# Re Gareau

IN THE MATTER OF:

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

**and**

**The By-Laws of the Investment Dealers Association of Canada (IDA)**

**and**

**Kenneth Gareau**

2011 IIROC 72

Investment Industry Regulatory Organization of Canada
Hearing Panel (Saskatchewan District Council)

Hearing: November 23, 2011 in Saskatoon, Saskatchewan
Decision: January 2, 2012
(49 paras.)

**Hearing Panel:**
Daniel Ish, Q.C. (Chair), William Welton, Eric Wray
**Appearances:**
Paul Smith, Gil Gauthier, for IIROC
William Howe, for the Respondent
Kenneth Gareau, the Respondent

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## PENALTY DECISION

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### INTRODUCTION AND SUMMARY

¶ 1 In the decision issued on September 26, 2011 this Panel found that all three allegations contained in a Notice of Hearing issued by IIROC on April 15, 2011 were proven to the required standard.

¶ 2 A further hearing was held on November 23, 2011 to receive evidence and submissions concerning the appropriate penalty to be levied upon the Respondent as a result of the Panel's findings. In addition to the testimony of the Respondent, Mr. Ken Gareau, eight other witnesses appeared before the Panel. The eight witnesses were character witnesses for Mr. Gareau, many of whom were his clients and others were business associates. Also, numerous testimonial letters were put into evidence by Mr. Gareau. Oral and written submissions were presented on Mr. Gareau's behalf and oral submissions were made by IIROC.

### SUMMARY OF FINDINGS

¶ 3 The allegations that were found to be proved by the Panel were:

**Count 1**

Between May 2006 and June 2008 the Respondent acted contrary to IDA By-law 29.1 and IIROC Dealer Member Rule 29.1 by recording inaccurate income, risk tolerance, and investment knowledge of two separate client families

on their client account forms.

**Count 2**

Between July 2006 and October 2008, the Respondent acted contrary to IDA Regulation 1300.1(q) and IIROC Dealer Member Rule 1300.1(q) by failing to ensure recommendations he made for two client families to purchase and hold securities were suitable for the clients.

**Count 3**

In September 2007 the Respondent acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by selling an income producing bond against the express wishes of a client.

¶ 4 A summary of the Panel's findings is found at Paragraph 158 of the Decision:

(A) The Respondent acted contrary to Dealer Member Rule 29.1 by inaccurately

recording risk tolerance and investment knowledge in New Client Application Forms for Bob and June Howden and for Jean and Emilie Raimbault and thereby conducted business detrimental to the public interest. In particular the Respondent:

(1) Inaccurately recorded the risk tolerance and investment objectives of Mr.and Mrs.Raimbault in each of the three NCAFs that they completed.

(2) Inaccurately recorded the risk tolerance and investment objectives of Mr. and Mrs. Howden in the NCAF completed on June 2, 2008.

(3) Inaccurately recorded in the NCAFs completed in September 2006 and June 2008 that no money had been borrowed to make investments.

(B) The Respondent acted contrary to Dealer Member Rule 1300.1(q) by failing to ensure recommendations he made to Bob and June Howden and to Jean and Emilie Raimbault were suitable investments for them. In particular the Respondent breached Rule 1300.1(q) by:

(1) Recommending and overseeing portfolios composed virtually of all equity assets for both the Howden family and the Raimbault family, all four people who were retired and reliant on their investment portfolio.

(2) Recommending to the Howdens that they purchase $100,000 of a hedge fund on margin.

(3) Recommending to the Howdens that they purchase $170,000 in limited partnerships, some of it on margin.

(4) Recommending to the Raimbaults that Bell Canada Bond units, a fixed income investment yielding as high as 6.7%, be sold to buy equity mutual funds.

(5) Recommending extensive use of margin accounts by the Howden family and failing to take extensive positive steps to reduce the margin once it reached excessive amounts.

(C) The Respondent acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by selling an income producing bond against the express wishes of his client, Jean and Emilie Raimbault and thereby conducted business detrimental to the public interest.

