INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA (Re), 2022 NSSEC 4

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the "Act")

– AND –

THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA (IIROC)

DECISION

Hearing	In Writing	
Decision	July 28, 2022	
Panel	Heidi Walsh-Sampson, Chair Natalie MacDonald, Commissioner	
Submissions	Mark Holden and Eugene Tan Walker, Dunlop	Counsel for the Applicants
	Brendan van Niejenhuis Stockwoods Barristers	Counsel for IIROC

1. This matter originated as a request by the Applicants for a hearing and review of the decision by IIROC to not investigate a complaint against an IIROC Dealer Member that we will refer to as National Bank Independent Network (NBIN).

2. The Applicants allege that NBIN played a role in the substantial losses that they each suffered at the hands of High Tide Financial Limited (HTFL), a registered Portfolio Manager, and HTFL's registered advising representative Frederick Saturley. The Applicants wanted NBIN investigated for a breach of IIROC's Rules. When IIROC declined to investigate, the Applicants initially applied to the Commission for a hearing and review of this IIROC decision pursuant to subsection 30(5) of the *Act*. Over the course of the proceedings, the Applicants have conceded that the Application is more appropriately brought pursuant to subsection 30(3A) of the *Act*. IIROC also acknowledged that if the Commission were to intervene, its jurisdiction to do so would be based upon subsection 30(3A). On this basis, the Commission

will not canvas the arguments put forth under section 30(5) of the *Act.* The Panel has only considered the request pursuant to Section 30(3A) of the *Act*, which states:

> The Commission may, where the Commission considers that it is in the public interest to do so, make any decision with respect to any by-law, rule, regulations, policy, procedure, interpretation or practice of a recognized self-regulatory organization.

3. This Panel is charged only with determining whether the complex matters raised in the Application meet the threshold for review by the Commission. Pursuant to subsection 30(3A), the threshold for determining this question is whether the Panel finds that the questions raised by the Applicants are a matter of public interest.

The Parties

4. The Applicants comprise numerous individuals who claim they suffered losses in excess of $20 million at the hands of HTFL and NBIN. HTFL was the Portfolio Manager for each of the Applicants and their accounts were managed by HTFL's advising representative, Frederick Saturley.

5. IIROC is the national self-regulatory organization (SRO) that oversees all investment dealers and their approved persons, as well as trading activity on Canada's debt and equity marketplaces. IIROC is recognized as a self-regulatory organization by the Commission and is organized for the purpose of regulating the operations and the standards of practice and business conduct of its member firms and their representatives with a view to promoting the protection of investors and the public interest.

6. HTFL was not a member firm of IIROC and was not therefore subject to IIROC's jurisdiction.

7. The Applicants lodged their complaints with IIROC against "National Bank Independent Network", and IIROC's responses to the Applicants' complaints, as well as IIROC's submissions to the Panel, similarly referred to National Bank Independent Network and described the firm as an IIROC Dealer Member.

8. It is essential to note that none of HTFL, Mr. Saturley nor NBIN are parties to this Application, and to the Panel's knowledge none of them have received notice of the Application.

The Record

9. The record for this Application consists of the following:

    - a letter dated June 12, 2020 from the Applicants' counsel to IIROC with the original complaint concerning NBIN;

    - a letter dated July 2, 2020 from the Applicants' counsel to IIROC with additional information concerning the complaint;

- a letter dated July 8, 2020 from IIROC to the Applicants' counsel acknowledging receipt of the complaint;

- a letter dated August 6, 2021 from the Applicants' counsel to IIROC resubmitting the complaint; and

- a letter dated September 20, 2021 from IIROC to the Applicants' counsel stating that "Enforcement Staff reviewed this matter and determined that further investigation is not warranted and [sic] will not open a new file."

10. Crucially, the record for this Application does not include any of the following materials:

    - client agreements and communications between the individual Applicants and HTFL and/or Mr. Saturley;

    - client agreements and communications (if any) between the individual Applicants and NBIN; or

    - agreements and communications between HTFL and NBIN relating to the individual Applicants' accounts.

