

Re Cusson

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada (IIROC)**

and

The By-Laws of the Investment Dealers Association of Canada

and

Alan Cusson

2012 IIROC 62

Hearing Panel of the Investment Industry Regulatory Organization of Canada
(Quebec District)

Hearing: August 8, 2012
Decision: October 16, 2012

Hearing Panel

Me Jean Martel Ad. E. (Chair), Gilles Archambault, André Godbout

Appearances

Me Martin Hovington, Counsel for IIROC

Me Martin Courville (De Chantal, D'Amour, Fortier, s.e.n.c.r.l.), Counsel for Respondent

DECISIONS ON SETTLEMENT AGREEMENT

¶ 1 This is a settlement hearing in accordance with Rule 20.35 to 20.40, *Corporation Hearing Process* (“**Rule 20**”), of the Investment Industry Regulatory Organization of Canada (**IIROC**).

¶ 2 From June 2004 to March 2010, Respondent was approved as a securities representative in the employ of Berkshire Securities Inc. (**BSI**). This IIROC-regulated firm, now known by the name of Manulife Financial Inc., was at the time a Member Firm of the Investment Dealers Association of Canada (**IDA** or the **Association**).

¶ 3 Prior to his employment with BSI, Respondent was already active in the investment industry. He was a mutual fund sales representative at Berkshire Investment Group Inc. from 2000 to June 2004 and, as such, he was a member of the Chambre de la sécurité financière.

¶ 4 Following an investigation into Respondent’s conduct, Staff of IIROC concluded that between June 2004 and April 2008, Respondent repeatedly violated the rules of IDA By-law 29.1, *Business Conduct*, now codified as IIROC Dealer Member Rule 29.1 (the **Rules**).

¶ 5 At all material times, these rules required that, in the transaction of their business, registered representatives of IDA member firms observe high standards of ethics and conduct and that they abstain from any business conduct or practice which is unbecoming or detrimental to the public interest.

¶ 6 Effective June 1, 2008, the self-regulatory activities previously carried out by the IDA were taken over by IIROC. *Transition Rule No. 1* allows IIROC inter alia to initiate settlement proceedings on behalf of the IDA in connection with events that occurred prior to this date, when the Respondent in these proceedings was governed by IDA rules.¹ That is the case here.

The Settlement Agreement

¶ 7 Based on an agreed statement of facts jointly submitted by the parties and an admission by the Respondent that he did violate certain of the rules in his capacity as an Approved Person of the Association, Staff of IIROC negotiated and concluded a Settlement Agreement with the Respondent on June 21, 2012 (the “**Settlement Agreement**” or the “**Agreement**”), the whole in accordance with Rule 20.35 and Rule 14 of the Rules of Practice and Procedure.

¶ 8 In the Agreement, Respondent admits having contravened the rules according to the terms of two counts of complaint by IIROC:

- “ 1. *Between June 2004 and April 2008, Cusson engaged in business conduct or practice which is unbecoming or detrimental to the public interest, in that on at least fourteen occasions he misappropriated funds from one of his clients, contrary to IDA By-Law 29.1 (now IIROC Rule 29.1); and*
2. *Between June 2004 and April 2008, Cusson engaged in business conduct or practice which is unbecoming or detrimental to the public interest, in that he engaged in personal financial dealings with a client without disclosing and obtaining prior approval from his employer, contrary to IDA By-Law 29.1 (now IIROC Rule 29.1)”.*²

¶ 9 Conditionally on the acceptance of such agreement by the Hearing Panel, the parties agreed that the violations committed by the Respondent should be sanctioned as follows:

- (i) a fine of \$125,000 on the first count;
- (ii) a fine of \$30,000 on the second count;
- (iii) a permanent ban on approval.³

¶ 10 Respondent also agreed to pay costs in the matter, in the amount of \$10,000.

