

# Re Fortrade Canada

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of Canada**

**and**

**Fortrade Canada Limited**

2022 IIROC 28

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Ontario District)

Heard: November 9, 2022, in Toronto, Ontario

Decision: November 9, 2022

Reasons for Decision: November 15, 2022

## **Hearing Panel:**

Donna Campbell, Chair, Ron Smith, and Selwyn Kossuth

## **Appearances:**

Sylvia Samuel, Senior Enforcement Counsel

Rob DelFrate, Senior Enforcement Counsel

Caitlin Sainsbury, for Fortrade Canada Limited

Graeme Hamilton, for Fortrade Canada Limited

Brianne Taylor, for Fortrade Canada Limited

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## **REASONS FOR ISSUANCE OF TEMPORARY ORDER**

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### **Overview**

¶ 1 On November 9, 2022, Staff of the Investment Industry Organization of Canada (IIROC) brought an application on short notice for a temporary order pursuant to Sections 8211 and 8425 of the IIROC Rules. Counsel for Fortrade Canada Limited (Fortrade) did not oppose the issuance of the order.

¶ 2 After a review of the evidence filed, and on reading and hearing submissions by both parties, the Hearing Panel (Panel) granted the hearing of the application on short notice and determined that the public interest favoured granting the issuance of a temporary order, a copy of which is appended as Appendix A. The reasons for issuing the temporary order are set out below.

### **Evidence and Information Before the Panel**

#### *Fortrade Background—Order Execution Only Dealer*

¶ 3 Fortrade was admitted to membership in IIROC on January 30, 2020. It is registered in all provinces except Quebec. Its head office is in London, England.

¶ 4 Fortrade operates as an order execution only (OEO) dealer offering online trading services to retail customers on contracts for differences (CFDs) and foreign exchange contracts that include shares, indices and commodities.

#### *The IIROC Rules Applying to Order Execution Only Dealers*

¶ 5 As a member of IIROC, Fortrade and its employees are required to comply with the IIROC Rules which apply to the OEO business model.

¶ 6 The IIROC Rules define an OEO account as follows:

An account which is not subject to a suitability determination (other than as required by clauses 3402(3)(i) and 3403(4)(i)) where:

- (i) the client is solely responsible for making all investment decisions, and
- (ii) the Dealer Member provides no recommendation to purchase, sell, hold or exchange any security, including any class of security or security of a class of issuer.

IIROC Rules, s. 1201(2)

#### *IIROC's Guidance on Order Execution Only Account Services and Activities*

¶ 7 Guidance on Order Execution Only Account Services and Activities, Guidance Note GN-3400-21-003, March 12, 2021, Part 3.1 (OEO Guidance Note)<sup>1</sup> defines 'recommendation' as follows:

Any communication or statement of opinion sent or made available to an investor (or class of investor) that could, based on the context of circumstances, reasonably be expected to influence that investor (or class of investor) to make an investment decision regarding a security (including any class of securities and the securities of a class of issuers) (collectively, securities).

¶ 8 The OEO Guidance Note also sets out when certain tools used by Dealer Members may be considered recommendations, including:

- information that is customized or personalized to an investor (tailored information),
- information that is sent/directed to a client without being solicited by the client (pushed information),
- information that is predictive about the future performance of an issuer/security/market segment (predictive information).<sup>2</sup>

#### *Evidence Gathered During the Investigation Into Fortrade*

¶ 9 The evidence relied upon by the Panel and referred to in these reasons is drawn from the sworn affidavit of Alex Oustinov, Senior Investigator at IIROC Enforcement (Oustinov Affidavit).<sup>3</sup>

¶ 10 Fortrade did not challenge the evidence in the Oustinov Affidavit or file evidence of its own.

¶ 11 On September 15, 2021, IIROC Staff notified Fortrade that as the result of complaints filed by two of its retail clients, an investigation was being commenced. Among other things, the clients alleged that they relied upon recommendations from Fortrade representatives and suffered losses as a result.

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<sup>1</sup> *Guidance on Order Execution Only Account Services and Activities*, Guidance Note GN-3400-21-003, March 12, 2021, Part 3.1, Enforcement Book of Authorities (EBA), EBA50-EBA74.