11. As will be clear from what follows, these agreements and communications are central to any determination of the respective rights and responsibilities of the Applicants, HTFL, Mr. Saturley and NBIN. We therefore emphasize that:

    - nothing in this decision is intended to suggest that we have made a finding that NBIN breached any obligations to the individual Applicants or that NBIN failed to comply with IIROC's requirements;

    - nothing in this decision relates to HTFL's or Mr. Saturley's obligations to the individual Applicants or HTFL's or Mr. Saturley's compliance with securities law.

The Application

12. The Applicants submit that NBIN was the "broker" that HTFL contracted with to execute trades on its behalf as well as to provide leveraged financing to finance Mr. Saturley's trading strategy.

13. NBIN is a registered Dealer Member of IIROC. At the heart of the Applicants' complaint to IIROC is that neither Mr. Saturley nor HTFL would have been able to place the trades that were placed in the absence of a contractual service arrangement with the IIROC Dealer Member, NBIN. The Applicants submit that they were clients of both the registered Portfolio Manager, HTFL, and the IIROC Dealer Member, NBIN. Further, they argue that NBIN failed to meet certain duties to the Applicants and was thereby in breach of IIROC Rules.

14. The Respondent, IIROC, submits that although the Commission has the authority under subsection 30(3A) to hear this application and "make any order" relating to a "by-law, rule, regulation, policy, procedure, interpretation or practice" of an SRO, such intervention is extraordinary and the necessary public interest basis on which such authority should be exercised is absent here.

Alleged Breaches

15. The Applicants' complaint to IIROC laid out a comprehensive list of alleged breaches of IIROC Rules by NBIN. The litany of allegations (none of which have been proven) is extensive, and included:

    - that HTFL was an agent of NBIN and that NBIN failed to perform due diligence on HTFL and HTFL's representative, Mr. Saturley;
    - that NBIN failed to adequately supervise HTFL and Mr. Saturley;
    - that NBIN refused to recognize the Applicants as NBIN clients, despite the fact that NBIN extended margin and charged commissions to the Applicants;
    - that NBIN used documents that attempted to contract out of industry regulations;
    - that NBIN failed to take internal action when IIROC put Dealer Members on notice in October 2019, in relation to the use of limitation of liability clauses or exclusionary clauses in retail contracts;
    - that NBIN improperly held registered funds; and
    - that NBIN failed to flag Mr. Saturley's trading behaviour as improper churning.

16. The Applicants identify the following allegations against NBIN as the most pressing to be considered by the Commission:

    - that NBIN relied on limitation of liability clauses in its agreements with the individual Applicants, explicitly contrary to IIROC guidance; and
    - that NBIN extended margin debt to the individual Applicants without meeting its IIROC obligations to advise them of the risks, proper authorization or notice of margin calls.

Service Arrangements Between Portfolio Managers and IIROC Dealer Members

17. Both parties' submissions indicated that the trading which led to the complaint was done pursuant to a service arrangement between HTFL, as Portfolio Manager, and NBIN, as a Dealer Member of IIROC.

18. Service arrangements between a Portfolio Manager and IIROC Dealer Member (PMDSA) can take a variety of structures which may relieve the IIROC Dealer Member of certain obligations to the client and still comply with IIROC Rules. The roles and responsibilities of each party will be set out in the terms of the PMDSA. In a typical PMDSA, many, if not most, of the IIROC Dealer Member's obligations to the retail client may be delegated to the Portfolio Manager, but certain obligations cannot be delegated.

19. Many allegations made by the Applicants in the initial IIROC complaint relate to conduct within the scope of duties for which a Portfolio Manager would be solely responsible, or for which the IIROC Dealer Member would typically be expected to have relieved itself of pursuant to a PMDSA. In both cases, the complained of behaviour may not have been the IIROC Dealer Member's responsibility and, as such, would fall outside the scope of IIROC's jurisdiction for review. As noted above, the terms of the PMDSA between HTFL and NBIN are not before the Commission and so the Panel has no information as to the extent of responsibilities assumed by HTFL in this matter. However, two of the Applicants' allegations relate to obligations that NBIN would not normally be able to contract out of or delegate to HTFL; namely, the limitation of liability clauses alleged to be in the account documentation excluding NBIN from liability and the alleged unauthorized margin trading in the Applicants' account without advising the clients of the risks in advance.