Agreed essential facts

¶ 11 Between September 2002 and November 2009, Respondent was acting as investment advisor for a retiree from Bell Canada. The client, who was over 80 years old at the material time, had total net assets valued at \$550,000, \$250,000 of which in cash and \$300,000 in fixed assets.

¶ 12 Between September 2003 and December 2007, Respondent repeatedly misappropriated funds belonging to this client, for a total amount of \$98,500. Of this amount, \$58,500 was misappropriated while Respondent was a securities representative at BSI, and the difference was misappropriated while he was a mutual fund sales representative with Berkshire Investment Group Inc.

¶ 13 Respondent’s *modus operandi* was as follows: he would go to the client’s home, the latter having health problems that prevented him from getting around easily; he would take delivery of blank cheques signed by the client, which he would fill out by adding the information agreed to with the client: the amount (corresponding to the sums to be invested) and the name of the payee (beneficiary), which would be BSI; once the cheques were cashed by the firm, their proceeds would be credited to the account which the latter maintained in the client’s

¹ In this case, according to *Schedule C.1 to Transition Rule No. 1, Hearing Committees and Hearing Panels Rule* (subsection 1.9(2)), IDA rules in force at the relevant time shall apply, to the extent they are consistent with IIROC practices and procedures at the time the enforcement proceedings are commenced.

² Settlement Agreement, Part II, s. 7, on p. 2.

³ Settlement Agreement, Part II, s. 8, on p. 2.

name.

¶ 14 Respondent respected the agreed scenario four times during the period concerned. In other cases, he would instead fill out the cheques with himself as the payee, and deposit the proceeds to a personal bank account. A total of 17 cheques were thus fraudulently cashed for the benefit of the Respondent.

¶ 15 Furthermore, around July 5, 2006, Respondent convinced the client to lend him \$5,000 and, on or around April 17, 2008, an additional sum of \$20,000. Respondent never disclosed these two loans to BSI, and therefore the latter never approved of his contracting them, which was against the rules.

¶ 16 On March 22, 2010, following receipt of a complaint filed by the new person holding the client's power of attorney, BSI conducted an internal investigation into Respondent's conduct, which led to his dismissal. The firm compensated the client for a total of \$117,500, corresponding to the \$98,500 that was misappropriated and never repaid, plus the unpaid balance on the two loans, an amount of \$19,250.

¶ 17 Since then, Respondent has not been registered in any capacity in the Canadian investment industry, and at no time has he acted as an Approved Person of an IIROC-regulated firm.

The proceedings

¶ 18 At a hearing held on August 8, 2012, the Settlement Agreement appended hereto was recommended for our acceptance, pursuant to Rule 20.36 (1) (a).

¶ 19 After consideration of the terms and conditions of this Agreement and taking into account the pleadings of the legal counsel for both parties, we are of the opinion that the agreement should be accepted for the reasons outlined below.

Analysis

¶ 20 Rules 20.35 to 20.40 state that upon conclusion of a settlement hearing, the Hearing Panel may either accept or reject the settlement agreement submitted for its consideration.

¶ 21 The principles that must guide us in this respect were defined in *Re Milewski* [1999] I.D.A.C. No. 17, in *Rault v. Law Society of Saskatchewan* [2009] SKCA 81, and in *Re Graydon Elliot Capital Corporation* [2007] I.D.A.C.D. No. 43, and more recently applied in *Re Rao* [2011] IIROC No. 12, a decision that counsel for the parties argued before us.

¶ 22 *Milewski* established that a hearing panel invited to consider a settlement agreement should accept it if, after consideration of the agreed-upon facts, the disciplinary measures that it proposes appear to fall within "a reasonable range of appropriateness" given the misconduct in question.⁴

¶ 23 In *Rault*, it was ruled that an administrative tribunal (which can be compared to an internal tribunal such as ours) has an obligation to give serious consideration to a joint submission on sentencing agreed upon by counsel, unless the sentence is unfit or unreasonable or contrary to the public interest, and should not be departed from unless there are good or cogent reasons for doing so.⁵

