellant by the objective standards of his own profession. Although these standards are unwritten, they are nonetheless real and it is within the jurisdiction of the appellant's professional brethren who constitute the board to determine in the particular case if he has fallen below that standard.

[148] This is consistent with the ABCA's approach in *Lysons* (as discussed above) and in *Yee* (at para. 23):

> The ultimate objective of professional regulation is protection of the public. The presumption behind self-regulation is that no one has a greater stake in the integrity of the profession than the members of the profession. No one is better positioned than the profession to judge when conduct is so unacceptable as to amount to professional misconduct that is contrary to the public interest.

[149] It is true that Consolidated Rule 8100 (subrule 8104) includes the requirement that "[a] person must cooperate with Enforcement Staff who are conducting an investigation" and that IIROC Staff could have alleged that O'Brien contravened this rule by making the

misrepresentations alleged, at least those made during the IIROC investigation. However, this does not mean that IIROC Staff could not instead prosecute the impugned conduct under Consolidated Rule 1400. It is not unusual under securities laws that the same market misconduct can constitute a contravention of various provisions of the Act, and enforcement staff have prosecutorial discretion on how to proceed.

[150] A rule similar to Consolidated Rule 8100 – IIROC Rule 19 – was in effect at the same time as IIROC Rule 29.1, yet allegations of registrant misconduct in the course of an investigation were brought under IIROC Rule 29.1. A number of past IIROC decisions were cited both to us and to the IIROC Panel wherein Registered Representatives were found to have contravened IIROC Rule 29.1 for dishonesty during investigations conducted by their firms or by IIROC: e.g., *Dass* (IIROC), *Tassone, Re Rudensky* (2018 IIROC 38), and *Turenne*. In *Tassone* the panel found that the respondent had lied to IIROC, and stated (at para. 10):

> Mr. Tassone's obligation to refrain from lying in the circumstances did not derive from some abstract moral principle. It was a violation of Dealer Member Rule 29.1, which he was bound to observe, and which required him, among other things, to 'observe high standards of ethics and conduct' and to refrain from engaging in any business conduct or practice 'which is unbecoming or detrimental to the public interest'.

[151] *Tassone* also cited *Re Li* (2016 IIROC 34) and *Re Rail* (2011 IIROC 64), in which "it was held that lying during the course of an IIROC investigation was a breach of the obligation 'to observe high standards of ethics and conduct' within the meaning of Dealer Member Rule 29.1" (*Tassone* at para. 12).

[152] In conclusion, it is our view that Consolidated Rule 1400 is broad enough to include misconduct of the nature found in the Liability Decision. The IIROC Panel did not err or act unreasonably in interpreting the rule or formulating its test ("What would a reasonably informed person with knowledge of the investment industry think of the propriety of the conduct in question?"). Nor did they err or act unreasonably in applying the test to find that O'Brien contravened the rule as alleged in Contravention 2.

[153] We dismiss this ground of appeal.

C. Obligation to Disclose

[154] O'Brien's last ground of appeal from the Liability Decision was that the IIROC Panel erred in law by finding that he "was under a positive obligation to disclose information even in the absence of direct questions from IIROC Enforcement Staff". As mentioned, he made this argument primarily in relation to the allegation that he was evasive and not forthcoming with investigators about the payment from Ms. H's bank account to his mother-in-law's TD line of credit.

1. IIROC Panel's Findings

[155] At the Liability Hearing, O'Brien made arguments similar to those he made on the Appeal as to whether he was required to volunteer information that was not the subject of a direct question during either the RBC Interview or the IIROC Interview. The IIROC Panel rejected his contention that he was at liberty not to disclose information on a subject raised in an interview if he was not specifically asked about it. As discussed previously, they did not accept that he had simply stood silent as the investigators asked about the line of credit, but instead found that he had deliberately

sought to induce the investigators to proceed on the erroneous understanding that it belonged to him.

[156] The IIROC Panel also rejected the notion that O'Brien's conduct should be considered "accidental, innocent or mistaken errors or trivial matters" as might be the case if one forgot or misstated a few minor details (Liability Decision at para. 291).

[157] Finally, the IIROC Panel held that there is a basic expectation in the industry that a Registered Representative "will provide true and complete answers to queries from their Dealer Members and from IIROC" (Liability Decision at para. 301). This is necessary, they explained, because dealer members have an obligation to respond to existing or potential conflicts of interest, and IIROC has the obligation to investigate breaches of its rules and other regulatory requirements in the interest of maintaining the integrity of the investment industry and the public trust.

2. Arguments of the Parties

(a) O'Brien

[158] In support of his argument that he did not have an obligation to volunteer information to investigators in the absence of specific questions, O'Brien cited the right against self-incrimination. Though a witness can be compelled to answer questions, the obligation should be narrowly circumscribed, and it does not include an obligation to volunteer information beyond the answers to the questions asked. In support, O'Brien referred to cases decided by the Immigration and Refugee Board of Canada, the ABCA in a civil dispute, and the British Columbia Workers' Compensation Appeal Tribunal, each of which discussed the issue in a different context.

[159] O'Brien maintained that he did what was required of him by attending the IIROC Interview, answering the questions asked under oath, and providing additional requested information in writing. Requiring him to "make assumptions as to what [IIROC] Staff wanted to know" or to "volunteer information without being asked would open the floodgates of absurdity", as it would allow IIROC Staff to conduct an interview by simply asking the subject if there is anything IIROC should know, and then disciplining the subject later if he or she omitted anything.

(b) IIROC Staff

[160] As mentioned, IIROC Staff disagreed that the IIROC Panel ever found that O'Brien was under a positive obligation to disclose information in the absence of direct questioning. Rather, their view was that the IIROC Panel made a finding of fact that he intentionally misled investigators, including by deliberately omitting information. They pointed to two past decisions in which they said IIROC registrants had been found to have breached IIROC Rule 29.1 by misleading IIROC investigators, including by withholding information: *Tassone* at para. 11 (citing *Re Nuttall*, 2012 BCSECCOM 97 at para. 10) and *Rudensky* (ONSEC at paras. 134-137). In *Rudensky*, the OSC found that the IIROC hearing panel below did not err in holding that "Mr. Rudensky's response had to fully and completely reflect the facts in order not to be false and misleading" (at para. 137).

[161] IIROC Staff further relied on s. 221.1 of the Act in support of their argument that the securities regulatory environment requires participants to be fully candid, as "[m]isleading by omission is no better than making false statements". Section 221.1 provides that a statement is misleading if it "does not state a fact that is required to be stated or that is necessary to make the statement not misleading".

[162] IIROC Staff also argued that there is no right to remain silent in IIROC enforcement proceedings. O'Brien contractually agreed to IIROC's jurisdiction when he became a registrant. In this regard, they cited *Dass* (BCCA at para. 5), in which the British Columbia Court of Appeal confirmed that IIROC's predecessor, the Investment Dealers Association of Canada, was a voluntary organization, its relationship with its members was contractual, and its members agreed to be bound by its by-laws, rules, and regulations. In further support, IIROC Staff cited the following passage from the Supreme Court of Canada decision in *British Columbia Securities Commission v. Branch* ([1995] 2 SCR 3 at p. 48):

> . . . it must be remembered that participants engage in this licensed activity of their own volition and ultimately for their own profit. In return for permitting persons to obtain the fruits of participation in this industry, society requires that market participants also undertake certain corresponding obligations in order to safeguard the public welfare and trust.

