

Re Gardiner

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Gerard Owen Gardiner

2020 IIROC 01 R

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

Heard: June 18, 2020 via videoconference

Decision: July 8, 2020

Hearing Panel:

Daniel Ish, Q.C., Chair, Tony Evans and Eric Wray

Appearances:

Tayen Godfrey, Senior Enforcement Counsel

Gerard Owen Gardiner

REASONS FOR DECISION

Introduction

¶ 1 The applicant, Mr. Gerard Gardiner, sought a review of a decision of the Registration Subcommittee of IIROC's Saskatchewan District Council (the "Subcommittee") dated December 23, 2019 (the "Decision"). The decision imposed terms and conditions on Mr. Gardiner's approval as a Dealing Representative under Saskatchewan's *Securities Act*, and approval in categories of Portfolio Management, Supervisor, Registered Representative with Echelon Wealth Partners Inc. ("Echelon Wealth"), requiring that he be under close supervision. In arriving at its decision, the Subcommittee agreed with recommendations made to it by IIROC Registration Staff.

¶ 2 Mr. Gardiner previously exercised his right to be heard by the Subcommittee as provided for pursuant to IIROC Rule 9203. He subsequently exercised his right to seek a review of the Subcommittee's decision by a Hearing Panel pursuant to IIROC Rules 9209 and 9304. This Panel is authorized to affirm, quash, vary the original decision or remove the terms and conditions.

Facts

¶ 3 Mr. Gardiner has been registered in the securities industry since 1992 and subject to IIROC's regulation since 2001. On September 16, 2019, Echelon Wealth disclosed that Mr. Gardiner had received a Requirement to Pay ("RTP") from Canada Revenue Agency in the amount of \$"██████████". The RTP was issued to "██████████". ("██████████"), a private corporation with shares held only by Mr. Gardiner and his spouse. The submission by Echelon Wealth was refiled on October 7, 2019. After receiving information from Echelon Wealth and from Mr. Gardiner, IIROC Registration Staff conducted a "Fit and Proper" review of Mr. Gardiner's ongoing

suitability for registration. As a result, IIROC Registration Staff recommended close supervision be imposed on Mr. Gardiner until IIROC received confirmation that the debt obligation to CRA had been satisfied, at which time Echelon Wealth could apply to have the terms and conditions removed.

¶ 4 IIROC Registration Staff and Mr. Gardiner made written submissions to the Subcommittee. IIROC Registration Staff's recommendation that Mr. Gardiner be placed under close supervision was based on the Canadian Securities Administrators' Harmonized Terms and Conditions, which provide that a registrant's financial condition is an indicator of the potential risk an individual may engage in self-interested activities at the expense of his or her clients. On December 23, 2019, the Subcommittee issued its decision to place Mr. Gardiner under close supervision. In its decision, the Subcommittee adopted the reasoning put forward in IIROC Registration Staff's recommendation.

¶ 5 Mr. Gardiner provided IIROC Registration Staff with a letter on December 19, 2019 setting out the reasons why the imposition of close supervision "would be counter-productive and serve no purpose". In anticipation of the present hearing, Mr. Gardiner, on June 2, 2020, sent another letter to Mr. Godfrey, IIROC Senior Enforcement Counsel, providing similar reasons in support of his application to have close supervision removed as a condition of his continued registration. The reasons set out by Mr. Gardiner were:

1. CRA has been asked to withdraw the Requirement to Pay since it cannot be fulfilled. They are aware that it is redundant and serves no active purpose;
2. Mr. Gardiner and his spouse had a personal refinancing application under review, prior to the recent financial crisis and will also open discussions with a commercial lender for refinancing once that sector begins accepting applications;
3. A previous debt that "██████████" had repaid was much larger (\$"██████████" v. \$"██████████") and this was repaid within a year;
4. Despite the financial and health pandemics, Mr. Gardiner has already made substantial progress in reducing this debt. If cash flow and revenues meet expectations, he anticipates having half of this debt repaid by September of 2020, with the balance cleared by February or March 2021; and
5. Close Supervision will impose a greater supervisory cost on the registrant, and if the goal is to repay CRA, then why restrict cash flow further? This would have a double detrimental impact resulting in:
 - a. Delays due to additional approvals for all client trades; and
 - b. Possible extra fees levied against the registrant by the member firm.