¶ 24 Finally, the *Graydon Elliot Capital Corporation* decision established that in considering a settlement agreement, the Hearing Panel should not substitute its discretion to that of the Staff that negotiated the settlement. The Panel must be cognizant of the importance of the settlement process, and should not interfere lightly in a negotiated settlement. It must bear in mind that the settlement process is one of negotiation and compromise and that the penalty imposed in the context may still be acceptable to the Hearing Panel even if it is somewhat different than the penalty that it would have imposed following a hearing where similar findings were made.⁶

¶ 25 Finally, to ensure that the criteria of fairness and reasonable appropriateness of the proposed penalty are

⁴ *Re Milewski* [1999] I.D.A.C. No. 17, on p. 11.

⁵ *Rault v. Law Society of Saskatchewan* [2009] SKCA 81, par. 13.

⁶ *Re Graydon Elliot Capital Corporation* [2007] I.D.A.C. No. 43, par. 9.

met, the Hearing Panel considered the *IIROC Dealer Members Disciplinary Sanction Guidelines* (March 2009 edition), took into account certain factors arising from the agreed-upon facts, and borrowed from the considerations set out in *Rao*, supra, and in *Re Lalonde* [2012] IIROC No. 6, *Re Silvaggio* [2011] IIROC No. 63, *Re Petriello* [2007] I.D.A.C.D. No. 1130/NOV/04 and *Re Evans* [2007] I.D.A.C.D. No. 53, which ruled on similar facts to those before us.

Mitigating factors

¶ 26 First of all, we note that in the interest of the client concerned and the public in general, Respondent cooperated fully with BSI and Staff of IIROC in their efforts to discipline him for his alleged misconduct.

¶ 27 He signed a statement dated March 23, 2010 – the day immediately following the discovery of the misappropriation of funds – in which he admitted to the violations with which he is charged here, as well as to the undisclosed personal loans that he incurred with the client. In signing this statement and the Settlement Agreement before us, he demonstrated a certain remorse for his dishonest and disloyal conduct vis-à-vis his client.

¶ 28 We also noted that Respondent had no disciplinary history other than the matter before us. Nevertheless, we had to weigh the mitigating force of this factor against the lengthy period of four years of misconduct.

¶ 29 Even though at the time that he misappropriated the \$40,000 in funds from the client, the Respondent was not a registered representative as defined in the Association rules – he was a mutual fund sales representative attached to a financial services firm that was not an IDA member – he nonetheless was employed in the investment industry. We cannot separate this fact from our assessment (see *Dosithe Charles Richard*, Bulletin No. 3260, March 15, 2004).

Aggravating factors

¶ 30 By misappropriating a client's funds for his own benefit, Respondent committed one of the most serious offenses in the securities industry. He also engaged in personal dealings with the client, borrowing money from him on two occasions without the knowledge of the IDA member firm which he represented.

¶ 31 These violations of the Rules were repeated and involved substantial amounts: 17 misappropriations for a total amount of \$98,500, and two loans totaling \$25,000.

¶ 32 All of these misappropriations were planned. Respondent knew perfectly well that the client was expecting him to act according to their agreement, that he would fill out the signed blank cheques as agreed, that he would have BSI cash them and that the proceeds would be deposited in his account with the firm.

¶ 33 By acting as he did multiple times, Respondent engaged in unfair, improper and fraudulent practices, which were contrary to the instructions of his client, a person over the age of 80 in a fragile state of health, a vulnerable person whose knowledge of finance and investing was limited, a person who trusted him implicitly to watch over his interests as is normal.