[163] As such, O'Brien's reliance on a right to silence as expressed in decisions involving immigration and refugee matters and civil disputes was not apt in this context.

3. Analysis and Conclusion – Obligation to Disclose

Did the IIROC Panel err in finding that O'Brien was under a positive obligation to disclose information in the absence of direct questions?

[164] We agree with both the IIROC Panel and IIROC Staff that the regulatory context is critical to the analysis of this question. It is trite that a credible securities industry, operating within a fair and efficient capital market, depends on public trust. In turn, that trust depends in large part on the trustworthiness of those who make the industry their profession. Honesty and candor are required, not only between issuers and investors, or between registrants and their clients, but also between registrants and those responsible for their regulation and oversight. Timely and efficient investigations of registrants are obviously more likely to occur when the subjects are forthright (see, e.g., *Nuttall* at para. 10), but even more important is the protection of market integrity and investor confidence. Confidence is encouraged when the public can be assured that the registrants who serve them have integrity and comply with their regulatory responsibilities.

[165] We also agree with IIROC Staff that the cases relied upon by O'Brien are not apposite here. They arose from entirely different contexts that are not comparable to the highly-regulated securities industry, and the parties who declined to disclose information to the authorities in those cases were not in an analogous position to securities registrants who "engage in this licenced activity of their own volition and ultimately for their own profit" (*Branch*, *supra*).

[166] In any event, the IIROC Panel did not find that O'Brien simply remained silent knowing that investigators were not asking him the "right" questions – they found that he engaged in active deception with the answers that he did give, in order to induce the investigators to believe that the line of credit was his and just another part of the loan from Ms. H. In our view, there was ample evidence to support that finding.

[167] We were unpersuaded by O'Brien's argument that requiring complete answers, even if they go beyond the strict confines of the question asked, could lead to an absurd result. There was no suggestion in this case that O'Brien was asked general, open-ended questions of the nature

postulated in his argument. He was asked specific questions about the line of credit, and the IIROC Panel found that he gave very specific answers to create the impression it was his.

[168] In the result, we would not disturb the IIROC Panel's decision on this issue. We found no error in their conclusion, which was reasonable based on the facts and law.

VII. APPEAL FROM PENALTY DECISION

[169] We turn now to the Penalty Decision.

A. IIROC Panel's Findings

[170] Beginning with Contravention 1, the IIROC Panel noted O'Brien's admission, but also that it remained a contested issue during both the Liability Hearing and the Penalty Hearing whether Ms. H was a vulnerable client at the time of the loan. They found that any mitigating effect the admission had on penalty was diminished, because O'Brien continued to litigate the issue of Ms. H's vulnerability after the panel found that she "was vulnerable to his actions in securing loans from her" (Penalty Decision at para. 17).

[171] O'Brien submitted an affidavit from his employer at the Penalty Hearing that expressed the affiant's opinion from speaking to Ms. H that she was not vulnerable and did not feel that she had been taken advantage of. The IIROC Panel gave a number of reasons for according the affidavit little weight. They noted that O'Brien's "continuing insistence on the narrative that his client was not vulnerable through to the [P]enalty [H]earing [was] further indication that he still does not recognize or feel any remorse for the nature and extent of his misconduct" (Penalty Decision at para. 29).

[172] The IIROC Panel summarized O'Brien's submissions on mitigating factors that should be considered in assessing a penalty for Contravention 1 (Penalty Decision at para. 22), including that:

- the misconduct occurred during a limited period of time;
- the misconduct affected only one client, and she ultimately suffered no financial loss;
- there was no evidence Ms. H considered herself exploited by O'Brien;
- O'Brien received no financial or other benefit as a result of his misconduct; and
- the proceedings against O'Brien were not the result of a client complaint.

[173] The IIROC Panel found these arguments unpersuasive. Based on their review of the evidence, they rejected the idea that O'Brien's conduct was a "one-time momentary error of judgment" (Penalty Decision at para. 24). They described him as having "[given] in to the temptation" of Ms. H's offer of money after initially declining it because he knew borrowing from her was contrary to his professional duties (Penalty Decision at para. 25). They concluded that he only stopped borrowing when RBC Fraud Detection began its inquiries, and said that they suspected he "may have had even longer term plans in mind for Ms. H's money" (Penalty Decision at para. 27).

[174] The IIROC Panel also rejected the argument that the misconduct affected only one client. They looked beyond Contravention 1 and found that O'Brien's false statement to RBC Fraud

Detection was a separate act of misconduct that affected both that entity and his employer, RBC Securities, who had been required to take action to protect their integrity and that of "the entire investment industry" (Penalty Decision at para. 31). O'Brien's misconduct was compounded when he pursued a "continued strategy to cover up and minimize the extent of his misconduct" (Penalty Decision at para. 32).

[175] The IIROC Panel did not explicitly find that Ms. H had suffered financial loss as a result of O'Brien's conduct, but they remarked that when they asked at the Penalty Hearing whether she might have incurred legal fees in responding to inquiries related to O'Brien, O'Brien's counsel replied that Ms. H had been repaid somewhat more than the amount borrowed. From this, the IIROC Panel concluded that O'Brien's "entire focus [was] solely upon the minimizing of his wrongful conduct, without any consideration of whether his client sustained additional financial or emotional expense in being involved for around two years in investigations and his disciplinary proceedings" (Penalty Decision at para. 35).

[176] The IIROC Panel was similarly unconvinced that O'Brien received no benefit as a result of his misconduct. They suggested that he had at least avoided financing charges by using Ms. H's funds to clear his credit facilities.

[177] As for the absence of a client complaint, the IIROC Panel found that because Ms. H declined to report her employee's theft to the police, O'Brien "must have known she was not the type of person to initiate or press complaints to authorities when persons she entrusted mishandled her finances" – another fact that the panel thought should have alerted him to her vulnerability (Penalty Decision at para. 23).

[178] Overall, the IIROC Panel found O'Brien's submissions on Contravention 1 indicative of his inclination to continue to shift blame away from himself and his inability to consider how his misconduct negatively affected others, including other members of his profession.

[179] With respect to Contravention 2, the IIROC Panel similarly found that O'Brien's submissions reflected his inability to accept responsibility or feel remorse for his actions or their consequences. Despite the seriousness of O'Brien's deceptive behaviour, he denied that his actions would have affected market integrity or the reputation of the marketplace, and that the parties involved – RBC Securities and IIROC – suffered any loss or were misled by him.

[180] The Penalty Decision indicated that IIROC Staff argued the appropriate penalty was a permanent ban on registration, a fine of $60,000 and costs of $20,000. In response, O'Brien's counsel argued that the appropriate penalty "for conduct that caused no actual harm to anyone" was a suspension of six to 12 months, a fine of $25,000 to $40,000, and costs of $10,000 (Penalty Decision at para. 44). IIROC Staff submitted an uncontested draft bill of costs in the amount of $114,361.

[181] The parties agreed that the IIROC Panel should consider the IIROC Sanction Guidelines (the **Guidelines**) before determining the appropriate penalty. The Penalty Decision comprehensively summarized the pertinent sections.