¶ 5 The details of the clients and the effect of the Respondent's transgressions are set out in detail in the Decision. In summary, this Panel found that both sets of clients were relatively unsophisticated and relied heavily upon Mr. Gareau for his expertise and advice. The clients who were called in support of Mr. Gareau at the Penalty Hearing similarly indicated that they relied heavily on him and invested usually only on his recommendations. The Panel's finding was that Mr. Gareau made inappropriate recommendations for both of

the client families to whom the allegations applied, the Howden family and the Raimbault family. It was not our finding that every recommended investment was a high-risk one; rather, most of them in another investment mix may have been appropriate. However, it was the extensive, almost exclusive, investments in equity mutual funds that caused us to conclude that the portfolios constructed on the advice of the Respondent were inappropriate.

¶ 6 The losses experienced by the Howden family exceeded $600,000. The losses were crystallized when they sold their equity mutual funds and moved to a money market fund. It is difficult to calculate what losses the Raimbault family may have incurred since, at the time of the hearing when Mrs. Raimbault testified, they had continued to hold the investments recommended to them by the Respondent, and which were the subject matter of their complaint against him. Because of the recovery of the market generally since its low point in 2008, it appears that the losses of the Raimbaults were minimal. In any event they were not actual losses since there were no sales of the assets in the portfolios that would have crystallized losses, as was the case with the Howden family. The Howdens received a $500,000 settlement from the Respondent's firm, $100,000 of which was contributed to by the Respondent.

**THE SUBMISSIONS**

¶ 7 In their submissions both parties made reference to IIROC's Disciplinary Sanction Guidelines and to previous decisions of tribunals imposing penalties for the breach of IIROC's rules and by-laws. The Guidelines and the precedents will be reviewed later in this decision.

¶ 8 In summary IIROC submitted that the Respondent's penalty should be:

- A suspension of membership and no application by the Respondent for registration as an approved person for a period of five years.
- A fine of $200,000.
- Disgorgement of commissions in the amount of $47,383.
- Costs in the amount of $20,000.

¶ 9 IIROC submitted that the Panel must concern itself with both specific and general deterrence. It was also submitted that the clients were vulnerable and there were multiple and continual transgressions resulting in significant losses. Specific reference was made to previous case authorities as well as the Sanction Guidelines.

¶ 10 The Respondent submitted that an appropriate penalty would be:

- A fine in the sum of $10,000.
- A portion of costs left to the discretion of the Panel.
- Strict supervision for twelve months, followed by six months close supervision.
- Rewrite and successfully pass the Conduct Practices Handbook Course, during the twelve month period of supervision.
- A partial disgorgement of commission taking into account that the Respondent already has paid $100,000 toward restitution.

¶ 11 The Respondent's submissions underscored the fact that there was no dishonest conduct by Mr. Gareau and that many of the case precedents did involve dishonesty or fraudulent conduct. It was also submitted that many of the case precedents involved "undefended" allegations and that this Panel should take that into account in using the precedents as comparators for appropriate penalty in the present case. It was also submitted that a suspension (or as characterized by Mr. Gareau's Counsel a "banishment"), would not be in the best interests of the Respondent's current clients. It was urged that if the best interests of the clients are taken into account, a suspension will not be imposed.

**REVIEW OF GUIDELINES AND CASE AUTHORITIES**

¶ 12 IIROC has published a detailed set of Disciplinary Sanction Guidelines to assist hearing panels in determining appropriate penalties. The publication of sanction guidelines is an approach that has been adopted by other regulatory bodies. The goal is that hearing panels treat such guidelines as indicative of industry expectations and as relevant to a penalty determination, although they are neither exhaustive nor determinative. The guidelines do not prescribe specific results but set out factors that panels should take into account in determining penalties. The guidelines are careful to preserve the individualization of sanctions and not suggest a blanket approach. In Part 2 of the Sanction Guidelines at page 8 it states:

> Sanctions should be based on the circumstances of the particular misconduct by a Respondent with an aim at general deterrence.

Emphasis is placed on investor protection and market integrity. The guidelines say:

> Registrants who choose to act in ways that threaten the integrity of the capital markets must have the expectation that they will be held accountable through enforcement action by regulators.