<sup>2</sup> OEO Guidance Note, Parts 3.2.1-3.2.3.

<sup>3</sup> Affidavit of Alex Oustinov, sworn November 4, 2022, Enforcement Record (ERD), ERD7 – ERD225.

¶ 12 As part of the investigation, Fortrade supplied information concerning all new accounts opened by it between December 1, 2021 and January 15, 2022. Among other things, the information revealed that:

- 13% of the retail clients who opened accounts in that time period listed annual incomes of less than \$15,000 USD;
- 64% listed annual incomes between \$15,000 USD and \$50,000 USD;
- 80% listed savings that ranged from less than \$5,000 USD to \$25,000 USD;
- 65% listed no knowledge of trading;
- 63% listed no previous CFD trading experience while 19% listed less than six months.

¶ 13 On its website, Fortrade prominently displayed a statement that said 81% of its retail investor accounts lost money when trading CFDs with them.

¶ 14 Fortrade also provided approximately 7601 phone calls and 7463 emails as part of the investigation. Enforcement Staff listened to approximately 4035 calls and reviewed approximately 1486 emails. The emails were selected by using keyword searches based on words that commonly appeared in the phone calls.

¶ 15 The Oustinov Affidavit contained transcribed excerpts from 10 discrete calls between 10 retail clients and 10 Fortrade representatives, and excerpts from emails between Fortrade representatives and retail clients. The excerpts were drawn from the phone calls and emails referred to above.<sup>4</sup>

¶ 16 A review of the calls and emails raised concerns that Fortrade representatives were making recommendations to clients concerning the purchase and sale of CFDs, using tailored, pushed and predictive information and making statements that could be expected to influence clients' investment decisions.

¶ 17 As a result of the evidence gathered, Enforcement Staff brought an application for the issuance of a temporary order with terms and conditions on Fortrade's membership until the conclusion of a hearing on the merits or further order of a hearing panel.

## Temporary Orders

### *Applicable Rules and Case Law*

¶ 18 A hearing panel may issue a temporary order pursuant to IIROC Rule 8211(1) which states:

On application by Enforcement Staff, if a hearing panel is satisfied that the length of time required to conclude a hearing could be prejudicial to the public interest, the hearing panel may, without notice to the respondent, make a temporary order that suspends or restricts a Regulated Person's rights and privileges and may impose terms and conditions that the hearing panel considers appropriate.

¶ 19 To assist in its consideration of the application, the Panel was directed to Omega Securities Inc. (Re)<sup>5</sup>, a decision of the Ontario Securities Commission (OSC) which dealt with the issuance of a temporary order pursuant to s. 127(5) of the Ontario Securities Act. Like Rule 8211(1), s. 127(5) permits a temporary order to be issued if the length of time required to conclude a hearing could be prejudicial to the public interest.

¶ 20 The OSC panel set out the following three-part test to be met by staff before a temporary order may be issued:

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<sup>4</sup> Complete transcripts of the phone calls, hyperlinks to the audio files of the calls and the complete email texts were appended as exhibits to the Oustinov Affidavit.

<sup>5</sup> *Omega Securities Inc. (Re)*, 2017 ONSEC 42 (*Omega Securities*), Enforcement Book of Authorities (EBA), EBA4-EBA28

- i. The allegation(s) made must be serious;
- ii. There must be *prima facie* evidence supporting the allegation(s); and
- iii. The public interest must favour granting the temporary order, which is an extraordinary remedy.<sup>6</sup>

¶ 21 The Panel accepts that the test is appropriately employed when determining if a temporary order should be issued in IIROC proceedings. The Panel recognizes that a temporary order is an extraordinary remedy and one which should not be granted lightly.<sup>7</sup>

## The Panel's Findings

### *The Allegations Must Be Serious*

¶ 22 Enforcement Staff alleges that Fortrade, an OEO Dealer Member offering online trading services to retail customers for CFDs, has engaged in making recommendations to its clients, contrary to the OEO Guidance Note regarding OEO account services. Those recommendations include providing predictive and tailored information and actively pushing information to the investors.