Limitation of Liability Clauses

20. The Applicants allege that NBIN account documentation was provided by HTFL to each Applicant, and they subsequently received NBIN account statements which showed HTFL as the Portfolio Manager. The Applicants allege that the provisions of these account documents explicitly excluded NBIN from any liability or claims from the Applicants. In their complaint to IIROC, the Applicants claimed that these provisions were in contravention of IIROC Consolidated Rule 1402(1) which reads as follows:

> (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.

21. In making this argument, the Applicants rely on IIROC Guidance Note 18-0242 – *Service arrangements between Dealer Members and Portfolio Managers* (Dec 20, 2018), as well as Canadian Securities Administrators (CSA) Staff Notice 31-347, *Guidance for Portfolio Managers for Service Arrangements with IIROC Dealer Members* (November 17, 2016).

22. In October of 2019, IIROC issued guidance to its Dealer Members (Guidance Note 19-0177 – *Limitation of Liability Clauses* (October 10, 2019)) which identifies several types of clauses

IIROC considers contrary to subsection 1402(1) of IIROC Consolidated Rules (the "IIROC Guidance"). In addition, the IIROC Guidance notes that the Ontario Securities Commission identified certain types of clauses it considers contrary to the duty to deal fairly, honestly and in good faith with clients in OSC Rule 31-505. Such clauses include*:* (a) clauses that seek to relieve Dealers from their regulatory obligations (such as suitability); (b) clauses which completely waive the Dealer's liability; and (c) clauses which arbitrarily limit damages (such as limiting them to the fees paid by the client).

23. IIROC Guidance Note 18-0242 makes clear the Dealer Member may have obligations to the client even in the context of a PMDSA. Moreover, where the Dealer Member attempts to contract out of these obligations or to limit its liability, Guidance Note 19-0177 states that the Dealer Member may be in breach of IIROC Rule 1402(1).

24. Accordingly, even though HTFL was not subject to IIROC requirements, NBIN, as an IIROC Dealer Member, remained obliged to meet certain limited notice and reporting requirements to the Applicants. Although we do not have the details of the PMDSA before us, we would question an arrangement that permitted the IIROC Dealer Member to completely delegate mandated responsibilities to the Portfolio Manager under the PMDSA contract while simultaneously excluding itself from all liability to the retail client in the account agreement.

25. IIROC Guidance Note 18-0242 states that the PMDSA guidance does not apply where the client investments are held on an undisclosed basis under an omnibus arrangement in the limited circumstances permitted by securities laws. There has been no evidence presented by either party to this effect.

NBIN Margin Accounts

26. The second category of allegation that the Applicants request the Commission to focus on relates to the Applicants' margin accounts with NBIN. The Applicants allege that they never agreed to trade on margin and that they were unaware that their accounts permitted this.

27. In the letter to IIROC dated July 2, 2020, Applicants' counsel stated "[i]t is our client's position that no prior authorization, express or otherwise, was granted to either their portfolio manager, Frederick Saturley or NBIN to borrow funds on margin. […] Almost every one of our clients was completely unaware that the portfolio manager had borrowed money on margin in the operation of their accounts. They all had enough money in their accounts to allow the portfolio manager to operate them without any of the risks associated with margin accounts."

28. IIROC Guidance Note 18-0242 states that:

> *3.2.1 Account opening and operation.*
>
> The Dealer is responsible for:

> […] where the client opens a margin account or uses leverage to trade, verifying that they are aware of the risk of trading on margin and providing each client with a leverage disclosure statement where applicable

29. The Applicants' allegation of unauthorized margin trading in their accounts is a serious one. In any event, we do not have the evidence before us to determine whether NBIN satisfied its obligations under IIROC Rules concerning the opening of the Applicants' margin accounts or use of leverage to trade, or whether NBIN verified that the Applicants were aware of the risk of trading on margin and providing each client with a leverage disclosure statement where applicable. As the account documentation did not form part of the submissions this Panel can make no findings on whether the account documentation is in violation of IIROC's Rules or securities legislation.