[182] According to the IIROC Panel's review of the Guidelines, the purpose of sanctioning in regulatory proceedings is to protect the public interest by restraining future conduct that may harm

the capital markets. An appropriate sanction should have both specific and general deterrent effect. In addition, the sanction should be proportionate to both the circumstances of the particular case, and to the sanctions imposed on respondents in similar cases. Sanctions should be reduced or increased in severity depending upon the relevant mitigating and aggravating factors. The IIROC Panel also noted that the Guidelines contain guidance on the circumstances that may warrant a suspension or a permanent ban, a fine, or both.

[183] The IIROC Panel reviewed the authorities submitted by both parties. Although they found none on all fours with this case, they noted that both parties had cited *Turenne*. In that case, the panel ordered a two-year suspension and a $20,000 fine (plus $10,000 in costs) for improper borrowing and making false statements to IIROC Staff.

[184] The IIROC Panel stated that they considered O'Brien's conduct more egregious than that of the respondent in *Turenne* because O'Brien's involved more than one serious contravention and a pattern of wilful and reckless conduct. O'Brien's misconduct also caused harm to investors, the integrity of the marketplace and the securities industry as a whole. They again noted O'Brien's insistence that Ms. H was not vulnerable, his continued attempts to minimize his misconduct, and his apparent lack of remorse.

[185] Before arriving at the appropriate orders, the IIROC Panel set out the mitigating factors they had accepted, and the aggravating factors they considered. The mitigating factors cited were:

- O'Brien's admission to Contravention 1;
- his repayment of the loan in full;
- his lack of a prior disciplinary record;
- the termination of his employment at RBC Securities; and
- the fact he had been under enhanced supervision at Raymond James for six months.

[186] The aggravating factors cited were:

- O'Brien's continued denial that Ms. H was vulnerable;
- his failure to "recognize, accept and demonstrate any understanding" of his obligations to cooperate with investigations and respond to requests for information "in a timely and straightforward manner" (Penalty Decision at para. 60);
- his failure to recognize the impact of his misconduct on market integrity and the reputation of the market; and
- his "refusal to recognize that RBC . . . Securities and IIROC could and did expend resources and costs as a result of his conduct" (Penalty Decision at para. 61).

[187] In the result, the IIROC Panel imposed the two-year Suspension and $100,000 Fine as the global sanctions that were necessary for specific and general deterrence, and to make clear to O'Brien the seriousness of his misconduct and the harm it caused to the industry, the affected market institutions, and the public trust. They also decided to impose additional remedial sanctions – the requirement that O'Brien rewrite and pass the CPH examination and be subject to 18 months' strict supervision after the Suspension – as further measures of specific and general deterrence.

[188] Finally, the IIROC Panel found that an order for $20,000 in costs was appropriate in light of the submitted bill of costs, and their view that the costs were incurred "as a result of [O'Brien's] misguided strategy of covering up his initial misconduct" (Penalty Decision at para. 66).

B. Reasonable Apprehension of Bias

[189] As set out in his Amended Notice of Appeal, O'Brien's first ground of appeal from the Penalty Decision was that the IIROC Panel denied his right to natural justice by demonstrating bias.

1. Arguments of the Parties

(a) O'Brien

[190] Although framed as a ground of appeal from only the Penalty Decision, O'Brien submitted that during both the Liability Hearing and the Penalty Hearing, the IIROC Panel made various comments and rulings that were indicative of a reasonable apprehension of bias.

[191] From the Liability Hearing, the impugned comments and rulings included:

- comments made during a discussion between the chair of the IIROC Panel and O'Brien's counsel about marking certain documents for identification versus marking them as full exhibits, which O'Brien argued denied him certainty as to whether the documents would be admitted as evidence;

- two interruptions by the IIROC Panel of the cross-examination of the IIROC investigator by O'Brien's counsel, which O'Brien argued assisted the witness;

- a comment made by the chair of the IIROC Panel about the additional weight that would be ascribed to O'Brien's testimony if he left the hearing room during Dr. Pachet's testimony; and

- the IIROC Panel allowing IIROC Staff to cross-examine O'Brien about an IIROC Rule not cited in the NOH or the Statement of Allegations despite O'Brien's counsel's objection, which evidence the IIROC Panel relied on in the Liability Decision.

[192] From the Penalty Hearing, the impugned comments included an exchange between the chair of the IIROC Panel and O'Brien's counsel about whether Ms. H incurred any legal fees in relation to the proceedings. He argued this was indicative of the IIROC Panel seeking a basis on which to find that Ms. H had been harmed, which they referenced in the Penalty Decision despite there being no evidence on the point.

[193] In O'Brien's submission, the foregoing comments "strongly suggest that the [IIROC] Panel was predisposed towards a particular result and/or had already pre-determined certain aspects of the proceedings".

(b) IIROC Staff

[194] IIROC Staff cited the decision of the Supreme Court of Canada in *Wewaykum Indian Band v. Canada* (2003 SCC 45 at para. 60) for the test for finding a reasonable apprehension of bias.

Wewaykum and several decisions of the ABCA have held that the threshold for establishing a reasonable apprehension of bias is high, because of the presumption that adjudicators are impartial.

[195] IIROC Staff argued that the portions of the hearing transcripts cited by O'Brien were only short excerpts of longer exchanges that, when reviewed in their entirety, demonstrated that the IIROC Panel was not exhibiting bias – they were "making reasoned rulings" that were within their purview to make, and O'Brien's disagreement with them did not establish bias.

[196] As to O'Brien's complaint that the chair of the IIROC Panel initially declined to mark certain documents from IIROC's disclosure that he wished to enter into evidence as exhibits and instead marked them as exhibits for identification (before ultimately marking them as full exhibits), IIROC Staff took the position that the Record shows that the chair fairly considered the arguments on both sides of the issue before ruling. IIROC Staff submitted that the following general principles apply: (i) without agreement of the parties, documents are not automatically marked as exhibits; (ii) aides used in cross-examination are not automatically marked as exhibits; (iii) full interview transcripts "are not routinely admitted as exhibits"; and (iv) the fact that a document was part of IIROC's disclosure does not necessarily make it admissible.

[197] Responding to O'Brien's complaint that the chair of the IIROC Panel permitted IIROC Staff to cross-examine O'Brien on his knowledge of an IIROC Rule not specifically at issue in the NOH and Statement of Allegations, IIROC Staff argued that the transcript shows the chair understood the relevance of the questions and allowed them to be asked without specific reference to the IIROC Rule, but only after hearing submissions on O'Brien's objection from both parties. This decision was within her power and not evidence of bias, as was her decision to ask O'Brien to move on from a line of cross-examination that she found had devolved into a "back and forth" where the witness was not going to change his testimony despite repetition of the question.

[198] Finally, IIROC Staff argued that the members of the IIROC Panel were entitled to ask their own questions about the evidence. Their questions about whether Ms. H incurred legal fees as a result of her involvement with O'Brien and the conclusions they drew were reasonable.

2. Analysis and Conclusion – Reasonable Apprehension of Bias

Did the IIROC Panel deny O'Brien's right to natural justice by demonstrating bias?