¶ 23 As an OEO Dealer Member, Fortrade is exempt from determining certain suitability requirements in respect of retail clients and institutional clients, provided it does not offer recommendations to its clients.<sup>8</sup>

¶ 24 Because of the exemption, the alleged recommendations were made without an assessment of the suitability requirements of each client. Given the evidence provided concerning the financial status and trading experience of the Fortrade retail clients profiled in the Oustinov Affidavit, and the content of the phone call transcripts and email excerpts, the lack of suitability assessments are of particular concern.

¶ 25 The Panel finds the allegations to be serious as they allege conduct which displays significant disregard for the Rules governing OEO Dealer Members with corresponding potential harm to the investing public, which is heightened by the lack of suitability assessments.

### *There Must be Prima Facie Evidence Supporting the Allegations*

¶ 26 The OSC panel in *Omega Securities* observed that *prima facie* evidence has been interpreted in various ways, depending on the context in which the evidence is received, and proposed the following interpretation in the context of an application for a temporary order:

In our view, the phrase should be interpreted in the context of an application pursuant to subsection 127(5) of the Act to mean that:

- a. the available evidence supports the material parts of the allegation(s) made by Staff; and
- b. in the opinion of the Commission, the evidence appears to be credible and reliable, having regard to all of the circumstances, including its source, detail, and the presence or absence, at this preliminary stage, of any explanations or evidence that may contradict it.<sup>9</sup>

¶ 27 As noted earlier, the Oustinov Affidavit is the source of the evidence filed in support of the issuance of a temporary order. Mr. Oustinov is a senior investigator and the evidence contained in his affidavit was

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<sup>6</sup> *Omega Securities* at para. 22.

<sup>7</sup> *Omega Securities* at para. 23.

<sup>8</sup> IIROC Rules, s. 3404(1) provides an OEO Dealer Member with an exemption from the suitability requirements, which would otherwise be imposed with regard to retail clients under s. 3402 and institutional clients under s. 3403.

<sup>9</sup> *Omega Securities* at para. 25.

gathered during the course of an IIROC investigation, which began approximately one year ago. There was no challenge to the manner in which evidence was gathered.

¶ 28 The evidence consisted primarily of transcribed portions of telephone calls and excerpts from emails between Fortrade representatives and certain retail clients. No challenge was made to the veracity, reliability or trustworthiness of the transcriptions or excerpts. No issue was taken with the excerpts chosen. Although audio files of the complete phone calls and the complete emails formed part of the evidence, the Panel was not directed to other portions of the phone calls or emails. Fortrade did not offer competing evidence or cross examine Mr. Oustinov on any of the evidence put before the Panel.

¶ 29 The Panel was satisfied that the evidence was credible, reliable, trustworthy and uncontradicted.

¶ 30 The Panel finds there is sufficient *prima facie* evidence to support Enforcement Staff's allegations that Fortrade representatives were making recommendations to retail clients, contrary to the Rules governing OEO Dealer Members. The excerpts from multiple phone calls and emails established that numerous Fortrade representatives were engaged in making recommendations that were tailored, predictive and pushed to investors.

¶ 31 The Panel's finding is made in the context of an application for a temporary order only. This Panel's findings in no way fetter or restrict the merits hearing panel's discretion with regard to the evaluation of the evidence filed at the merits hearing. As stated by the OSC panel in *Omega Securities*:

Ultimate determinations of credibility or reliability are not to be made on an application for a temporary order. Those are to be made by a hearing panel when the hearing on the merits takes place. Equally, even if the evidence presented is credible or reliable, ultimate determinations as to whether that evidence is sufficient, in fact or in law, to prove Staff's allegations are to be made when the hearing on the merits takes place.<sup>10</sup>

#### *The Public Interest Must Favour the Granting of the Temporary Order*

¶ 32 IIROC is part of the larger regulatory framework which regulates the securities industry. A key part of IIROC's mandate is the protection of investors through rules designed to protect investors, both retail and institutional. On occasion, Dealer Member conduct which breaches those rules requires a rapid response by way of a temporary order to protect the investing public in advance of a hearing on the merits.