Analysis

30. As an SRO, IIROC's primary role in reviewing any complaint is to determine whether there is sufficient evidence of a breach of IIROC's Rules to warrant regulatory action. It is entirely conceivable that NBIN may be found partially or wholly liable to the Applicants for their losses in a court of law and not be in breach of IIROC's Rules. The question in the present matter, where IIROC has declined to investigate a complaint, is whether the Commission should be exercising its broad discretionary power to intervene as a matter of public interest pursuant to subsection 30(3A).

31. In bringing this Application under subsection 30(3A), the Applicants rely heavily on the decision of the Nova Scotia Court of Appeal in *Nova Scotia (Securities Commission) v. Schriver*, 2006 NSCA 1, where the purpose of the legislation is outlined as follows:

> [17] The purpose of the *Act* is to protect investors and foster the process of capital formation: s. 1A. As has been said many times, securities regulations with these objectives is a highly specialized activity. Lead responsibility for discharging this specialized function has been entrusted to the Commission: see, for example, *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557 (S.C.C.) at para. 60 and s. 5(1) of the Act. The Commission is given a broad mandate to determine and act in accordance with the public interest: see for example s. 134. It has not only an adjudicative role, but also a part in policy development, particularly through its extensive rule-making power: see s. 150. In short, the *Act* gives the Commission the central role in securities regulation under a complex and detailed statutory scheme.
>
> [18] The provisions of the *Act* most directly relevant to this appeal are ss. 30 and 134. Section 30, among other things, gives the Commission a discretion to grant and revoke recognition of SROs, authorizes the Commission to review decisions of those organizations as if they were decisions of the Director and makes failure to comply with those rules a contravention of the *Act.* **Section 134 gives the Commission a**

broad mandate to determine and act on what it considers to be in the public interest. [Emphasis added].

32. Although the Commission has a broad mandate to determine and act on what it considers to be in the public interest, IIROC argues that the proceeding requested by the Applicants does not fit comfortably within the purpose of this residual authority. They argue that the proper exercise of this power requires that it be exercised on the basis of the broader public interest of the investing public as opposed to the interest of a particular individual or group of individuals. They also argue that the threshold for the Commission to intervene in an SRO investigative matter in order to protect the public interest is not met here.

Exercise of Discretionary Authority

33. Pursuant to section 30 of the *Act,* the Commission has delegated authority to IIROC to regulate the operation and the standards of practice and business conduct of its members in accordance with its by-laws, rules, regulations, policies, procedures, interpretations, and practices.

34. IIROC's counsel cited a series of cases which support that the discretionary authority granted to the Commission in subsection 30(3A) should be exercised only rarely and with caution, recognizing the important and expert roles that have been left to SROs to administer as part of the broader scheme of regulation. The cases cited by IIROC are panel decisions of securities commissions which make clear that a commission should refrain from interfering in the self-regulatory activities of an SRO unless necessary. According to the OSC Panel in *Re Derivative Services Ltd.,* also cited by IIROC counsel, "[t]he theory is that the industry through SROs like the [IDA], will carry on the necessary regulatory activities with the government riding shotgun to ensure that they remain on the correct path." IIROC also submitted that, "what is true of SRO adjudicative matters carries even more force in evaluating SRO investigative matters, including the staff assessment of whether to proceed or not proceed with an investigation of a dealer member".

35. This Panel accepts that the Commission should not interfere with the SRO regime other than where necessary and in exceptional cases. The challenge has been for this Panel to determine whether IIROC's refusal to open an investigation into the allegations that NBIN breached IIROC Rules is a matter of public interest. Although this Panel did not have the opportunity to review the supporting documentation, IIROC staff did. The Applicants' initial complaint indicates that IIROC staff have had the benefit of reviewing the supporting client account documentation between NBIN and the Applicants, as well the discretionary trading agreements between the Applicants and HTFL in determining not to proceed with an investigation of the Applicants' complaints. Where IIROC staff has had the benefit of reviewing the evidence relevant to the complaint and the Panel has not, we are cautious to interfere with the decision not to proceed with an investigation. In considering the Applicant's request, we are mindful of not opening the floodgates by allowing parties to circumvent the SRO process; however, we are also mindful of the serious allegations made by the Applicants for which there has been no adequate answer provided.