¶ 6 In his appearance via WebEx videoconference before this Panel, Mr. Gardiner relied on the same grounds in support of his application to have close supervision removed. In addition, he provided the Panel with a three-page net worth statement setting out assets and liabilities of Mr. Gardiner and his spouse personally, those of "██████████" and those of a family trust. Mr. Gardiner also advised the Panel that, at the time of the hearing, the CRA debt had been reduced to \$"██████████" as a result of monthly payments made to CRA. The financial information contained in the net worth statement had not been provided to the Subcommittee. It is entirely appropriate for this Panel to consider information not before the Subcommittee because this is a de novo hearing, and the Panel has the broadest range of authority under IIROC Rule 9304.

¶ 7 The issue before this Panel is whether the imposition of close supervision on Mr. Gardiner is a reasonable term and condition to his continued registration.

Analysis

¶ 8 IIROC's Registration Staff recommendations to the Subcommittee, which were adopted in the reasons

for its decision, continue to be IIROC's position before this Panel. IIROC Rule 9204(2) requires a District Council to approve an application unless the applicant:

- (a) does not meet an IIROC requirement;
- (b) is likely not to comply with IIROC requirements;
- (c) does not satisfy securities legislation relating to or is not suitable for approval on the basis of training, experience, solvency or integrity, or
- (d) the approval is otherwise not in the public interest.

¶ 9 The requirement under paragraph (c) is commonly referred to as the "Fit and Proper test" and is applied in determining whether to approve an application for approval or to impose terms and conditions. IIROC has addressed the Fit and Proper test for approved persons in IIROC Notice 09-0192, which sets out three criteria for determining whether an individual is fit and proper for approval. They are integrity, financial solvency and competence.

¶ 10 There is no issue raised with respect to Mr. Gardiner's integrity or competence. It is the "financial solvency" criteria that IIROC is relying upon in this hearing and which was adopted by the Subcommittee in its decision of December 23, 2019. IIROC Notice 09-0192 says that financial solvency "is considered relevant because it is an indicator of the risk that an individual will engage in self-interested activities at the expense of clients". The notice goes on to state:

In evaluating a person's financial soundness, IIROC Registration Staff will have regard to factors including, but not limited to:

- whether the person has been the subject of any judgment debt or award, in Canada or elsewhere, that remains outstanding or was not satisfied within a reasonable period;
- whether, in Canada or elsewhere, the person has made any arrangements with his creditors, filed for bankruptcy, had a bankruptcy petition served on him/her, or been adjudged bankrupt;
- whether the person has failed to meet a material financial obligation as it came due or has, or has had, any outstanding garnishment, unsatisfied judgments or directions to pay.

¶ 11 The issue before this Panel is whether the imposition of close supervision on Mr. Gardiner is a reasonable term and condition to his continued registration. This Panel's primary concern must be the protection of the investing public and the public interest generally, including the integrity and efficacy of the regulatory framework. We must also be cognizant of the fairness and reasonableness of terms and conditions placed on registrants.

¶ 12 The condition of close supervision imposed by the Subcommittee, and now argued for by IIROC Registration Staff, is based on Mr. Gardiner's outstanding debt to CRA. The amount in December 2019 was approximately \$"██████████", and the outstanding amount today is \$"██████████". In the abstract, it is difficult, if not impossible, to know whether such a debt poses a "risk that an individual will engage in self-interested activities at the expenses of clients". It seems that an assessment of risk can only be made if the total of the individual's financial circumstances are known. It is interesting that neither IIROC Registration Staff or the Subcommittee had information about Mr. Gardiner's overall financial circumstances in December 2019. If, for instance, an individual owed a debt of \$100,000 and their net worth was \$3 to \$4 million and unencumbered, the risk would appear to be minimal.

