

Re Mosher

IN THE MATTER OF:

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

and

Barry Mosher

2019 IIROC 12

Investment Industry Regulatory Organization of Canada
Hearing Panel (Nova Scotia District)

Heard: April 2, 2019 in Halifax, Nova Scotia

Decision: April 2, 2019

Written Decision: April 30, 2019

Hearing Panel:

R Scott Peacock Chair, Ken Wheelans and David Acker

Appearance:

Kathryn Andrews, Enforcement Counsel

Michelle Awad and Jillian D'Alessio, for Barry Mosher

Barry Mosher absent

DECISION IN RESPECT TO PROPOSED SETTLEMENT AGREEMENT

¶ 1 The Investment Industry Regulatory Organization of Canada ("IIROC") issued a Notice of Application for Settlement Hearing in the captioned proceeding on 7 March 2019. The oral hearing was set for Halifax on the 2nd day of April 2019 commencing at 10:00 AM. The hearing to be held on the premises of the Nova Scotia Securities Commission. The purpose of the hearing was to consider a Settlement Agreement entered into by the parties on the 28th day of February 2019.

¶ 2 Having reviewed and considered the Settlement Agreement, the cases submitted for consideration by counsel, the oral submissions made by Senior Enforcement Counsel and counsel for the Respondent; and upon deliberation, the panel accepted the proposed Settlement Agreement. An order was made on the 2nd day of April 2019 giving effect to the panel's decision. The penalties imposed as set out in the order are:

- a) A fine in the amount of \$20,000.00
- b) To re write and pass the Conduct and Practices Handbook examination within six months of any registration with IIROC
- c) Six months of close supervision upon any re-registration with IIROC and
- d) Costs of \$ 2,000.00.

¶ 3 In the matter of a proposed Settlement Agreement the panel must consider whether or not the parties are proposing an agreement that meets all of the requirements for its acceptance. Amongst those considerations of the acceptability of a proffered agreement are: does it provide for sanctions that are in an appropriate range, are the provisions fair and reasonable, do the provisions meet the needs for specific and general deterrence and is the totality of the agreement in the public interest.

¶ 4 The determination of the acceptability of a Settlement Agreement is constrained by the facts set forth in the four corners of the proffered agreement. The panel is not at liberty to consider extraneous facts or inferences as such but in the normal course of its deliberation may apply the member's general knowledge and experience in the capital markets milieu. The settlement process is recognized as being an essential component of securities regulation. The deference that is generally given to a settlement agreement mandates that the agreement contain sufficient detail of the facts and circumstances surrounding the Respondent's conduct for the panel to properly evaluate the agreement.

¶ 5 The panel considered and is mindful of the principles and precedents set out in the numerous cases provided by counsel for its consideration in deliberation. Particular note is made of the comments of the panel in *Re Johnson*¹

“ The test applicable to a decision whether to accept or reject a settlement is well-known. Simply put, a panel should accept such an agreement unless it considers the penalty provided for clearly to fall outside a reasonable range of appropriateness.”

¶ 6 The Panel also considered and adopts the reasoning in *Re Trapeze Capital*²

“ It is clear from jurisprudence..... that our task is not to decide whether in this case, we would have arrived at the same decision as that reached by the parties. Rather, our duty is to determine whether the penalty is a reasonable one and it meets the objectives of the disciplinary process which are to maintain the integrity of the Investment industry.”

¶ 7 The panel also made particular note of *Re Milewski*³ which set forth the same principles.

¶ 8 In the Settlement Agreement which is attached to this decision and is incorporated herein, the Respondent admits to failing to know your client in that his clients risk tolerance was overstated in her account documentation and further that the account documentation was not updated after a material change in the clients circumstances. The clients account also contained a concentration of unsuitable high risk investments, the accounts of the client sustained an unrealized loss of \$36,128.

¶ 9 Other factors set forth in the settlement agreement included the facts that the Respondent has no prior disciplinary record, has retired from the industry, does not intend to return to the industry, and finally that Cannacord compensated the client in relation to the complaint.

¶ 10 The Respondent acknowledged contravention of IIROC Dealer Member Rule 1300.1(a) between the dates of 31 October 2011 and 30 June 2015 and IIROC Dealer Member Rule 1300.1(q) in that same period. The agreement on settlement terms allowed for an expeditious and efficacious disposition of the matter. A factor always relevant in considering a settlement agreement.