¶ 34 The misappropriation of funds is an offense that undermines the very foundations of the relationship of trust that must exist between the representative and his client, and which the Rules aim to establish and maintain. If an investor is not convinced that the assets that he has entrusted to his investment dealer will be faithfully used for the purposes that he determines, he will simply abstain from trading and allocate his capital to economically productive purposes. This is why the financial system so badly needs this relationship of trust, which is fundamental to its smooth operation, and any attack against this relationship must be considered detrimental to the public interest.⁷

¶ 35 The intrinsic gravity of the Respondent's failure demands a serious penalty. Paragraph 1.4 of the *Guidelines (Misappropriation of Funds)* moreover recommends a permanent ban in almost all cases of misappropriation of funds. It is only in cases where there are numerous mitigating circumstances that such a ban

⁷ *Re Petriello* [2007] I.D.A.C.D. No. 1130/NOV/04, par. 27 and 28.

ought to be replaceable with a prolonged suspension. That is not the case here, and therefore the Settlement Agreement rightly imposes a permanent ban.

¶ 36 As for the \$25,000 in loans incurred by the Respondent, he only repaid them in part, in an amount of \$5,750. He even issued postdated cheques which he remitted to the client for the purpose of repaying both loans, subsequently canceling the payment of these cheques with his bank.

¶ 37 We note, relative to the fines agreed between the parties, that paragraph 1.4 of the *Guidelines* provides for a minimum fine of \$25,000 in the case of a misappropriation of funds, and states that the fine should include the amount of any financial benefit to the Respondent, i.e. \$98,500 in our case. Paragraph 2.5 of the *Guidelines*, concerning undisclosed personal business with a client, provides for a minimum fine of \$10,000 in case of an offense and disgorgement of the profits, which is \$19,250 here.

¶ 38 The Hearing Panel concludes that the fines provided in the Settlement Agreement – \$125,000 (misappropriation of funds) and \$30,000 (personal business with a client) – effectively take into account the parameters cited above and do not represent a departure from the precedents invoked before us, in particular the recent decisions in *Rao* and *Lalonde*, supra.

Conclusions

¶ 39 For all of these reasons, we allow the joint recommendation of the parties and accept the Settlement Agreement before us. We believe that the penalties agreed upon in the Settlement in every respect satisfy the criteria of fairness and reasonable appropriateness, allowing us to rule in this manner.

¶ 40 NOW THEREFORE THE HEARING PANEL

ACCEPTS the Settlement Agreement appended to this decision and notably assesses the following penalties against Respondent:

1. a permanent ban on approval in any capacity with IIROC;
2. a fine of \$125,000 on the first count
3. a fine of \$30,000 on the second count; and
4. costs in the amount of \$10,000.

Montréal, October 16, 2012.

Gilles Archambault, Panel Member

Jean Martel, Chair

André Godbout, Panel Member

Official English Version

SETTLEMENT AGREEMENT

I. BACKGROUND

1. IIROC Enforcement Staff and Alan Cusson (“the Respondent”), consent and agree to the settlement of this matter by way of this settlement agreement (“the Settlement Agreement”).
2. The Enforcement Department of IIROC has conducted an investigation (“the Investigation”) into the conduct of Alan Cusson.
3. On June 1st, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment

Dealers Association of Canada and Market Regulation Services Inc. Pursuant to the Administrative and Regulatory Services Agreement between IDA and IIROC, effective June 1st, 2008, the IDA has retained IIROC to provide services for IDA to carry out its regulatory functions.

4. The Respondent consents to be subject to the jurisdiction of IIROC.
5. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C (“the Hearing Panel”).

II. JOINT SETTLEMENT RECOMMENDATION

6. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
7. The Respondent admits to the following contraventions of IIROC Rules, Guidelines, IDA By-Laws, Regulations or Policies:
 1. Between June 2004 and April 2008, Cusson engaged in business conduct or practice which is unbecoming or detrimental to the public interest, in that, on at least fourteen (14) occasions, he misappropriated funds from one of his clients, contrary to IDA By-law 29.1 (now IIROC Rule 29.1); and
 2. Between June 2004 and April 2008, Cusson engaged in business conduct or practice which is unbecoming or detrimental to the public interest, in that he engaged in personal financial dealings with a client without disclosing and obtaining prior approval from his employer, contrary to IDA By-law 29.1 (now IIROC Rule 29.1).
8. Staff and the Respondent agrees to the following terms of settlement:
 - a) Count 1: a fine of \$125,000;
 - b) Count 2: a fine of \$30,000;
 - c) A permanent ban.
9. The Respondent agrees to pay costs to IIROC in the sum of \$10,000.