36. The fact that no substantive explanation has been provided by IIROC to the Applicants in response to their complaint is not to say that IIROC has a responsibility under its internal review processes to provide any such explanation. IIROC's response to the Applicants implied that upon its analysis of the evidence (with the Panel noting that its oversight only extended to NBIN and not to HTFL), there was an insufficient basis on which to determine that NBIN breached the IIROC Rules , or that the evidence was insufficient to prove a violation in a formal disciplinary proceeding. However, it is unclear how IIROC arrived at its determination that the alleged breaches were insufficient to investigate, since no explanation was provided. Given the lengthy list of allegations made by the Applicants, the magnitude of losses they experienced and their express request that IIROC provide them with reasons and information, it may be understandable that the Applicants were left wondering why there was no basis for IIROC to proceed.

37. Pursuant to subsection 30(3A) of the *Act*, the Commission has jurisdiction to intervene in the public interest with respect to any by-law, rule, regulations, policy, procedure, interpretation, or practice of a recognized self-regulatory organization. In assessing whether the public interest considerations are sufficient to intervene, it is instructive to consider the purpose of the *Act*, as enunciated in section 1A:

> 1A (1) The purpose of this Act is to provide investors with protection from practices and activities **that tend to undermine investor confidence in the fairness and efficiency of capital markets** and, where it would not be inconsistent with an adequate level of investor protection, to foster the process of capital formation. [emphasis added]

38. An SRO's authority to establish its own processes is granted pursuant to the *Act*, and this authority is also subject to the *Act*'s stated purpose of investor protection. Indeed, the *Act*'s definition of "self-regulatory organization", also explicitly recognizes this purpose:

> (aqa) "self-regulatory organization" means a person or company that is organized for the purpose of regulating the operations and the standards of practice and business conduct of its members and their representatives **with a view to promoting the protection of investors and the public interest**; [emphasis added]

39. While the Panel maintains that careful consideration must be exercised in invoking subsection 30(3A), the Commission's overriding responsibility is a consideration of the protection of investors, and to ensure that practices by SROs do not undermine investor confidence in the fairness and efficiency of capital markets. While the regulation of its members through the operation and standards of practice and conduct is the responsibility of an SRO (which also promotes efficiency in capital markets), its ultimate and primary responsibility in doing so is to promote the protection of investors and the public interest through such regulation.

40. In this regard, the Panel must consider whether IIROC's actions in deciding not to investigate the allegations by the Applicants, and in particular, its failure to provide any

substantive explanation as to why it had decided not to do so, tends to undermine investor confidence in the capital markets. In the Panel's view, investor confidence is instilled through various means, including through education and information to promote an understanding of the securities regime, transparency and reporting requirements imposed on the industry, and also in investors' knowledge that they have avenues of recourse available to them, if necessary.

Relief sought

41. IIROC argues that it "lies beyond the proper scope of the Panel's inquiries to engage in a full exploration of IIROC's investigative decision here." We agree that, given this decision will not consider the initial request under subsection 30(5), the Panel cannot review the IIROC decision not to investigate the complaint nor, consequently, grant an appeal of the IIROC decision even if it were a reviewable decision, simply because there is no record on which to base it.

42. That does not mean that a remedy under the public interest provision of subsection 30(3A) is not necessary or appropriate. The question thus becomes what is an appropriate remedy in the circumstances should the Panel find that it is in the public interest to consider the Application?

43. Stymied by the lack of record in this Application, but equally concerned about the nature of the allegations, particularly those relating to the limitation of liability clauses and unauthorized margin trading, and the impact of the losses on these investors, the Panel requested submissions from the parties on the appropriate form of relief under subsection 30(3A). The Applicants identified the following three forms of relief:

    - first, an order for reasons for the refusal to proceed with an investigation;

    - second, certain findings regarding whether there was a duty owed by NBIN based on another Commission decision in the *Matter of the Application for Registration of Adonis Asset Management and Adrian Saturley* (February 14, 2022); and

    - third, an order for a *de novo* hearing.