Thus, in addition to the individual circumstances of a Registrant who is subject to sanctions, there is an overall public policy goal and objective that must be taken into account by panels when they are fashioning disciplinary sanctions for infractions of IIROC's regulations and by-laws. The balancing of these two interests underscores the very difficult task that a panel, such as the present one, must undertake.

¶ 13 The Sanction Guidelines set out 14 key considerations that panels are asked to consider in determining sanctions. We will address each of them in relation to the particular facts of the present case.

**Harmed Clients, Employer and/or the Securities Market**

¶ 14 The Respondent's conduct caused significant harm to his clients. He purchased unsuitable securities which were not consistent with the clients' investment objectives and tolerance for risk. The result was that the clients were exposed to significant risk given their age, modest portfolios and long-term objectives. The one unauthorized discretionary trade resulted in the sale of an investment that was totally suitable and facilitated the purchase of unsuitable securities.

¶ 15 The core duty and responsibility of an investment advisor is to make suitable recommendations in accordance with the clients' objectives and risk factors, and to properly obtain instructions before implementing trades. Where almost total reliance is placed upon the investment advisor, as it was in the present case, the responsibility to make suitable investments is heightened.

¶ 16 The Respondent's breach of these fundamental duties not only caused financial harm (the loss of in excess of $600,000 to one client) but it also caused emotional harm to his clients and, more generally, diminishes confidence in the Registrant, his firm and the securities industry generally.

**Blameworthiness**

¶ 17 The Respondent must take responsibility for his actions. They were not the result of not knowing what was appropriate, or even negligence. We did not find, and do not find, that the Respondent's conduct was fraudulent or deceptive. However, they were not isolated incidents but, with respect to the two client families, were repeated and pervasive. There are no mitigating factors such as illness or other extenuating circumstances of a personal nature that may impact on the Respondent's blameworthiness.

**Degree of Participation**

¶ 18 The Respondent was the direct perpetrator solely responsible for his misconduct. Of course, his firm must share the responsibility for allowing the investments to have occurred but this does not diminish his own responsibility.

**Extent to Which the Respondent was Enriched by the Misconduct**

¶ 19 The Respondent was enriched by commissions he earned on the investments he made for the two client families. IIROC estimated the commissions to be $47,383, and this was not challenged by the Respondent.

**Prior Disciplinary Record**

¶ 20 The Respondent has no prior disciplinary history with IIROC or its predecessor organization, the Investment Dealers' Association of Canada. However, he was the subject of discipline by the insurance regulator for the province of Saskatchewan in the 1990s.

**Acceptance of Responsibility, Acknowledgment of Misconduct and Remorse**

¶ 21 The Respondent has acknowledged his wrongdoing but only did so at the Penalty Hearing. The guidelines indicate that the earlier an acknowledgment and remorse occurs the more indicative it is of being genuine. Notwithstanding its timing, we find the acceptance of responsibility and remorse by the Respondent to be genuine.

**Credit for Cooperation**

¶ 22 The Respondent did not self-identify a breach of the rules or report any infractions. However, it appears that he cooperated with IIROC when asked to provide assistance or information in the course of the investigation. There was no evidence to suggest that the Respondent was uncooperative.

**Voluntary Rehabilitative Efforts**

¶ 23 The Rehabilitative efforts of the Respondent all seem to have occurred after the release of the Panel's decision. The Respondent testified that this disciplinary process has caused him to re-evaluate and actively work to reduce the use of margin accounts and leverage generally. The evidence at the Penalty Hearing was that he had already reduced margin and leverage accounts. While we must be cautious that these subsequent rehabilitative efforts might be self-serving, we do accept that they show both an acknowledgement of the misconduct and a commitment to remedying it. Also, the Respondent contributed $100,000 toward the payment by his firm to one of the client families and reimbursed the other family for $6,000 of commissions.

**Reliance on the Expertise of Others**

¶ 24 This is a rather difficult factor to assess in the present case. The Respondent's firm's compliance department approved all of the purchases he recommended for the two client families. Without any "push-back" from his firm, the Respondent perhaps developed a reliance leading him to the conclusion that his recommendations were suitable for his clients. There clearly is sufficient fault to be shared both by the Respondent and his firm in this respect.