[199] *Northern Securities* (ONSEC at para. 322) referred to authority for the proposition that O'Brien should have raised his concerns about bias before the IIROC Panel when they arose. The OSC cited the following from the Federal Court of Appeal in *Kozak v. Canada (Minister of Citizenship and Immigration)* (2006 FCA 124 at para. 66):

> Parties are not normally able to complain of a breach of the duty of procedural fairness by an administrative tribunal if they did not raise it at the earliest reasonable moment. A party cannot wait until it has lost before crying foul.

[200] Because O'Brien did not raise the issue with the IIROC Panel and there is therefore no decision for us to review on appeal, we applied the well-known test cited by the parties, which is succinctly set out by the ABCA in *Rainbow Beach Developments Inc. v. Parkland (County)* (2013 ABCA 205 at para. 12; see also *Yee* at para. 29):

> The test for reasonable apprehension of bias on the part of a tribunal is whether a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking the matter through, would have a reasonable apprehension of bias . . . [citations omitted].

[201] The burden of proof on a balance of probabilities is on the party alleging a reasonable apprehension of bias. The threshold is a high one because of the strong presumption that adjudicators are impartial: *Wewaykum* (at paras. 59, 76); *Bizon v. Bizon* (2014 ABCA 174 at para. 62). As stated in *Boardwalk Reit LLP v. City of Edmonton* (2008 ABCA 176 at para. 29), "[t]o have any legal effect, an apprehension of bias must be reasonable, and the grounds must be serious, and substantial. Real likelihood or probability is necessary, not a mere suspicion" (citations omitted; see also *R. v Lupyrypa* (2011 ABCA 324 at para. 6)). Moreover, "[t]he test of appearance to a reasonable neutral observer does not include the very sensitive or scrupulous conscience" (*Boardwalk, ibid.*; citations omitted).

[202] Mindful of the foregoing, we carefully reviewed the Liability Hearing and Penalty Hearing transcripts and considered the impugned passages cited by O'Brien in their full context. We found nothing inappropriate in the IIROC Panel's comments and rulings, much less anything that would meet the test for reasonable apprehension of bias.

[203] Generally, we agree with IIROC Staff's submissions that the impugned passages reflect nothing more than the IIROC Panel ruling on objections, controlling their proceedings, and asking questions or making comments for the purpose of clarification. They were entitled to take these measures to ensure orderly conduct of the hearings. Disagreement with some of the rulings does not make them evidence of bias, and not all of IIROC Staff's objections were sustained – for example, their objection to the affidavit O'Brien tendered as evidence in the Penalty Hearing was overruled.

[204] With respect to O'Brien's complaint that the IIROC Panel initially declined to mark certain documents as full exhibits at the Liability Hearing before eventually doing so, we do not find this uncommon or see how it either impeded O'Brien's ability to examine the witness or prejudiced his case in any way. After an objection from IIROC Staff, the issue was discussed at length on the record, and the IIROC Panel ruled on the objection. This is not evidence of bias. The same is true of the IIROC Panel's ruling on O'Brien's objection to IIROC Staff's questions about IIROC Rule 42. While the chair overruled the objection, she nonetheless asked IIROC Staff to rephrase their questions and not refer to the rule.

[205] As to O'Brien's complaint that the IIROC Panel chair interrupted the cross-examination of the IIROC Staff investigator, in our view, she was entitled to step in and move the proceedings along. Counsel asked the witness the same question at least three times, and upon receiving the same answer each time, insisted that the witness's answer was wrong. Though the chair intervened after the third time, we note that she allowed O'Brien's counsel to rephrase and continue the same line of inquiry before moving on.

[206] The chair's other interruption was simply to clarify the full context of an excerpt from the IIROC Interview transcript that counsel was putting to the witness – as she followed along, she repeated a line from the transcript that counsel had himself just read aloud, but then omitted when

questioning the witness about the excerpt. As she explained at the time, "I just wanted to get it clear".

[207] On the issue of the IIROC Panel chair's suggestion that O'Brien's evidence would have more weight if he left the room during his expert medical witness's testimony, we note that it was counsel's idea to have his client leave the room if it would make the panel more comfortable. The full exchange makes it clear that the chair's intent was not in any way to prejudice O'Brien's case, and that O'Brien's counsel agreed with her approach:

> MR. THOM: . . . Does the panel want Mr. O'Brien to be excluded when Dr. Pachet is giving evidence? I don't care and Mr. Godfrey doesn't care. If the panel would feel more comfortable having Mr. O'Brien not hear the expert evidence, because the whole plan originally was that he was going to be done before that.
>
> THE CHAIR: Yes, if you comfortable [sic] --
>
> MR. THOM: I am.
>
> THE CHAIR: If you are comfortable --
>
> MR. THOM: The defence will consent.
>
> THE CHAIR: -- I am going to suggest to you that it will give his testimony slightly more weight because he is not going to be unconsciously influenced in any way whatsoever because it removes the appearance of possible influence.
>
> MR. THOM: And that's why I wanted to call him first. We will exclude Mr. O'Brien voluntarily. For the record, defence consents to that.
>
> THE CHAIR: Since you're consenting, it makes it so much easier. It's a subtle point, but I think it's for his benefit. It's going to go in his favour.
>
> MR. THOM: And I thought so, too.

[208] It is difficult to see how this exchange could be construed as evidence of bias, or raise a reasonable apprehension of bias.

[209] Finally, with respect to O'Brien's complaint that during the Penalty Hearing, the IIROC Panel chair raised the possibility that Ms. H may have incurred legal fees as a result of his misconduct, we did not interpret her question as evidence that she was reaching for a basis on which to find that Ms. H was harmed. The chair asked the question, and the ensuing discussion with O'Brien's counsel resulted in agreement that there was no evidence on the point. Again, we do not see this as evidence of bias.

[210] In summary, we found that whether they were considered separately or as a whole, the impugned questions and comments made by the IIROC Panel would not cause "a reasonable person, viewing the matter realistically and practically, and after having obtained the necessary information and thinking the matter through, [to] have a reasonable apprehension of bias". We dismiss this ground of appeal.

C. Consideration of Irrelevant Factors

[211] O'Brien's next ground of appeal from the Penalty Decision was that the IIROC Panel denied his right to natural justice by considering irrelevant factors in arriving at the penalty imposed.

1. Arguments of the Parties

(a) O'Brien

[212] O'Brien argued that the IIROC Panel improperly imposed enhanced sanctions because he disputed some of the allegations and maintained that position in his penalty submissions when arguing mitigation. He pointed to portions of the Penalty Decision that criticized certain elements of his defence as indicative of a lack of remorse and a focus on minimizing his misconduct while shifting the blame away from himself. This, he argued, was contrary to the law as set out in several case authorities, including the ABCA's decision in *Walton v. Alberta (Securities Commission)* (2014 ABCA 273). In that decision (discussed further below), the ABCA found that the hearing panel had erred in characterizing it as aggravating that the appellants neither admitted guilt nor expressed remorse, because the appellants were entitled to contest the allegations and make arguments in their favour (at para. 155).

[213] In O'Brien's view, the IIROC Panel misunderstood these principles and erred in considering these aspects of his defence as factors in determining the penalties.

[214] O'Brien also argued at the Appeal Hearing that the IIROC Panel improperly focused on a matter for which there was no evidence – whether Ms. H incurred legal fees as a result of his conduct.