Are reasons required or appropriate in this matter?

44. The Applicants' original application submitted that IIROC's interpretation of its own Rules in this matter is not correct and should be corrected. Ironically, IIROC responded that:

> the challenge to its "interpretation of its own Rules" has not been explicated by an IIROC Panel in a formal decision at a hearing, nor by IIROC staff in the correspondence regarding the Complaint, or indeed by the Applicants themselves in their initiating correspondence.

45. Of course, there could be no formal decision at a hearing if IIROC has refused to investigate to determine whether the matter should be brought to a hearing. The Applicants would no doubt have welcomed an explanation by IIROC staff in correspondence, indeed they explicitly requested it in their August 6, 2021 letter, but what they received was blanket refusal without reasons, other than IIROC's reference to the threshold evidentiary test it considers when determining whether to investigate.

46. The Applicants ask the Panel to consider whether the public interest was served by IIROC's failure to give reasons. A duty to give reasons may arise where there is a reviewable decision. IIROC submits that the refusal to proceed with an investigation of the Applicant's complaints is not a reviewable decision. IIROC cited a series of cases that have consistently concluded that a decision by an SRO not to investigate/close an investigation file without action (or similar decisions made in the course of investigations or enforcement proceedings) is not a "decision" as that term is properly construed in the analogous provisions to subsection 30(5) that appear in other provincial securities statutes. However, since this Application has been reframed under subsection 30(3A), it no longer relies upon the statutory right of review under subsection 30(5) but relies instead on the broader authority granted the Commission under the public interest provision. It is important to note that a request for reasons has the benefit of not interfering with the decision of IIROC but simply requests an explanation.

47. As noted previously, the Panel does not find that IIROC has an obligation to provide reasons or detailed explanations in its pre-investigation processes. Indeed, there may be numerous instances where doing so is neither efficient nor necessary.

48. However, the Panel is troubled by certain elements of the Application brought before it, specifically the two unanswered complaints relating to unauthorized margin trading and the limitation of liability provisions alleged to have been included in the NBIN account documentation. Moreover, there are certain basic elements of the complaints which cannot be ignored. The Applicants are described as mostly elderly with some in their 80s and dependent on the monies invested in their accounts for their retirement. Documentation included in the Application indicates that a significant number of clients lost money, with the August 6, 2021 complaint to IIROC listing 40 individuals. The total losses are alleged to exceed $20 million. Given the late stage of life of many of the Applicants and the magnitude of the losses, these alleged losses are likely devastating and near impossible to financially recover from. If an IIROC Dealer Member was able to contract out of all liability to the Applicants and did, in fact, permit trading on margin in their accounts without their clients' knowledge and consent and proper advice on the associated risks, then a potential violation of Rule 1402(1) may have occurred, but we are in no position to make such a finding. This would require an investigation and hearing of which we have not had the benefit, and we also note that NBIN has not had the opportunity to answer the claims.

49. Counsel for the Applicants initially submitted complaints to IIROC in letters dated June 20, 2020 and July 2, 2020 followed by an amended complaint dated August 6, 2021. In the

August 6th letter, the Applicants noted that the complaints submitted in 2020 were "dismissed without written or oral reasons from IIROC". In their August 6th complaint they specifically stated:

> It is necessary that following this series of complaints that a thorough investigation will be undertaken and written reasons will be provided so we can have a more fulsome understanding of when the IIROC rules and guidance apply or when they have been breached.