**Planning and Organization**

¶ 25 The actions of the Respondent were not a rash or temporary lapse of judgment. He made numerous transactions and they were part of an organized investment strategy. On the other hand, he made no attempt to conceal his misconduct, or deceive or intimidate clients.

**Multiple Incidents of Misconduct Over an Extended Period of Time**

¶ 26 Again, this is not a situation of an isolated event. The Respondent planned and organized an investment strategy for both of the client families which involved multiple transactions over a considerable period of time. However, it is the investment strategy itself (placing the clients totally in equity funds) that created the unsuitability of the investments. Virtually all of the investments may have been appropriate if they were only a small part of a bigger well-balanced portfolio. This was not the case. The discretionary trade, however, was a one-time occurrence.

**Vulnerability of Victim**

¶ 27 Both client families were unsophisticated investors. This is particularly the case with respect to the Raimbault family. Both client families were very trusting and completely reliant upon the Respondent's advice. Given the financial circumstances of each, they required conservative investment strategies and objectives consistent with low risk. It was the Respondent's responsibility to not allow his clients to make unsuitable investments even if he put at risk losing their accounts. On any objective analysis, the Respondent had to know

that these two clients families were vulnerable.

**Failure to Cooperate with the Investigation**

¶ 28 There is no evidence to suggest that the Respondent did not cooperate with the investigation by IIROC.

**Significant Economic Loss to the Client and/or Dealer Member Firm**

¶ 29 The Sanction Guidelines state:

> A finding of a significant monetary loss by the respondent's clients or the Dealer Member firm arising out of the respondent's misconduct can be seen as an aggravating factor to the extent that investing has at its core capital preservation and returns.

¶ 30 In the present case one client family did lose in excess of $600,000 when they liquidated their assets. The family was paid $500,000 but $400,000 of that amount was paid by the Respondent's firm. On any view of the situation, the Respondent's actions did cause significant economic loss to both a client and to his firm. However, the firm has indicated that the Respondent will continue to be associated with the firm in the future if he is able to do so.

¶ 31 In addition to the fourteen key considerations the Sanction Guidelines contain the following with respect to the use of sanctions:

> 4. Use of Sanctions
>
> As set out above, sanctions should be remedial in nature and "fit" the misconduct. Sanctions should effectively address the conduct in such a way as to discourage and prevent future misconduct by the respondent, and at the same time, promote general adherence to industry rules and standards.
>
> 4.1 Fines
>
> It is generally accepted that monetary fines serve to express general condemnation of specific misconduct. Fines will generally increase in relation to the relative severity of specific misconduct. Severity is measured to all of the factors set out above.
>
> 4.1.1 Deductibility of Fines
>
> As a result of the Supreme Court of Canada's decision in *65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 604, fines imposed by self-regulatory organization on its Members and their approved persons may be deductible as business expenses for income purposes. As this may undermine a fine's intended effects, Hearing Panel could consider income tax deductibility in determining the appropriate amount of the fine.
>
> 4.1.2 Credit for Internal Sanctions
>
> In imposing sanctions, a credit should be accorded for any fine or suspension that may have been imposed upon a respondent by his/her own Dealer Member firm arising out of internal disciplinary action.
>
> 4.1.3 Disgorgement
>
> At present, Dealer Member Rules specifically restrict the levy of a fine to a maximum of $1,000,000 per contravention for Approved Persons and $5,000,000 for Dealer Members. As well, a Hearing Panel may require a respondent to pay an amount equal to three times the profit made or the loss avoided by the respondent as a result of the commission of the contravention in question, including any commissions earned, or other benefits obtained from the impugned transactions. However, disgorgement is a sanction – it is not restitution.
>
> 4.2 Suspension of Corporation Membership or Approved Person Status
>
> 4.2.1 Suspension
>
> A suspension may be appropriate where:

- there have been numerous serious transgressions,
- there has been a pattern of misconduct,
- the respondent has a disciplinary history,
- the misconduct has an element of criminal or quasi-criminal activity, or
- the misconduct in question has caused some measure of harm to the integrity of the securities industry as a whole.