III. STATEMENT OF FACTS

(i) Acknowledgment

10. Staff and the Respondent agree with the facts set out in this Section III and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

(ii) Factual Background

OVERVIEW

11. Cusson was the investment advisor of “A”, an 80 years old retired technician from Bell, who had a net worth of \$550,000 consisting of \$250,000 of liquid assets and \$300,000 of fixed assets.
12. During the course of their relationship, Cusson misappropriated \$98,500 from “A”.
13. Of this \$98,500, \$58,500 was misappropriated from “A” while Cusson was registered with IIROC as a Registered Representative.
14. The misappropriation was effected by Cusson directing “A” to sign blank cheques under false pretenses. Cusson would then complete the cheques and make them payable to himself.
15. On at least two (2) other occasions, Cusson directed his client “A”, to lend him a total of \$25,000 without having disclosed and obtained the approval of his employer.

REGISTRATION

16. In June 2004, Cusson became a Registered Representative at the Ville St-Laurent office of Berkshire

Securities Inc. (“**Berkshire**”), that later became Manulife Securities Inc. (“**Manulife**”) in 2007.

17. Before his employment at Berkshire, Cusson was a Mutual Funds Representative at Berkshire Investment Group Inc. since 2000. Berkshire and Berkshire Investment Group Inc. shared the same address in Ville St-Laurent. Berkshire Investment Group Inc. was not an IDA Member Firm.
18. Cusson was dismissed by Manulife on March 22nd, 2010, and is no longer a registrant with an IIROC member firm.

INTERNAL INVESTIGATION

19. On March 22nd, 2010, upon receipt of “A”’s letter of complaint, Manulife opened an internal investigation that led to the termination of the agency agreement between Cusson and Manulife.
20. On March 23rd, 2010, Cusson signed a declaration in which he admitted taking “A”’s money and using it for his own purposes.

MISAPPROPRIATION OF FUNDS FROM HIS CLIENT “A”

21. In or about September 2002, “A” became a client of Cusson. At that time, he was a Mutual Funds Representative at Berkshire Investment Group Inc.
22. In June 2004, “A” transferred his account from Berkshire Investment Group Inc. to Berkshire. The value of “A”’s account was approximately \$60,000.
23. The investigation revealed that between September 2003 and April 2008, seventeen (17) cheques signed by “A” were made payable to Cusson, for a total of \$98,500.
24. The seventeen (17) cheques were completed by Cusson as follows:

BERKSHIRE INVESTMENT GROUP INC. (NOT AN IIROC MEMBER)

Cheque	Date	Amount (\$)	Payor	Payee	Handwriting
325	September 15 th , 2003	10,000	“A”	Alan Cusson	Alan Cusson
365	January 15 th , 2004	20,000	“A”	Alan Cusson	Alan Cusson
349	May 22 nd , 2004	10,000	“A”	Alan Cusson	Alan Cusson

SUB-TOTAL \$40,000

BERKSHIRE SECURITIES INC. (IIROC MEMBER)

Cheque	Date	Amount (\$)	Payor	Payee	Handwriting
357	September 1 st , 2004	7,000	“A”	Alan Cusson	Alan Cusson
364	December 2 nd , 2004	4,000	“A”	Alan Cusson	Alan Cusson
558	April 13 th , 2006	5,500	“A”	Alan Cusson	Alan Cusson
582	May 30 th , 2006	5,000	“A”	Alan Cusson	Alan Cusson
595	June 16 th , 2006	4,000	“A”	Alan Cusson	Alan Cusson