50. IIROC replied by letter dated September 20, 2021, stating,

> Enforcement Staff reviewed this matter and determined that further investigation is not warranted and will not open a new file. Please note that our review and decision in this matter were based solely on regulatory considerations, and the considerations that we applied in coming to our decision may be different than those applied in a civil law context, arbitration proceeding or by the Ombudsman for Banking Services and Investments (OBSI). While this may not be the preferred outcome for you, it is important for you to understand IIROC's role in reviewing investor complaints. As a self-regulatory organization, IIROC's Enforcement staff conducts its reviews in an objective manner in accordance with IIROC's mandate. Our role in reviewing your complaint is to determine whether there is evidence of an IIROC rule breach and whether that evidence is likely to be sufficient to prove a rule violation in a formal disciplinary proceeding.

51. While IIROC's response to the Applicants provided an overview of sorts, addressing that Enforcement Staff's review and decisions are based solely on regulatory considerations, it did not address why any of complaints alleged were insufficient or not founded.

52. This Panel's concern lies in our assessment of the ultimate question: does IIROC's approach in deciding not to investigate, and its failure to provide a meaningful response to the complaints tend to undermine investor confidence in the public markets?

53. The Panel acknowledges that IIROC's decision not to investigate may very well have merit; however, in the specific circumstances of this matter, the failure to provide a meaningful explanation as to why any of the numerous allegations were insufficient for proving a violation in a disciplinary proceeding is troubling. NBIN is an IIROC Dealer Member. Members of the public are directed to IIROC, as the SRO, when dealing with complaints or concerns about its members. In this regard, the public must have confidence in the process established to review such complaints.

54. A consideration of the public interest, including the public's confidence in a regulatory or administrative regime, may include a consideration of numerous factors. Public confidence does not require that a complainant receives the remedy or outcome they believe they are entitled to, but it would seem, at a minimum, to require that they know there is a fair process to which their concerns were heard and addressed.

55. The Panel is of the view that IIROC's chosen level of response may be appropriate in most cases. However, an assessment of whether IIROC's decision not to investigate these allegations raises public interest concerns must be considered in light of the very specific circumstances at hand. The magnitude of losses suffered by the Applicants (many of whom were elderly); combined with an unclear PMDSA arrangement; complicated by the fact that the Portfolio Manager was not an IIROC member and therefore not subject to oversight by IIROC; and, considering the numerous allegations including those relating to margin trading activity and the limitation of liability provisions, might lead any investor to expect that their complaint would lead to investigation. A lack of any meaningful explanation in response to these circumstances would surely raise concerns of investor confidence.

56. And, even if, after a fulsome review by IIROC, no breaches had been found, the lack of a meaningful explanation as to why no investigation was merited may leave the complainants, and the public, questioning the integrity of the process. Had IIROC provided some explanation, even if it fell short of detailed reasons, as to why the alleged breaches were either not proven, or were insufficient to warrant discipline, this may have provided the Applicants with some comfort that the matter was reviewed and considered in light of IIROC's Rules.

57. The Panel does not espouse a legal or administrative duty on the part of IIROC to give reasons, however, a consideration of the public interest in this matter is intricately related to IIROC's failure to provide any substantive explanation to the Applicants in this case.

58. While the landmark decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, is often cited in relation to the court's clarification regarding the application of the standard of review in administrative law matters, the Court's commentary on the value of reasons in demonstrating fairness and in support of the perception of public confidence in an administrative regime is illustrated below and worth noting:

> [79] Notwithstanding the important differences between the administrative context and the judicial context, reasons generally serve many of the same purposes in the former as in the latter: *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 15 and 22-23. Reasons explain how and why a decision was made. They help to show affected parties that their arguments have been considered and demonstrate that the decision was made in a fair and lawful manner. Reasons shield against arbitrariness as well as the perception of arbitrariness in the exercise of public power: *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine*, at paras. 12-13. As L'Heureux-Dubé J. noted in *Baker*, "[t]hose affected may be more likely to feel they were treated fairly and appropriately if reasons are given": para. 39, citing S.A. de Smith, J. Jowell and Lord Woolf, *Judicial Review of Administrative Action* (5th ed. 1995), at pp. 459-60. And as Jocelyn Stacey and the Hon. Alice Woolley persuasively write, "public decisions gain their democratic and legal authority through a process of public justification" which includes reasons "that justify [the]

decisions [of public decision makers] in light of the constitutional, statutory and common law context in which they operate": "Can Pragmatism Function in Administrative Law?" (2016), 74 *S.C.L.R.* (2d) 211, at p. 220.