4.3 Permanent Bar From Approval or Expulsion/Termination of Membership

A permanent ban from approval of an individual or the termination or membership or expulsion from the Corporation is a severe economic penalty and should generally be reserved for cases where:

- the public itself has been abused,
- where it is clear that a respondent's conduct is indicative of a resistance to governance,
- the misconduct has an element of criminal or quasi-criminal activity, or
- there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole.

Hearing Panel may consider imposing a fine and requiring disgorgement even when a registrant is permanently barred in egregious cases involving significant harm to clients and/or to the integrity of the securities industry as a whole.

4.4. Other Remedies

To address the misconduct effectively in any given case, a Hearing Panel may design specific remedial sanctions other than a fine, disgorgement or suspension. For example, a Hearing Panel may impose sanctions that:

(i) require a Dealer Member firm to submit for the Corporation approval and/or implement procedures for improved future compliance with regulatory requirements,

(ii) require a Dealer Member firm to implement heightened supervision of certain individuals or branches/departments in the firm,

(iii) limit the activities of a registrant, including suspending or barring a registrant from acting in a supervisory capacity, and

(iv) require professional re-qualification by the writing of an exam or the successful competition of a remedial course of study.

This list is illustrative, not exhaustive, and is included to provide examples of the types of sanctions that may design to address specific misconduct.

¶ 32 The Sanction Guidelines also specifically address the transgression of particular rules. With respect to unsuitable recommendations (Dealer Member Rule 1300.1(P)) the guidelines emphasize the importance of the relationship of trust and confidence that exists between a registrant and a client. At paragraph 3.1 of the Guidelines under the heading "improper Sales Practice" there are a number of considerations listed in addition to general principles and recommended sanctions. The considerations include:

- Extent of due diligence conducted with respect to recommended security.
- Magnitude of losses directly attributable to the unsuitable recommendations.
- The number of clients affected.
- The level of sophistication of the clients.
- The existence of any pattern of making unsuitable recommendations.

- Presence of any ulterior motive (ie. financial gain to the Respondent).

¶ 33 The recommended sanctions in order of severity, presumably based upon the number of considerations that are pertinent to the particular factual situation, range from a minimum fine of $10,000 to a period of suspension "in most egregious cases involving elements of deception and misrepresentations".

¶ 34 Paragraph 3.6 of the Sanction Guidelines specifically addresses discretionary trading. While not prohibited out rightly, the essence of the contravention relates to lack of proper written authorization by the client for a trade. Further, a registrant cannot engage in discretionary trading unless the account has been properly designated as a "discretionary" or "managed" account. The considerations to be taken into account in addition to general principles include:

- Number of unauthorized trades.
- Whether the client provided verbal authority to engage in discretionary trading.
- Underlying reason for engaging in discretionary trading (eg. for personal financial gain).
- The number of clients affected.
- Period of time discretionary trading took place.
- Suitability of discretionary trades.
- Magnitude of client losses.

¶ 35 The recommendations contained in Paragraph 3.6 range from a minimum fine of $5,000 to a period of suspension in most egregious cases involving large number of large value trades.

**The Case Authorities**

¶ 36 In addition to the Sanction Guidelines the parties both relied on a number of decisions of previous tribunals. We will briefly summarize each of the cases in the paragraphs that follow.

¶ 37 In *Re Phillips* [2011] IIROC No. 34 the Registrant, Who did not attend the hearing and was not represented by legal counsel, was found responsible on four counts of misconduct. The four counts included unsuitable purchases, unauthorized discretionary trades, completing tax returns without prior approval from her firm (and without any formal training or designation) and sale from the Registrant's personal account. The unsuitable purchases involved 30 purchases on 17 different days in which 70% of the client's holdings were placed in high-risk speculative junior mining stocks and small cap income trusts. As a result of the unsuitable trades, the clients' accounts lost in excess of $169,000. In transactions involving another client there were 13 purchases on seven different days in which 90% of the client's assets were invested in high-risk speculative securities. This client's account lost in excess of 50% of its value, which appears to have started with $138,000. The Panel found that the clients were particularly vulnerable and that this was known to the Registrant. Of the purchases of unsuitable securities, it was found that the Registrant made 13 unauthorized discretionary purchases for one of the clients on seven different days. In addition, as stated, the Registrant was found to have breached IDA by-laws by preparing tax returns and by facilitating a trade from her own personal account. The Panel ordered a three-year suspension, a fine of $290,000, disgorgement of commissions, payment of costs of $15,000 and other conditions to be met prior to any re-registration including retaking and completing courses and being subject to strict supervision for two years.