604	August 7 th , 2006	4,000	“A”	Alan Cusson	Alan Cusson
607	August 24 th , 2006	2,000	“A”	Alan Cusson	Alan Cusson
612	September 19 th , 2006	3,500	“A”	Alan Cusson	Alan Cusson
620	October 26 th , 2006	3,000	“A”	Alan Cusson	<i>Unidentified</i>
573	January 3 rd , 2007	3,500	“A”	Alan Cusson	Alan Cusson
587	March 28 th , 2007	3,500	“A”	Alan Cusson	Alan Cusson
635	August 20 th , 2007	5,000	“A”	Alan Cusson	Alan Cusson
636	August 27 th , 2007	5,000	“A”	Alan Cusson	Alan Cusson
852	December 6 th , 2007	3,500	“A”	Alan Cusson	Alan Cusson

SUB-TOTAL **\$58,500**

TOTAL: **\$98,500**

25. Cusson completed each of the above-mentioned cheques, except for one unidentified handwriting, after “A” signed them but not in his presence. Other than his signature, “A” did not fill out any other section of the cheques.
26. It was the client’s understanding that, once Cusson returned to his office, he would stamp the seventeen (17) cheques with the name of Berkshire, and then he would deposit the cheques in “A”’s account at Berkshire.
27. Instead, Cusson put his name as the “Payee” and then deposited the seventeen (17) cheques in his personal bank account at the Toronto Dominion Bank in Dorval, Québec.
28. Some of the above-mentioned cheques contained the note “Investment”.
29. During the same period of time, “A” also signed four (4) cheques that were completed and deposited into “A”’s account as he intended them to be.
30. In 2009, “A” named “B” as his power of attorney.
In November 2009, the account of “A”’s at Berkshire was transferred to RBC Dominion Securities Inc. (“RBC”).
31. In January 2010, as a result of inquiries by “B”, the power of attorney of “A”, and with the help of his new advisor at RBC, it was discovered that an amount of \$98,500 was missing from the investment account of “A”.
32. During the internal investigation that took place at Manulife, Cusson admitted to his wrong-doing and signed a written statement in which he admitted taking “A”’s money and using it for his own purposes.
33. Cusson never reimbursed the \$98,500 misappropriated from his former client “A”.

PERSONAL FINANCIAL DEALINGS WITH “A”

34. On or about July 5th, 2006, Cusson convinced his client “A” to lend him the sum of \$5,000.
35. On or about April 17th, 2008, Cusson convinced his client “A” to lend him an additional sum of \$20,000.
36. Cusson never disclosed nor obtained approval from Berkshire or Manulife for these two (2) loans.
37. In 2009, Cusson made some post-dated cheques to “A” as loan repayments.

38. On three (3) of these post-dated cheques, respectably dated June 30th, 2009, September 30th, 2009 and December 31st, 2009. Cusson instructed its bank to issue a stop payment.
39. Cusson has only reimbursed “A” a total sum of \$5,750 out of the \$25,000.
40. In August 2010, Manulife repaid “A” a total sum of \$117,500 in compensation for the misappropriated funds and the unpaid balance of the loans by Cusson.

IV. TERMS OF SETTLEMENT

41. This settlement is agreed upon in accordance with IIROC Dealer Member Rules 20.35 to 20.40, inclusive and Rule 15 of the Dealer Member Rules of Practice and Procedure.
42. The Settlement Agreement is subject to acceptance by the Hearing Panel.
43. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
44. The Settlement Agreement will be presented to the Hearing Panel at a hearing (“the Settlement Hearing”) for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement.
45. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his/her/its right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
46. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.
47. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
48. Staff and the Respondent agree that if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement.
49. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
50. Unless otherwise stated, any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondent at the City of Dorval in the Province of Québec, this 30th day of May, 2012.

“Witness signature”

“Alan Cusson”

Witness

Alan Cusson, Respondent

AGREED TO by Staff at the City of Montréal in the Province of Québec, this 21st day of June, 2012.

“Witness signature”

“Martin Hovington”

Witness

Martin Hovington

Enforcement Counsel on behalf of Staff of the
Investment Industry Regulatory Organization of
Canada

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