59. With due respect to IIROC's pre-investigative processes, the response provided to the Applicants in this case seem to fall below an appropriate level of explanation to instill in them, and therefore also the public, a reasonable level of confidence that their concerns were considered in a fair and meaningful manner. While it is uncertain whether a more substantive response would have satisfied the Applicants, had they been afforded some explanation as to why there were insufficient grounds to investigate, it would have provided insights into the regulatory considerations that IIROC applied and it may have provided, at a minimum, some clarification to them to instill trust in the process.

60. As noted previously IIROC would have reviewed the documentation and information presented by the Applicants, which was not before the Panel, in deciding not to investigate. The Commission remains of the view that the statutory authority granted to SROs is intended to provide an efficient and effective means to regulate its members, in furtherance of the *Act.* As part of that regime, there are various mechanisms and reporting requirements to which SROs such as IIROC are subject in order for CSA staff to maintain appropriate oversight in relation to case assessment, investigations and complaint handling. The Panel is not prepared to intervene in IIROC's processes in this regard, nor does it intend to intervene in relation to IIROC's policies or practices generally, including in relation to its general practice in determining whether to investigate and how to communicate that decision to complainants.

61. However, in the very specific circumstances of this matter, the Panel finds that the serious nature of the allegations and losses, combined with the complicating factors of the relationship of NBIN and HTFL, leads to a conclusion that in this case the lack of any meaningful explanation to the Applicants raised sufficient public interest concerns under the *Act.* The Commission will not intervene in IIROC's decision, but finds that in this case, it is appropriate for IIROC to provide some level of explanation as to why there was insufficient basis to investigate.

Request for certain findings of fact or law or both

62. The Applicant also urged the Panel to make findings as to whether NBIN had a duty, including a duty to supervise HTFL, whether there was a violation of that duty and whether there was violation of any other IIROC Rule. The Applicant urged the Panel to make these findings based on the findings of fact in another Commission decision, *In the Matter of the Application for Registration of Adonis Asset Management and Adrian Saturley* (February 14, 2022).

63. Neither Adonis Asset Management nor Adrian Saturley is the subject matter of the complaint before this Panel. The Commission cannot make a finding in this matter based on findings of fact made in another unrelated decision. Moreover, the Commission cannot

grant relief in relation to a complaint for which the party complained against has had no opportunity to respond. This goes beyond an unorthodox request and flies in the face of the most elementary principles of due process.

Request for a *de novo* hearing

64. The Applicant concluded that the most appropriate remedy would be a hearing *de novo* on the matter at the Commission level, pursuant to the broad residual power of the Commission. The Panel is practically prevented from granting a *de novo* hearing on the IIROC decision not to investigate because there has been no evidence to support the complaints due to the lack of investigation and consequently, there is no record to form the basis of the hearing. Moreover, the subject of the allegations, NBIN, is not a party to this Application. Essentially, we have been presented with unanswered allegations under the public interest provisions without evidence to substantiate them and for which there is no identifiable remedy under the *Act*.

Conclusion

65. The Panel hereby finds that it is a matter of public interest for IIROC to provide an explanation to the Applicants for its refusal to proceed with an investigation into their complaint against NBIN.

Order

66. Based on the foregoing, we will issue an order that provides that:

    (a) Pursuant to section 30(3A) of the Act, IIROC shall provide a written explanation to the Applicants summarizing the basis of IIROC's decision that further investigation of their complaint against NBIN is not warranted;

    (b) IIROC is not required to disclose confidential information relating to NBIN or internal IIROC staff work product in the written explanation; and

    (c) IIROC shall provide the written explanation to the Applicants by September 30, 2022.

DATED at Halifax, Nova Scotia, this 28th day of July 2022.

NOVA SCOTIA SECURITIES COMMISSION

(signed) "*Heidi Walsh-Sampson*"
Heidi Walsh-Sampson
Chair

(signed) "*Natalie MacDonald*"
Natalie MacDonald
Commissioner