¶ 38 In *Re Balanko* [2007] I.D.A.C.D. No. 10 the Registrant, who was not represented at the hearing, was found to have made unsuitable trades and making a total of 25 discretionary trades (unauthorized transactions). The misconduct of the Registrant related to two clients, one a retired man in his 70's and the other a teacher. The losses incurred were $19,000 (7% of the account value) and $1,300 (10% of the account value) respectively. The Panel found that both clients had a low level of sophistication. Although the recorded level of risk was 20% low risk and 80% medium risk for one of the clients, the Registrant traded in high-risk stocks. The details of the trades for the other client are not clear from the Panel's decision. The Panel made reference to several other decisions noting that in those cases there was more than one client, there were similar unsuitable

investments, the clients were unsophisticated, and there were similar losses in the accounts. Notwithstanding IDA Counsel's recommendation for a one-year suspension, the Panel imposed a two-year suspension. In addition it imposed fines of $60,000, disgorgement of commissions of $2,500 and costs of $25,000; and, prior to any re-registration, a re-write and successful completion of examinations followed by a period of strict supervision for the first twelve months.

¶ 39 In *Re Wilson* [2011] IIROC No. 47 the Panel found the Registrant, who did not appear and was not represented, had contravened by-laws and regulations by effecting transactions that were unsuitable for his client and engaging in unauthorized trading. The client invested $640,000 with the Registrant, after a divorce. The Panel found that the client had limited experience in dealing with securities, had a "balanced" investment objective, did not understand the avid risk of a margin account, had a low tolerance for risk and needed to preserve capital because of her family circumstances. The investments made by the Registrant were found to be speculative in nature and were predominantly small capitalized companies in the mining, oil and gas sectors. The account opened for the client was a margin account. The withdrawals from the account together with interest expenses due to margin borrowing, margin calls, commissions and loss on the investments of $220,000 resulted in the client's account being depleted from approximately $640,000 to approximately $60,000. It was also found that the NCAF inaccurately recorded the client's investment objectives. Although the account was not set up as a discretionary trading account, all of the trades, 75 in all, were made without authorization. The Panel ordered a five-year suspension, a fine of $75,000, disgorgement of commissions of $26,000 and costs of $10,000. The Panel also ordered that the Respondent, after the period of suspension, must rewrite the appropriate examinations before becoming re-registered.

¶ 40 In *Re Janiewicz* [2006] I.D.A.C.D. No. 3 the Registrant, who did not attend the hearing and was not represented, breached by-laws and rules by engaging in unauthorized transactions and making recommendations that were unsuitable for his client. The client, a 41 year old woman with no investment experience, transferred approximately $182,000 in assets to the Registrant from another investment firm. Over a period of eleven months the Registrant effected approximately 65 transactions, 64 of which involved the buying or selling of put options. The Panel found that the client did not understand option trading and did not appreciate the risk factors involved. The trades generated losses amounting to approximately $42,000 U.S. It was also found that 41 of the 65 transactions involved the Registrant exercising his discretion without the client's authorization. It was also found that the client's account, a U.S. margin account, had not been accepted and approved by his employer firm. The penalties imposed upon the Registrant were a suspension of six months, a $50,000 fine, a disgorgement of commissions of $8,345 U.S. It was also found that any re-registration required a rewrite and passing the exam of Conduct and Practices Handbook Course offered by the Canadian Securities Institute followed by a twelve month period of close supervision by his member firm.