(b) IIROC Staff

[215] IIROC Staff disagreed that the IIROC Panel improperly found certain factors to be aggravating when it determined sanction. They noted that the IIROC Panel considered the two contraventions separately, and clearly considered O'Brien's admission of Contravention 1 as a mitigating factor. However, the IIROC Panel also correctly found that O'Brien's "continued insistence on arguing over the vulnerability of Ms. H" negated the mitigating effect of his admission and was instead an aggravating factor. IIROC Staff pointed to two other decisions in which the adjudicators highlighted a respondent's lack of remorse despite having pled guilty: *Turenne* and *Law Society of Upper Canada v. Armstrong* (2011 ONLSAP 1).

[216] IIROC Staff further argued that for Contravention 1, it was appropriate for the IIROC Panel to have taken into account O'Brien's failure to take full responsibility and appreciate the consequences of his actions, including their effect on Ms. H.

[217] For Contravention 2, IIROC Staff relied on several more cases for the proposition that while the absence of a guilty plea is not aggravating, an absence of remorse, failure to accept responsibility, and maintaining innocence may be considered legitimate sanctioning factors because they suggest a lack of personal insight – and therefore an increased need for specific deterrence. Those cases include *Quaidoo v. Edmonton (Police Service)* (2015 ABCA 381), *R. v. B.A.* (2008 ONCA 556) and an ASC decision, *Re Hagerty* (2014 ABASC 348).

[218] In short, it was IIROC Staff's submission that the IIROC Panel properly considered the factors that it should have, and "did not punish O'Brien for exercising his option for a contested hearing".

2. Analysis and Conclusion – Consideration of Irrelevant Factors

Did the IIROC Panel deny O'Brien's right to natural justice by considering irrelevant factors in arriving at the penalty imposed?

[219] In arriving at our findings on this issue, we were guided by *Walton*, which dealt in part with the proper consideration of and weight to be given to the sanctioning factors applied by an ASC panel in a case of insider trading and tipping. The factors typically considered in ASC sanction decisions are very similar to those in the Guidelines. From the Record and the Penalty Decision, it does not appear that *Walton* was brought to the IIROC Panel's attention.

[220] In considering the appellants' argument that the sanctions imposed on them were demonstrably unfit in the circumstances, the ABCA in *Walton* noted (at para. 152) that following the Supreme Court of Canada decision in *Re Cartaway Resources Corp.* (2004 SCC 26 at para. 64), a "sanctions order must be reviewed 'globally'. No one factor should be considered in isolation, although unreasonable weight given to one factor may render the sanction unreasonable." The ABCA observed that the ASC hearing panel had been "concerned that none of the appellants 'admitted they committed the serious[. . .] misconduct found or indicated they are repentant for that misconduct'" (at para. 155). Although the ABCA appears to have recognized these as legitimate considerations in assessing penalties in certain circumstances, they stated (at para. 155):

> Care must be taken not to overemphasize this factor. It is not an aggravating factor that the respondent fails to "plead guilty" or fails to express remorse. It is unreasonable to suggest that these appellants will, despite the findings of culpability, nevertheless think that there is nothing wrong with what they did. The appellants were entitled to mount a defence before the [ASC], and they were entitled to make arguments in their favour. Just because they were unsuccessful does not mean that they fail to understand the seriousness of what happened. The ordeal and expense of the hearing, together with the publicity that accompanied it, themselves have a deterrent effect.

[221] We are of the view that in the Penalty Decision, the IIROC Panel erred by overemphasizing O'Brien's perceived lack of remorse and failure to recognize the seriousness and impact of his misconduct, which they associated with his continued denial that Ms. H was a vulnerable client or that she had been harmed by his actions. The law is clear that while a respondent's admissions in this regard might properly be considered mitigating, failure to make such admissions is not aggravating. The IIROC Panel treated these aspects of O'Brien's defence and position on sanction as aggravating. Judging by the numerous references to these facts in the Penalty Decision (see, for example, paras. 17, 23, 29, 57, 60), the IIROC Panel also considered them significant.

[222] Unquestionably, there was evidence led at the Liability Hearing from which the IIROC Panel could infer that Ms. H was vulnerable, but O'Brien's defence from the outset of the case was to refute this and deny that she had been harmed. In his Response to Statement of Allegations, O'Brien denied that Ms. H had had anyone assisting her with her daily finances prior to May 2017, and stressed that she had been repaid in full, with interest. He was entitled to take this position, and to maintain it through the penalty phase and on appeal. Having referred to the Guidelines in his written submissions on penalty, he was no doubt aware that the degree of his client's vulnerability and harm suffered are sanctioning factors. There was nothing improper about making arguments in his defence that would minimize or negate their relevance so that the resulting sanctions might be more lenient.

[223] In our respectful view, the IIROC Panel erred when they found that, "the mitigating effect of [O'Brien's] admission to Contravention 1 prior to the [Liability H]earing [was] diminished by his decision to continue to litigate the issue of Ms. H's vulnerability at both the [Liability and Penalty H]earings" (Penalty Decision at para. 13). It was not inconsistent for O'Brien to admit the contravention by admitting that he engaged in personal financial dealings with a client contrary to IIROC Rule 43 while also maintaining that Ms. H was neither vulnerable nor harmed. As acknowledged by the IIROC Panel, he contravened IIROC Rule 43 regardless of whether she was vulnerable.

[224] The same may be said of the IIROC Panel's criticism of O'Brien's defence of Contravention 2, which they also considered aggravating and indicative of a lack of remorse, and a failure to accept responsibility and appreciate the consequences of his actions (see, for example, the Penalty Decision at paras. 41, 58, 60). From the outset of the case through the Appeal, O'Brien was steadfast in denying that he misled investigators or failed to cooperate. That was his right, and as stated by the ABCA in *Walton*, it is not an aggravating factor. The Ontario Court of Appeal came to the same conclusion in *College of Physicians and Surgeons (Ontario) v. Gillen* ([1993], 13 OR (3d) 385), cited in O'Brien's written submissions. At para. 6 of their reasons, the court stated:

> Any doctor is entitled to deny allegations made against him or her and to require the College to establish such allegations. If he or she chooses to admit the allegations, that may be taken into account in appropriate circumstances in setting a penalty, but in no circumstances should denial serve to increase what would otherwise be an appropriate penalty.

[225] IIROC Staff quoted from *Armstrong* (at para. 27) in relation to Contravention 1: "[l]ack of remorse is a consideration when misconduct is not disputed, as it demonstrates lack of insight into the consequences of the misconduct". However, the full paragraph referenced is also relevant to Contravention 2:

> The majority of the hearing panel also placed undue weight on the factors of remorse and rehabilitation, given that Mr. Armstrong honestly believed that he was innocent. Lack of remorse is a consideration when misconduct is not disputed, as it demonstrates lack of insight into the consequences of the misconduct. However, it cannot be an aggravating factor when a person honestly believes in his or her innocence. In *R. v. Nash (A.W.)* (2009), 340 N.B.R. (2d) 320 (N.B.C.A.) (leave to appeal to Supreme Court of Canada denied), Justice Robertson stated:
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> > . . . In my respectful view, the trial judge erred. She erred in principle by holding that the failure to express remorse, following a conviction for second degree murder, is an 'aggravating factor' that supports a decision to extend the period of parole ineligibility. In fairness to the trial judge, the jurisprudence of this Court pertaining to remorse is ambiguous. It fails to draw a clear distinction between cases where the offender is found guilty of second degree murder and those where the offender has pled guilty. For purposes of deciding this appeal, it is important to recognize that an offender's continuing right to silence based on a plea of not guilty does not evaporate once the jury returns a verdict of guilty. That is why the failure to express remorse cannot be considered an aggravating factor, save in exceptional circumstances.