¶ 33 As noted in *Re Shallow Oil & Gas Inc.*:

The authority of the Commission to issue and extend temporary cease trade orders is directly related to its goal of protecting investors. It is essential that the Commission be able to act quickly, at an early stage of an investigation, to protect investors from ongoing harm. In doing so, the Commission must consider the public interest in the particular circumstances. We recognize that issuing a cease trade order is an extraordinary remedy and one which should not be exercised lightly. Where, however, there is credible evidence of harm to investors, the Commission must be able to act to prevent further harm. In our view, it is clear as a legal matter that a temporary cease trade order may be extended based on sufficient evidence of conduct that may be harmful to the public interest.<sup>11</sup>

¶ 34 The Panel finds that there is credible, reliable and uncontradicted evidence of possible harm to investors occurring before a hearing on the merits could be concluded, which requires the issuance of a temporary order.

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<sup>10</sup> *Omega Securities* at para. 27.

<sup>11</sup> *Re Shallow Oil & Gas Inc.*, 2008 LNONOSC 100 at para. 33, EBA29-EBA37.

¶ 35 In issuing the temporary order, the Panel is mindful that the issuance of such an order is protective and preventative, not remedial or punitive. It is in place to protect investors and the capital markets.<sup>12</sup>

### **The Temporary Order is Granted**

¶ 36 The temporary order is granted and will remain in place until the conclusion of the merits hearing or unless otherwise ordered by a hearing panel.

Dated at Toronto, Ontario this 15 day of November 2022.

Donna Campbell, Chair

Ron Smith, Member

Selwyn Kossuth, Member

### **ORDER**

**WHEREAS** on November 9, 2022, an application for a temporary order was made by Enforcement Staff (“Staff”) with notice to the Respondent, Fortrade Canada Limited (“Fortrade”), pursuant to Section 8211 and 8425 of the IIROC Rules,

**AND UPON** reviewing the Notice of Application issued November 4, 2022, the affidavit of Alex Oustinov sworn November 4, 2022, and the written submissions of Staff and of the Respondent filed and upon hearing submissions of counsel for Staff and counsel for the Respondent,

#### **THIS HEARING PANEL ORDERS:**

1. that Fortrade, by its agents, employees, directors, or otherwise, shall not make recommendations to clients or prospective clients in connection with trading in securities or contacting any person, whether by email, telephone, SMS, or otherwise, for the purpose of soliciting or recommending trading with Fortrade and shall comply with the requirements applicable to an “order execution only account” as defined in subsection 1201(2) of the IIROC Rules and conduct its activities consistent with the guidance set forth in Guidance Note GN-3400-21-003.
2. that Fortrade shall not open any new client accounts.
3. that Fortrade shall not seek the deposit of additional funds into existing client accounts, except that Fortrade may contact clients who have a margin deficiency to inform them of such margin deficiency.
4. that Fortrade shall provide to IIROC Enforcement Staff monthly, within seven days of the last day of the previous month, audio recordings of all telephone calls with its clients during the previous month. In respect of the month of October 2022, Fortrade shall provide audio recordings of telephone calls with its clients still in its possession by November 16, 2022.
5. that Fortrade shall provide to IIROC Enforcement Staff monthly, within seven days of the last day of the previous month, an audit trail of its monitoring of telephone calls and any other form of client communications, which audit trail shall include the number of communications sampled, the time, date and type of the communication, the name of the Fortrade representative, the name of the client, and

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<sup>12</sup> *Committee for the Equal Treatment of Asbestos Minority Shareholders v Ontario (Securities Commission)*, 2001 SCC 37 at para 42, Respondent’s Book of Authorities (RBA) RBA53-RBA68.

any queries or other measures taken as a result of the monitoring. In respect of the month of October 2022, Fortrade shall provide the audit trail by November 16, 2022.

6. that this Temporary Order shall remain in effect until the conclusion of the hearing on the merits or until further order of a hearing panel.
7. that the time for service and filing of the Notice of Application and Application Record be and is hereby abridged so that this application is properly returnable on November 9, 2022.

**DATED** at Toronto, Ontario, this 9<sup>th</sup> day of November 2022.

Donna Campbell

Ron Smith

Selwyn Kossuth

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