¶ 13 This Panel does have the benefit of an overall view of Mr. Gardiner's financial situation because he provided to us a comprehensive net worth statement. In the hearing, the Panel had questions of Mr. Gardiner concerning the statement, and the Panel has considered the net worth statement in detail. It does not disclose a financial situation such as a hypothetical posed in the last paragraph. Rather, the consolidated net worth

statement discloses a risky situation.

¶ 14 The net worth statement discloses assets and liabilities of Mr. Gardiner and his spouse showing a net worth of \$"██████████". It also shows an outstanding liability to a "██████████" of \$"██████████". The net worth statement for "██████████", which is the entity that owes \$"██████████" to CRA, shows a negative net worth of \$"██████████". The third entity encapsulated by the net worth statement is a family trust. It shows a net worth of \$"██████████". This number would at first glance indicate more than sufficient solvency to minimize risk associated with a debt in the \$"██████████" range. However, on closer scrutiny, it appears the main asset of the family trust is composed of stocks and bonds worth \$"██████████" in "██████████". "██████████", as outlined above, has a negative net worth.

¶ 15 A review of the net worth statements taken together seem to show a net worth of not greater than \$"██████████" and possibly even \$"██████████" less than that. Thus, as previously stated, it is important that any individual's overall financial circumstances must be considered; however, a consideration of those circumstances in this case do not lead us to the conclusion that the imposition of close supervision is unreasonable. Further, in October 2019, Mr. Gardiner advised IIROC that he and his spouse were seeking to refinance their principal residence to allow them to pay off the CRA debt. In his June 2, 2020 letter (see paragraph 5 above), Mr. Gardiner similarly stated that refinancing was being sought. At the hearing, Mr. Gardiner said that he has not been successful in obtaining the refinancing. The inability to raise \$"██████████" based on the combined assets of Mr. Gardiner and his associated entities also is a concern for us leading to the conclusion that the CRA debt does pose a risk, and leading to the further conclusion that close supervision is appropriate. Also, there was no evidence that the request to CRA by Mr. Gardiner, as outlined in his letter of December 19, 2019 and June 2, 2020, to withdraw the Requirement to Pay has yielded any results. Although explored by questions from the Panel in the hearing, it is not clear what series of circumstances led to the CRA debt.

¶ 16 At the hearing, Mr. Gardiner raised what can be characterized as a jurisdictional issue. It was his submission that IIROC is overstepping its authority by imposing the close supervision on him because the debt owed to CRA is not owed by him but by "██████████", which is a legal entity separate from him. We agree that IIROC's regulatory authority is limited to Mr. Gardiner, but it is entirely appropriate in assessing risk to consider liabilities that will ultimately fall upon Mr. Gardiner even though they are liabilities of a separate entity. Mr. Gardiner and his spouse are the shareholders of "██████████" and non-payment of the debt to CRA would ultimately be visited upon them in their individual capacity by virtue of CRA's broad range of debt enforcement remedies.

Conclusion

¶ 17 It is our conclusion, for the reasons outlined above, that the decision of the Subcommittee is affirmed. Mr. Gardiner will remain under close supervision as determined in the Subcommittee's decision of December 23, 2019.

Rendered at Saskatoon, Saskatchewan, this 8 day of July, 2020.

Daniel Ish

Tony Evans

Eric Wray

ORDER

This Panel makes the following orders, which have been consented to by the parties:

- a. Pursuant to IIROC Consolidated Rules 9303, 8203(5)(iii) and 8406(10), and IIROC policies, any personal information, as defined in IIROC's *Policy Regarding Use and Disclosure of Personal Information in IIROC Disciplinary Proceedings*, as well as information relating to the Applicant's personal finances, shall be redacted from the Hearing Record prior to any part of the Hearing Record being made public, including any transcripts of the proceeding.
- b. The following documents are not to be provided to the public:
 - a. Documents provided by the Applicant at the hearing, setting out his net worth;

Dated this 8 day of July, 2020.

"Dan Ish"

Dan Ish

"Eric Wray"

Eric Wray

"Tony Evans"

Tony Evans

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