[226] The *Armstrong* appeal panel also stated (at para. 28), "Mr. Armstrong never disputed his conviction, but he believes he has been wrongfully convicted and has paid a price for his belief. On these facts, the undue emphasis upon lack of remorse and rehabilitation is unreasonable."

[227] We are also of the view that the IIROC Panel erred in taking into account a fact that was not in evidence in assessing the appropriate penalty, namely that Ms. H may have suffered financial harm because she may have incurred legal fees. As mentioned, it was agreed that this was speculation only – yet the IIROC Panel referred to it in the Penalty Decision, while also stating that it was not a deciding factor in their decision on penalty. Any speculative facts should have been disregarded entirely.

[228] We therefore found that the IIROC Panel erred in law and principle by considering irrelevant factors in deciding the penalties.

D. Penalties Not Sought by IIROC Staff

[229] O'Brien also appealed on the ground that the IIROC Panel denied his right to natural justice by imposing disciplinary measures not sought by IIROC Staff without giving him an opportunity to be heard.

1. Arguments of the Parties

(a) O'Brien

[230] Specifically, O'Brien's Amended Notice of Appeal referred to the amount of the Fine, and the orders that he rewrite and pass the CPH examination before reinstatement, and that he be subject to 18 months' strict supervision after reinstatement. IIROC Staff did not seek the latter two orders, so neither party made submissions on them. In addition, neither party suggested a fine as high as $100,000 – IIROC Staff argued for $60,000, and O'Brien argued for a maximum of $40,000.

[231] In O'Brien's view, the IIROC Panel failed to give transparent and intelligible reasons for its decision to depart from the parties' submissions, which had been based on the parties' respective reviews of the range of penalties imposed in past decisions with comparable facts. He pointed to the additional reasons in the addendum to the decision in *Re Floyd* (2013 IIROC 27), in which an IIROC panel chair (the same person who chaired the IIROC proceedings against O'Brien) expressed her concern that the respondent had not had an opportunity to make submissions on the penalty imposed: a permanent ban versus the 18-month ban sought by IIROC Staff. Although the chair took comfort in the detailed reasons given by that panel for its departure from the submission, she indicated that in the absence of an opportunity for the respondent to speak to the more severe terms, she would have imposed the penalty argued.

[232] O'Brien argued that the same approach should have been taken in his case. In his submission, not giving him the opportunity to speak to the terms imposed deprived him the right to be heard, and the IIROC Panel's lack of explanation for its departure from the parties' submissions was akin to a failure to provide reasons. O'Brien asserted that both were breaches of natural justice.

(b) IIROC Staff

[233] IIROC Staff distinguished what occurred in this case from cases in which the parties make a joint submission on sanction. They argued that while there is authority for the proposition that an adjudicator contemplating a departure from a joint submission should give the parties an opportunity to make further argument, in a contested sanctions hearing there is nothing requiring a panel to seek further submissions if they disagree with the parties' positions. They pointed to the

burden of doing so where a panel reserves its decision and reaches its conclusions during deliberations following the parties' arguments.

[234] IIROC Staff also argued that O'Brien had an ample opportunity to make submissions on sanction. Moreover, they suggested that the package of sanctions for which they had advocated at the Penalty Hearing was more significant than what was imposed by the IIROC Panel, including a permanent registration ban.

[235] Finally, IIROC Staff submitted that the IIROC Panel gave clear and ample reasons for the sanctions assessed.

2. Analysis and Conclusion – Penalties Not Sought by IIROC Staff

Did the IIROC Panel deny O'Brien's right to natural justice by imposing aspects of discipline not sought by IIROC Staff, without any opportunity for O'Brien to make submissions on them?

[236] It was common ground that the IIROC Panel made sanction orders against O'Brien that were not sought by either party. We are of the view that they were entitled to do so in these circumstances. Significant deference is generally given to parties when there is a joint submission on sanction, but there was no joint submission here. As argued by IIROC Staff, there is authority that indicates an adjudicator should advise the parties if a departure from a joint submission is under contemplation so that the parties may make further arguments, but we were not referred to any authority that indicates a similar approach must be taken absent a joint submission.

[237] In the addendum to the *Floyd* decision cited by O'Brien, the chair referenced *R. v. Thompson* (2013 ONCA 202) with respect to her procedural concern about the panel's decision to impose a harsher penalty than had been sought by IIROC Staff (at para. 1). In *Thompson*, the Ontario Court of Appeal found that the trial judge erred in departing from a joint submission for one defendant and a sentencing proposal for the other, and substituting harsher sentences without giving meaningful reasons or giving the parties notice so they could argue the point (at paras. 3-4, 13). However, as pointed out in both the *Floyd* addendum (at para. 2) and in IIROC's written submissions on this Appeal, *Thompson* is distinguishable because it involved a joint submission.

[238] It is apparent from the *Floyd* addendum that the chair's primary concern was that, ". . . Floyd was justified in assuming from what was said at the penalty hearing both by IIROC counsel and this Panel, that his worst case scenario would be a long suspension followed by strict and then close supervision" (at para. 3). Instead, he received a more severe penalty than this "worst case scenario" without an opportunity to speak to it. The chair said she "would have imposed the suspension penalty and conditions as submitted by IIROC" (at para. 3).

[239] The Guidelines and other relevant authorities make it clear that a panel is not bound by the parties' submissions. The Guidelines state (at p. 2):

> The determination of the appropriate sanction in any given case is discretionary and a fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. Hearing panels retain the discretion to impose the sanctions they consider appropriate.

[240] In *Northern Securities*, the OSC concluded (at paras. 301 and 319):

> It is clear, as a matter of law, that the IIROC Panel was not bound by the sanctions and costs proposals made by IIROC Staff and that it had the discretion to impose the sanctions and costs it considered appropriate and proportionate to the conduct involved. Having said that, IIROC Staff's requested sanctions and costs were a relevant consideration.
>
> . . .
>
> In our view, the IIROC Panel was not required to impose sanctions consistent with IIROC Staff's recommendations. Subject to our conclusion in paragraph 305 above with respect to procedural fairness, the Panel was entitled to impose the full range of sanctions available under IIROC Rules and to express its views on the appropriateness of the sanctions requested by IIROC Staff.

[241] In that case, the "procedural fairness" issue referenced was the panel's failure to provide reasons for its decision on the merits before directing the parties to make their submissions on sanction. The OSC therefore set aside the sanctions and costs orders made by the IIROC panel because the sanctions hearing had been procedurally unfair to the applicants.

[242] The OSC panel also noted their concern that the panel had imposed more severe orders against one of the applicants than had been sought by IIROC Staff, including a permanent ban on acting as an ultimate designated person when only a suspension had been sought. While the OSC found that the panel was not bound by the submissions of IIROC Staff, they found unfairness in the fact that without the panel's reasons on the merits, the applicant would not have been aware that the panel made findings that could warrant a permanent ban – what the chair in *Floyd* might have described as the "worst case scenario" – or that they were even considering a permanent ban; if he had, he could have prepared his submissions accordingly (see paras. 298, 300-301, 304-305).