¶ 41 In *Re Daubney* (2008), 31 OSCB 4187 the Ontario Securities Commission found that the Registrant had made numerous unsuitable investments for six clients. The general investment program the Registrant recommended to the six investors involved what the Commission characterized as a "double-leveraging scheme" which included the following:

- Move all existing investments and securities to the Registrant, which included liquidating the investments and purchasing units of mutual funds selected by the Registrant;
- Take out or increase a loan (in the form of a mortgage or line of credit) on the investors' respective homes to approximately 75% of their appraised value;
- Invest the proceeds of the mortgage and mutual funds selected by the Registrant;
- Pledge the mutual funds purchased as security for a two-for-one investment loan from a financial institution;
- Invest the proceeds of the investment loan in more mutual funds selected by the Registrant; and
- Where they existed, use withdrawals from RRIFs to help finance the debt service charges on these loans.

The Registrant's investment recommendations included mainly equity mutual funds because the Registrant felt that bond funds would not generate sufficient income to meet the debt service obligations of the investment loans. The majority of the mutual funds were sold on a deferred sales charges basis and the Registrant gave optimistic projections on how the investments would grow. The investors lost a very significant amount of money. The OSC imposed a permanent suspension.

¶ 42 In *Pugliese* v. *Clark*, 2008 BCCA 130 the Court upheld a decision of the Financial Services Tribunal not to re-register the Appellant. The facts of the case are not comparable to the ones before us but the Court did make comments about the integrity of the industry. It found that the Registrar was correct in taking into account the negative impact of the confidence of the public and the industry in the financial services sector.

¶ 43 There were seven other decisions that were made reference to in the Penalty Hearing. An IIROC notice summarizing the findings of the various panels on penalty was submitted for each of them. We will briefly summarize each of the seven decisions:

- Gale Richard Wells – 11-0062/February 11, 2011:

  Failure to be properly registered to conduct business: $10,000 fine – costs of $13,000.

- Kostantinos Georgeos Arapas – 11-0159/May 19, 2011:

  Private placement of shares of a company in which he had an interest: $45,000 fine – rewrite the options supervisors course – 12 month period of close supervision – prohibition from trading or advising in level 4 option accounts for 12 months – 6 month suspension from acting as supervisor – loss of $5,000.

- Rocco Tony Cornacchia – 11-0172/June 2, 2011:

  12 clients in a private placement based upon an exemption for which they did not qualify and failure to know his clients by not updating NCAFS: $10,000 fine – disgorgement of profits of $1,768 – rewrite CPH exam – close supervision for 12 months.

- Kenneth Nott – 11-0211/July 14, 2011:

  Artificial closing bids, 230 in total: $15,000 fine – costs of $5,000 – close supervision for 6 months.

- Elizabeth Maureen Morrison – 11-0201/July 4, 2011:

  Fail to know your client obligations and failed to ensure that an investment in a private placement was not suitable for clients: $30,000 fine – costs of $5,000.

- Allan Mansfield Busch – 11-0219/July 19, 2011:

  Unsuitable investment recommendations for the accounts of two of his clients and providing compensation to three clients for account losses: $15,000 fine – costs of $5,000.

- Mary Louise Kasten-Brown – 11-0207/July 8, 2011:

  Failure to use due diligence to learn and remain informed of the essential facts relevant to client and acceptance of unsuitable orders: $23,250 fine – disgorgement of commissions of $787.50 – rewrite CPH exam – 6 months close supervision – costs of $3,000.

- Radoslaw Andrzej Chrabaloyski – 11-0233/August 5, 2011:

  Failure to ensure investment recommendation was suitable for clients: $20,000 fine – disgorgement of commission of $522.00 – costs of $2,500.

- Bryan Dale Claggett – 11-0181/June 13, 2011:

  Conduct unbecoming for paying a sum of money to client in an attempt to settle complaint without prior knowledge or consent of employer: $10,000 fine.

¶ 44 We will now turn to a consideration of the particular appropriate penalty to be imposed upon Mr. Gareau for the infractions of the IIROC Rules and By-laws as found by this Panel.