¶ 11 Notwithstanding the deference to be shown to an agreement between the parties, it is essential that

¹ 2012 IIROC 19 at para 4

² 2012 IIROC 25 at para 12

³ (1999) IDA 17

the agreement committed to writing contain sufficient detail for the panel to properly exercise its duties and obligation. Without that detail it is not possible to assess whether or not the proposed settlement falls within the reasonableness test, conforms to the Sanction Guidelines and is in the public interest. One element that is sometimes overlooked in the settlement hearing is the impact the investigation and hearing has had on the administration of the regulatory body, its members and the investors. In assessing the global appropriateness of a proposed settlement it would be of assistance to the panel to have some concept of the costs involved. It is common practice to have a bill of costs in contested matters, it would be helpful to provide the same information for the panel's consideration in settlement proceedings as well.

Dated at Halifax, Province of Nova Scotia this 30 day of April, 2019.

R. Scott Peacock

Ken Wheelans

David Acker

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada (“IIROC”) will issue a Notice of Application to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel (“Hearing Panel”) should accept the settlement agreement (“Settlement Agreement”) entered into between the staff of IIROC (“Staff”) and Barry Mosher (the “Respondent” or “Mosher”).

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement in accordance with the terms and conditions set out below.

PART III – AGREED FACTS

3. For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement.

Background

4. The Respondent was a Registered Representative (“RR”) at a Canaccord Genuity Corp. (“Canaccord”) branch in Halifax. His client NA held two accounts with him during the period of October 31, 2011 until June 30, 2015 (the “Material Period”). NA had also been a client of the Respondent prior to Canaccord.

Overview

5. The Respondent failed to know client NA during the Material Period, in that her investment objectives and risk tolerance were overstated on her account documentation and her Know Your Client (“KYC”) forms were not updated when her circumstances changed in the summer of 2014.
6. Various high risk securities including Aston Hill Financial Inc. (“AHF”) in NA’s accounts were unsuitable. At times both of NA’s accounts were concentrated in AHF. NA’s accounts sustained an unrealized loss of \$36,128 relating to AHF during the Material Period.

Respondent’s Registration

7. The Respondent had been an IIROC registrant since 1983. The Respondent was an RR at Canaccord from 2009 until June 2018. He had also been registered as a Branch Manager at a prior firm between April 2004 and October 2008. The Respondent has not been an IIROC registrant since June 29, 2018.

NA opens Accounts at Canaccord

8. NA opened an RRSP account with the Respondent in October 2009 (the "RRSP Account"). NA's October 6, 2009 Know Your Client form (the "2009 KYC") for her RRSP Account indicated investment objectives of 90% moderate growth/medium risk and 10% short term trading/medium-high risk. On April 30, 2010, a LRSP account (the "LRSP Account") was opened by NA, with the same objectives and risk as the RRSP Account.

Failure to Know the Client NA

(i) November 2011 Update

9. A November 1, 2011 update (the "2011 Update") changed NA's investment objectives to 50% moderate growth/medium risk and 50% speculative/high risk for both the RRSP and LRSP Accounts. The 2011 Update was prepared to reflect the securities purchased by the Respondent in her Accounts rather than reflecting her true circumstances.

(ii) November 2013 Updates

10. A November 20, 2013 update to NA's RRSP Account (the "2013 RRSP Update") changed her investment objectives to 50% moderate growth/medium risk, 20% short term trading/medium high risk and 30% speculative/high risk for this Account.
11. At the same time, the LRSP Account was updated to indicate 100% speculative/high risk (the "2013 LRSP Update").
12. During the Material Period, NA's actual investment objectives and risk tolerance were lower than her KYC documentation. The Respondent did not fully explain to NA what moderate growth or high risk meant in terms of the operation of the Accounts.

(iii) 2014 Change in Circumstances

13. In mid-July 2014, NA separated from her husband. She says that she told the Respondent at that time that her risk tolerance was now zero. The Respondent failed to update her KYC forms in either of her Accounts to reflect that she was separated from her husband.

Suitability

(i) LRSP Account

14. During the Material Period, the LRSP Account held a number of high risk securities that were not suitable for NA. These securities were AHF, Sentry SLCT Prim Metals Cl A, Dex Media Inc. and WSTN Forest Products Inc.
15. There were also a number of medium- high risk securities held during the Material Period which were not suitable for NA, given her actual investment objectives and risk tolerance, namely Bonnett's Energy Corp., Lanesborough Reit TR UT, Capital Power Corporation and Yellow Media Ltd.
16. According to IIROC Staff's analysis, NA's LRSP Account was off-side based on the KYC account documentation alone from October 31, 2011 until October 31, 2013, as that account exceeded the high risk allowance indicated on the KYC account documentation on numerous occasions during that time period.