[243] That is not what occurred in this case. The IIROC Panel here issued comprehensive reasons on the merits before the Penalty Hearing. Further, the panels in *Floyd* and *Northern Securities* (ONSEC) imposed penalties more severe than what had been proposed by the parties. Sanction or penalty orders should be considered as a whole, rather than parsing each constituent element, as the elements are intended to work together to protect the public interest affected by the misconduct. When the penalties imposed against O'Brien are considered in this manner, we are of the view that the aggregate penalties ordered were less severe than what was sought by IIROC Staff. Even though the Fine was $40,000 more than O'Brien might have expected and the remedial orders (the CPH examination and strict supervision) may have come as a surprise, IIROC Staff asked for the "worst case scenario": a permanent ban that would have ended O'Brien's career in the industry. If that ban had been ordered, the exam and supervision orders would have been unnecessary, and a lower fine together with the permanent ban would have provided the necessary specific and general deterrence. Instead, the IIROC Panel was more lenient and gave O'Brien the prospect of resuming his career.

[244] In *Northern Securities* (ONSEC at para. 296), the panel stated that the issue was "whether the Applicants were given a meaningful opportunity to address and make submissions on the question of sanctions and costs". It is our view that O'Brien was given that opportunity. He knew IIROC Staff was seeking a permanent ban, and should have expected that any order up to and including that "worst case scenario" was a possibility. The NOH gave him notice of the sanctions that could be imposed, including a fine of up to $1 million per contravention, suspension "for any period of time and on any terms and conditions", and "any sanction determined to be appropriate under the circumstances". The Guidelines gave him notice that, "[t]o address the misconduct

effectively in any given case, a hearing panel may design specific remedial sanctions in addition to, and other than, a fine, disgorgement or suspension", including by requiring "heightened supervision" and "professional re-qualification by the writing of an exam or the successful completion of a remedial course of study" (at pp. 6-7).

[245] We are also of the view that the Penalty Decision gave sufficient and intelligible reasons for the IIROC Panel's conclusions. As stated in *Walton* (at para. 21), "[r]easons must be sufficiently transparent to justify the ultimate conclusion. But reasons need not be perfect, and need not explore every issue that was actually or potentially raised". In *High River (Town) v. High River (Town) (Subdivision and Development Appeal)* (2010 ABCA 339 at para. 11), the ABCA held that the test for adequacy of reasons is, "whether they demonstrate why or how or on what evidence the Board reached its conclusion".

[246] The Penalty Decision states that the IIROC Panel considered that the core issue before them was whether O'Brien's misconduct suggested that he was "ungovernable" and should be banned from registration permanently, or "whether he can be rehabilitated through an appropriate array of sanctions" (at para. 42). Referring to the Guidelines and the factors therein for when a permanent ban rather than a suspension is appropriate, the IIROC Panel enumerated the factors they relied on for their determination that a suspension would suffice. They also explained that they were satisfied that the goals of sanctioning could be served with a blend of other orders, including the Suspension and the Fine.

[247] The IIROC Panel balanced its decision to order a suspension instead of the ban sought by IIROC Staff by ordering a higher monetary penalty. The reasons for the combination of the Suspension and higher monetary penalty – as well as the additional remedial sanctions – were set out in detail. The remedial orders were logically connected to concerns expressed by the IIROC Panel in both the Liability Decision and the Penalty Decision: O'Brien's claims that he was not aware of the prohibition against borrowing money from a client and the other associated rules and requirements, and protection of the public from such conduct in the future.

[248] We thus found no error of law or principle in the IIROC Panel's decision to order disciplinary measures not sought by the parties. O'Brien was not denied the right to be heard, and the IIROC Panel did not fail to give adequate reasons for their decision on penalty.

[249] We dismiss this ground of appeal.

E. Suitability of Penalties

[250] O'Brien's final ground of appeal was that the IIROC Panel erred by imposing penalties – specifically, the duration of the Suspension and the amount of the Fine – that were excessive and unwarranted in the circumstances.

1. Arguments of the Parties

(a) O'Brien

[251] In support of his argument on this ground, O'Brien referred to the IIROC decision in *Re Suppal* (2014 IIROC 45), where the panel stated that "penalty decisions should be consistent with penalties imposed by other panels in similar circumstances" (at para. 9). Several other IIROC penalty decisions were cited to argue that the penalties ordered in the Penalty Decision were excessive and unwarranted. They included *Coccimiglio, Azancot, Re Steinhoff* (2010 IIROC 42),

Re Lamontagne (2009 IIROC 6), *Re Warkentin* (2012 IIROC 40), and *Re Tassone* (2019 IIROC 3), all of which O'Brien had also cited to the IIROC Panel in his penalty submissions. He distinguished the cases that were relied on by IIROC Staff at the Penalty Hearing: *Turenne*, *Rudensky* (IIROC), *Re Yaskiw* (2017 IIROC 19), and *Floyd*.

[252] Based on the decisions he argued were comparable, O'Brien submitted that the appropriate orders were a suspension of six to 12 months, a fine of $25,000 to $40,000, and costs of $10,000. If he were not found liable for Contravention 2, he argued that the appropriate orders would be a fine of $15,000 to $20,000 and costs of no more than $3000.

(b) IIROC Staff

[253] IIROC Staff maintained that the Penalty Decision was well-reasoned and the penalties were appropriate in the circumstances. They further argued that we should defer to the IIROC Panel's expertise in determining sanctions for IIROC registrants, as they have greater familiarity with IIROC's regulations and Guidelines. They also emphasized that the IIROC Panel was in a better position to evaluate all of the evidence, including O'Brien's oral testimony.

[254] IIROC Staff argued that *Turenne* – relied on by the IIROC Panel in addition to the Guidelines – is comparable to this case. Turenne was suspended for two years and fined $20,000 for a second instance of borrowing money from a client and misleading investigators during the prior investigation. Like O'Brien, he admitted to borrowing from a client, but not to making false statements.

[255] IIROC Staff also pointed to the IIROC decision in *Rudensky* as comparable. In that case, Rudensky had borrowed $3,000,000 from a client of his firm, then lied about the source of the funds when questioned by his firm. The client was a sophisticated investor and received a financial benefit from the arrangement. The panel suspended Rudensky for two years, ordered him to disgorge over $25,000, fined him $30,000, and directed him to rewrite and pass the CPH course prior to re-registration with IIROC.

[256] IIROC Staff submitted that the IIROC Panel reached sound conclusions based on the appropriate considerations, and that they properly tailored the sanctions imposed to the specific circumstances of this case – including what they characterized as O'Brien's continued failure to accept full responsibility for his misconduct.

2. Analysis and Conclusion – Suitability of Penalties

Did the IIROC Panel err by imposing penalties that were excessive and not warranted in the circumstances?

[257] The authorities are clear that the sanctioning process is discretionary in nature, and that deference is owed to the decision maker below unless there was an error of law or principle. In *Walton*, the ABCA held that while the appropriateness of sanctions ordered were within the expertise of the adjudicator of first instance (in that case, the ASC), the sanctions would be overturned on appeal if "demonstrably unfit, based on some error of principle, or . . . otherwise unreasonable" (at para. 23).