**Analysis and Order**

¶ 45 We have reviewed the fourteen key considerations outlined in the Sanction Guidelines and assessed how they apply to the particular facts of this case. In short, the unsuitable recommendations made by the Respondent did cause considerable financial and emotional harm to his clients. The clients were vulnerable and unsophisticated, which was not acknowledged by the Respondent in the hearing on the merits. In the Penalty Hearing the Respondent acknowledged that he had engaged in wrongdoing, expressed remorse and spoke to rehabilitative efforts he has undertaken with respect to other clients, which mainly resulted in the reduction of the use of margin accounts and leveraging generally. It is noteworthy, however, that at the time of the Penalty Hearing many of the Respondent's clients were still investing on margin yet investment sophistication of the clients who were called as witnesses to support the Respondent appeared to be very fundamental. They were unsophisticated investors and, if they are representative of his overall clients, the use of margin accounts continues to be unsuitable for them.

¶ 46 We have also considered the situations in which the General Principles, contained in the Sanction Guidelines, suggest a suspension may be appropriate and those in which a permanent bar may be appropriate. With respect to the latter, three of the four factors set out in paragraph 4.3. do not appear to have application to the Respondent's conduct. He was not resistant to governance, his misconduct does not have an element of criminal or quasi-criminal activity and there is no reason to believe that the Respondent cannot be trusted to act in an honest and fair manner. The one factor that does apply to his situation is that the public has been abused both by his unsuitable trading recommendations and the one discretionary trade.

¶ 47 Paragraph 4.2 of the General Principles lists five factors which may support a suspension. Of the five factors, four appear to apply to the Respondent. There have been numerous transgressions, there was a pattern of misconduct, there is a disciplinary history (albeit with another regulator) and the misconduct in question has caused some measure of harm to the integrity of the securities industry as a whole. The fifth factor, which does not apply to the Respondent's conduct, is that there is no element of criminal or quasi-criminal activity.

¶ 48 It is interesting that the Guidelines which relate to specific offences, discussed above at paragraphs 32 and 34, only refer to the imposition of a suspension where unsuitable recommendations are egregious involving elements of deception and where discretionary trades involve a significant number of large value trades. If the guidelines were followed, a suspension would not be imposed in the present case since there was no deception involved and there was only one discretionary trade. However, previous tribunals have not been reluctant to suspend registrants on facts similar to those presented in this case. This Panel is of the view that a period of suspension is warranted in the present case.

¶ 49 It is our view that a permanent suspension in the present case would be too severe. However, the transgressions of the Respondent suggest that a suspension from trading activities is appropriate. The challenge for this Panel is to fix a period of suspension that signals the seriousness of the Respondent's conduct yet does not amount to a *de facto* permanent suspension. Perhaps the most difficult feature of the present case is that the Panel does not have confidence that the Claimant, or his firm, understood the inappropriateness of creating investment portfolios for the two client families that were composed entirely of equity investments. While some of the investments clearly would have been suitable in a portfolio of mixed debt and equity products, none were suitable because all were equity products and some were very high risk. Even after hearing the testimony of the Respondent at the Penalty Hearing, this Panel is left with the unsettling feeling that the inappropriateness of the investment mix for the Respondent's relatively elderly clients, who were by any measure unsophisticated investors, is still not fully appreciated by Mr. Gareau. Nevertheless, based on the objective factors, we feel that a period of a substantial suspension together with a significant fine and other sanctions fashions an appropriate penalty based on the facts of this case. Therefore, we order that the following sanctions be imposed upon the Respondent:

(a) An order that the Respondent may not seek registration for a period of one year from the date of

this decision;

(b) A fine of $100,000.

(c) Disgorgement of commissions of $47,383.

(d) The Respondent must successfully re-take the CPH Examination prior to re-registration;

(e) In the event the Respondent is re-registered, he must be subject to strict supervision for one year subsequent to re-registration and followed by a further six months of close supervision;

(f) Payment of costs of $20,000;

Dated at Saskatoon, Saskatchewan this 2nd day of January, 2012.

Daniel Ish, Q.C., Chair

William Welton, Member

Eric Wray, Member