17. NA's LRSP Account was concentrated in AHF during the Material Period, ranging from 39% to 76% at various times.

(ii) RRSP Account

18. Various unsuitable high risk securities were held in NA's RRSP Account during the Material Period. These securities included Sentry SLCT Prim Metals CI A, AHF and WSTN Forest Products Inc.

19. At various times between October 31, 2011 and October 31, 2013, the RRSP Account at month-end held between 51% to 68% in high risk securities. At various times between November 30, 2013 and June 30, 2015, the RRSP Account held between 17% and 75% in high risk securities at month-end.

20. According to IIROC Staff's analysis, during the Material Period, the percentage of high risk securities held in NA's RRSP Account exceeded the high risk allowance indicated on the KYC account documentation on numerous occasions, which was not suitable for her.

21. NA's RRSP Account was concentrated in AHF, ranging from 25% to 37%, at various times between October 31, 2011 and August 31, 2013.

22. The Respondent failed to ensure that recommendations in NA's RRSP and LRSP Accounts were suitable for her, given her investment objectives and risk tolerance. In addition, the concentration in AHF in NA's RRSP and LRSP Accounts was not suitable for her.

Profit and Loss Analysis of NA's Accounts

23. According to IIROC Staff's analysis, NA's RRSP Account sustained an unrealized loss of \$29,248 relating to AHF, during the Material Period. In addition, NA's LRSP Account sustained an unrealized loss of \$6,880 related to AHF during the Material Period.

24. When viewed overall, NA's RRSP Account was profitable in the amount of \$78,526 during the Material Period. NA's LRSP Account sustained an overall unrealized loss of \$15,785 during the Material Period.

25. The above amounts include any dividends received by NA in her Accounts during the Material Period.

Other Factors

26. The Respondent does not have a prior disciplinary history.

27. The Respondent has indicated that he no longer lives in Canada, has no intention of returning to Canada, has retired from the investment industry and has no intention of re-entering the investment industry.

28. In April 2018, Canaccord compensated NA in relation to her complaint.

PART IV – CONTRAVENTIONS

29. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:

(i) Between October 31, 2011 and June 30, 2015, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to a client, contrary to IIROC Dealer Member Rule 1300.1(a).

(ii) Between October 31, 2011 and June 30, 2015, the Respondent made unsuitable recommendations for a client's accounts, contrary to IIROC Dealer Member Rule 1300.1(q).

PART V – TERMS OF SETTLEMENT

30. The Respondent agrees to the following sanctions and costs:

- a) A fine in the amount of \$20,000;
- b) To re write and pass the Conduct and Practices Handbook examination within six months of any re-registration with IIROC;
- c) Six months of close supervision upon any re-registration with IIROC; and,
- d) Costs of \$2,000.

31. If this Settlement Agreement is accepted by the Hearing Panel, the Respondent agrees to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

32. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondent in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the following paragraph.

33. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. These proceedings may be based on, but are not limited to, the facts set out Part III of this Settlement Agreement.

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

34. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

35. This Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.

36. Staff and the Respondent agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing, unless the parties agree that additional facts should be submitted at the settlement hearing. If the Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

37. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.

38. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement or Staff may proceed to a disciplinary hearing based on the same or related allegations.

39. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

40. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.

41. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf will make a public statement inconsistent with this Settlement Agreement.

42. The Settlement Agreement is effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

43. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.
44. A fax or electronic copy of any signature will be treated as an original signature.

DATED this "28" day of February, 2019.

"Witness"
Witness

"Barry Mosher"
Respondent Barry Mosher

"Ricki Newmarch"
Witness

"Kathryn Andrews"
Kathryn Andrews
Senior Enforcement Counsel on behalf of Enforcement
Staff of the Investment Industry Regulatory Organization
of Canada

The Settlement Agreement is hereby accepted this "2nd" day of "April", 2019 by the following Hearing Panel:

Per: R. Scott Peacock
Panel Chair

Per: "Ken Wheelans"
Panel Member

Per: "David Acker"
Panel Member

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