[258] There is no question that O'Brien's misconduct was serious. Past decisions involving similar behaviour typically comment on its seriousness and the importance of trust and honesty to the proper functioning of a highly-regulated securities industry. As such, significant sanctions were

appropriate, including a suspension of some duration and a fine. O'Brien appears to have recognized this in proposing the sanctions he did at both the Penalty Hearing and on the Appeal.

[259] As set out in the Guidelines (and the Penalty Decision at para. 48, citing the Guidelines at p. 4), "[a]ny sanction imposed must be proportionate to the conduct at issue and should be similar to sanctions imposed on respondents for similar contraventions in similar circumstances. The sanction should be reduced or increased depending on the relevant mitigating and aggravating factors." The Guidelines also provide that sanctions should be more severe for respondents who have been disciplined before, and should ensure the respondent does not retain any financial benefit from his or her misconduct (at pp. 4-5).

[260] The Penalty Decision is clear on the mitigating factors the IIROC Panel took into account in formulating their sanction orders, summarized earlier. This included the IIROC Panel's acknowledgement that O'Brien had already suffered some consequences of his actions, as he was terminated by RBC Securities and placed under enhanced supervision at Raymond James.

[261] The Penalty Decision is equally clear on the aggravating factors that were taken into account. However, since we found that the IIROC Panel erred by giving undue weight to certain factors and treating them as aggravating, we concluded we must intervene in that aspect of the Penalty Decision. It was also necessary to account for our finding that the IIROC Panel erred in determining that O'Brien made a misrepresentation in claiming he was not aware he needed his firm's approval to borrow money from his client. These findings affect the suitability and proportionality of the IIROC Orders. In *Northern Securities* (at para. 78), the OSC noted that, "[t]he failure to impose proportionate sanctions constitutes an error in principle or in law within the meaning of *Canada Malting*".

[262] Although s. 36(3)(c) of the Act allows us to direct the IIROC Panel to reconsider their orders, we determined that it was a more efficient use of resources and allowed for a more timely result for us to vary the IIROC Orders pursuant to ss. 36(3)(a) and (b) of the Act. In issuing the Appeal Order shortly after the Appeal Hearing, we were mindful of the need for timeliness given the impact of our decision on O'Brien's future livelihood. We were of the view that the Record was sufficient to inform our decision. IIROC's sanctioning principles are very similar to those applied by ASC hearing panels in enforcement proceedings under the Act, with a similar public interest mandate of investor protection and fostering fair and efficient capital markets.

[263] In arriving at our decision that the Suspension should be reduced from two years to nine months and the Fine reduced from $100,000 to $50,000, we were careful not to re-weigh the evidence, and to remain mindful of the findings in the Liability Decision and the Penalty Decision that we did not disturb.

[264] We considered the mitigating factors identified by the IIROC Panel in the Penalty Decision to be reasonable and consistent with the Guidelines. We also took into account certain other facts that were apparent from the Record, including that: (i) O'Brien was involved in the industry for many years without incident before this misconduct occurred, (ii) the length of time over which he borrowed money from Ms. H was limited, (iii) a single client was involved, and (iv) he had the support of Raymond James even after the Liability Decision was released, and worked there for over two years without incident.

[265] In considering the aggravating factors, we focused on O'Brien's misconduct instead of the position he took at the Penalty Hearing. In accordance with the Guidelines, these included: (i) the loan amount, (ii) the harm caused to the parties affected and the reputational harm to the capital markets, (iii) the IIROC Panel's finding that Ms. H was a vulnerable client, (iv) the financial benefit O'Brien obtained, and (v) O'Brien's deceit in making misrepresentations to RBC Fraud Detection and IIROC Staff.

[266] We also considered the range of sanctions set out in the cases IIROC Staff and O'Brien cited as comparable to this matter. However, as the IIROC Panel stated in the Penalty Decision, none were on all fours with this case and were therefore of limited utility. We gave scant regard to the cases involving a joint submission on penalty or a settlement agreement, because many different considerations can influence an agreement that may not apply in a contested hearing. Even *Turenne,* referenced in the Penalty Decision, differs significantly from this case in that the respondent had been disciplined for the same contravention – borrowing from clients – only two years previously (see *Re Turenne* (2013 IIROC 43)).

[267] That said, we noted that the suspensions ordered in the cases cited by the parties ranged between six months and two years, and fines ranged between $20,000 and $75,000. In some cases, including *Turenne* and *Rudensky* (IIROC), a suspension at the high end of the range was paired with a fine at the lower end.

[268] In the Stay Ruling, we agreed with the British Columbia Securities Commission's statement in *Re Steinhoff* that a suspension of a year or more "is tantamount to the termination of [a] registrant's career", and that, "[a]t a minimum, it requires the registrant to build a book from scratch, a process that takes years and enormous effort" (2013 BCSECCOM 308 at para. 90). We also agreed with the *Tassone* panel's conclusion that as a result, IIROC Staff's request for a suspension of two years or more amounted to a permanent ban (at para. 28). The *Tassone* panel noted (at para. 28) that in the *Steinhoff* penalty decision (2014 BCSECCOM 23 at para. 22), IIROC Staff "acknowledged that 'longer suspensions are usually reserved for cases involving multiple clients or a pattern of misconduct'".

[269] It was clear to us that the IIROC Panel considered a permanent registration ban was unnecessary to protect the public interest. We are of the view that this was a reasonable conclusion.

[270] On the issue of the appropriate fine, we were guided by the ABCA in *Walton* cautioning against administrative penalties that are more than is required for specific and general deterrence: see, for example, paras. 154, 164, and 166. The ABCA described an administrative penalty of $55,000 imposed against one respondent as "extremely onerous", and an administrative penalty of $90,000 imposed against another as "staggering" (at paras. 163-164). The IIROC Panel did not explain how it assessed $100,000 against O'Brien – which was outside the range suggested by the comparable cases – nor why a lower amount would not suffice.

[271] Having reviewed the Record, the relevant cases and the parties' submissions, we concluded that a suspension of nine months' duration and a fine of $50,000 were sufficient to achieve the applicable sanctioning objectives: prevention of future misconduct by O'Brien and others, and protection of the public interest. Together, these penalties are proportionate in relation to relevant prior decisions, recognize the seriousness of the misconduct, and are stern but not excessively punitive.

[272] As to the other aspects of the IIROC Orders, we found that the remedial elements – the requirement for O'Brien to re-write and pass the CPH examination and to submit to strict supervision for the first 18 months following his re-entry to the industry – were consistent with prior cases and were reasonable measures in the public interest to ensure that O'Brien understands industry standards of conduct and his ethical obligations as a Registered Representative.

[273] The costs award was also reasonable, and we did not disturb it.

VIII. CONCLUSION

[274] As set out in the Appeal Order, we made the following orders on June 4, 2020 in accordance with ss. 36 and 73 of the Act:

(a) the Appeal was allowed in part;

(b) the IIROC Orders were varied as follows:

(i) the Suspension was reduced from a period of two years to a period of nine months commencing March 26, 2020 and expiring December 26, 2020; and

(ii) the Fine was reduced from $100,000 to $50,000; and

(c) all other aspects of the IIROC Orders were confirmed.

[275] This proceeding is concluded.

October 15, 2020

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn