

Re Small

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Michael Small

2021 IIROC 28

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

Heard: October 14, 2021 in Montreal, Quebec

Decision: October 14, 2021

Reasons for Decision: November 22, 2021

Hearing Panel:

Me Michèle Rivet, C.M., Ad.E., Chair, Daniel Houle and Yves Ruest

Appearances:

Francis Larin, Ad.E., Senior Enforcement Counsel

Michael Small (present)

REASONS FOR ACCEPTANCE OF A SETTLEMENT AGREEMENT

¶ 1 This settlement hearing was convened in accordance with the procedures described in Sections 8215 of IIROC's Consolidated Enforcement, Examination and Approval Rules ("Rules") to consider whether the Hearing Panel should accept a Settlement Agreement entered into between IIROC Enforcement staff and the Respondent, Michael Small ("Settlement Agreement"). A copy of the Settlement Agreement is attached.

¶ 2 Having considered the material filed, the submissions of counsel and after reviewing the Settlement Agreement, the Panel advised the parties at the hearing that the Settlement Agreement was accepted, at the date of the hearing, and that written Reasons for Decision would be provided.

¶ 3 The Settlement Agreement describes the contraventions as follows:

Count 1: Between March and October 2019, the Respondent had personal financial dealings with a client, who is also a Related Person as defined in the Income Tax Act, when he borrowed money from the latter without his employer's knowledge, contrary to Rule 43.2(3) of the IIROC Dealer Member Rules.

Count 2: From May 2015 to December 2019, the Respondent acted as Power of Attorney for a client, who is also a Related Person as defined in the Income Tax Act, without his employer's knowledge, contrary to Rule 43.2(5) of the IIROC Dealer Member Rules.

¶ 4 The Respondent accepts the following penalties and costs:

a) A fine in the amount of \$20,000;

- b) The obligation to pass the Conduct and Practices Handbook (CPH) Course, in the event of re-registration; and
- c) Costs in the amount of \$2,500 payable to IIROC.

¶ 5 Mr. Small has been a registered representative with IIROC as well as its predecessor, the investment Dealers Association of Canada (IDA), since March 2008. From May 2015 to December 2019, Small was employed and registered with National Bank Financial Inc. (NBF). Mr. Small has not been an IIROC registrant since December 2019.

¶ 6 On or about May 23, 2015, Client A opened an account with NBF, through Mr. Small. Client A is an immediate family member of Mr. Small and is a related person under the meaning of the Income Tax. Since around April 2015, Mr. Small has acted as a Power of Attorney for client A, under a general mandate. Mr. Small did not declare the situation to his employer, wither when the account was opened or afterwards. In no case was NBF informed in a timely manner, nor did it approve it.

¶ 7 Moreover, the Respondent allegedly proceeded to borrow money from client A, between March and October 2019: March 27, 2019, \$2,000; April 24, 2019, \$2,000; June 7, 2019, \$1,300; October 18, 2019 \$1,000. The Respondent did not declare this situation to his employer.

ROLE OF THE HEARING PANEL IN CONSIDERING WHETHER TO ACCEPT A SETTLEMENT AGREEMENT

¶ 8 Senior Enforcement Counsel for IIROC submitted a series of decisions reemphasizing the role of a hearing panel to assess the settlement agreement and decide to accept it or not. The cornerstone decision is undoubtedly *Re Milewski*¹ rendered in 1999 to which the decisions *Re Maurice*², *Re M Partners and Isenberg*³, *Re Jacob*⁴ namely referred to.

¶ 9 In *Re Milewski*⁵, a District Council considered whether to accept a settlement agreement between a registered representative and the IDA, the forerunner of IIROC. The allegations were that a registered representative had sold investments to clients that were inappropriate given the client's stated investment objectives. The penalty proposed was a substantial fine plus disgorgement of commissions. The District Council who approved the settlement stated that the test to be applied to determine whether it should accept a settlement agreement is the following:

Although a settlement agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

This understanding is reflected in paragraph 20.26 of the By-laws, which authorizes the District Council to "accept", rather than "approve", a settlement agreement. In each case, a District Council must determine appropriateness, but the standards applicable to its doing so on a settlement hearing differ from those in a contested hearing. Thus, the penalties imposed under settlement agreements, while

¹ *Milewski (Re)*, 1999, I.D.A C.D.17, July 28, 1999.

² *Maurice (Re)*, 2019 IIROC 20 at para 13.

³ *M Partners and Isenberg (Re)*, 2018 IIROC 25 at para 20.

⁴ *Jacob (Re)*, 2017 IIROC 17 at para 27.

⁵ At pp. 9-10.

relevant to a District Council exercising its discretion to penalize, provide only limited assistance in a hearing like this.

¶ 10 In 2016, in *R. v. Anthony-Cook*,⁶ the Supreme Court of Canada in the judgment of Justice Moldaver considered the test to be applied by a court in deciding whether to accept a joint submission of the Crown and defence on the appropriate sentence for an accused charged with serious crimes:

[34] In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold — and for good reason.

¶ 11 Does the *Anthony Cook* Supreme Court judgment change the criteria to be applied by a regulatory body like IIROC Hearing Committees when assessing the acceptance of a settlement agreement?

¶ 12 As stated in *Re Jacob* in 2017:⁷

Unlike the procedure under the Criminal Code, there is a detailed procedure for Settlement Agreements outlined in the IIROC Rule 8215. A Panel, for example, cannot vary a Settlement Agreement, but must either accept or reject it. If it is rejected, the Settlement Agreement can come before another Panel. It is arguable that the process permits Panels more scope for rejecting Settlement Agreements than appears possible under the Anthony-Cook test.

¶ 13 Moreover, as also pointed out in *Re Jacob*⁸, there are significant differences between the regulatory process and the criminal process, such as the potential penalties, the quantum and burden of proof, the right to be protected from self-incrimination, the right to counsel, the use of closed hearings, the use of sanction guidelines, and the use of industry representatives on the panels, to mention some of the differences. The contexts with respect to the regulatory process and the criminal process are different. The adjudicative contexts are also completely different. The Supreme Court of Canada was trying to solve a serious and difficult problem of congested courts and unreasonable delay in the criminal justice system, which can and does result in the dismissal of charges under the Charter of Rights and Freedoms.

¶ 14 So, criteria established in *Re Milewski* and the following decisions applying it should prevail.

THE REGULATIONS AT STAKE

¶ 15 Beside the Regulations that apply generally to IIROC hearing proceedings as Rule 8200 - Enforcement Proceedings and Rule 8400 - Rules of Practice and Procedure, the specific rule for the alleged facts is Rule 43, Personal Financial Dealing with Clients.

¶ 16 Rule 43.1 is clear. An employee or an Approved Person of a Dealer Member should never, directly or indirectly, engage in any personal financial dealing with clients, unless as specified in Rule 43.2(3)(i)(b): The client is a Related Person as defined by the Income Tax Act (Canada) and the transaction is addressed in accordance with the Dealer Member's policies and procedures. That arrangement should be disclosed and approved in writing by the Dealer Member, prior to the transaction.

¶ 17 Rule 43 also specifies that an employee or an Approved Person of a Dealer Member could not act as a Power of Attorney when the client is a person as defined by the Income Tax Act (Canada) and the

⁶ *R. v. Anthony-Cook*, [2016] 2 SCR 204.

⁷ *Supra* note 4 at para 24.

⁸ *Ibid*, also *supra* note 3 at paras 25-27.

arrangement is not disclosed to and approved in writing by the Dealer Member prior to the transaction, as indicated in Rule 43.2 (5)(i)(a) and (b).

¶ 18 Borrowing money from a client and acting with a Power of Attorney are submitted to the same restrictive conditions to be in conformity with Rule 43.

THE SANCTIONS GUIDELINES AND THE PRECEDENTS

¶ 19 The IIROC Sanction Guidelines are intended to promote consistency, fairness and transparency by providing a framework to guide the exercise of discretion in determining sanctions which met the general sanctioning objectives.

¶ 20 As mentioned in these Guidelines:

The determination of the appropriate sanction in any given case is discretionary and a fact specific process. The appropriate sanction depends on the facts of a particular case and the circumstances of the conduct. Hearing panels retain the discretion to impose the sanctions they consider appropriate.

¶ 21 Given the preventive and deterrence nature of disciplinary sanctions, the sanctions are imposed to protect the investing public, strengthen market integrity, and improve overall business standards and practices, as stated in the Guidelines.

¶ 22 The Hearing Panel in considering a settlement agreement has only two options under IIROC Rules: to accept the agreed settlement with its penalties because the panel agrees that the penalties are acceptable, or to reject the agreed settlement because the agreed penalties are not acceptable or because the panel has not been given enough information for it to come to a determination that the agreed penalties are acceptable.

¶ 23 The Hearing Panel should accept a settlement if it is within the reasonable range of appropriateness, considering the specific facts mentioned in the proposed settlement agreement. To assess so, the Hearing Panel will take into account decisions rendered in cases of similar nature.

¶ 24 The Hearing Panel considered a series of decisions rendered under Rule 43 to compare the penalties imposed to the one in the proposed Settlement Agreement. No case is identical but penalties for similar offences usually provide for a fine and additional measures, such as the obligation to pass the CPH examination and payment of costs incurred by or on behalf of IIROC in connection with the hearing and any investigation related to the hearing. In more serious contraventions, restrictions on membership or suspension have been imposed. We specifically mention a few cases, which show a large spectrum of facts and fines agreed upon.

¶ 25 In *Re Coccimiglio*,⁹ the respondent transferred the client account in June 2017 from his responsibility to TDW's direct investing brokerage in order to become the client's Power of Attorney for Personal Care and Property. Once the client was no longer the respondent's Registered Representative, the respondent borrowed \$200,000, interest-free, from the client. The Respondent assisted the client with transferring the funds from the direct investing account to the bank account, from which the client wrote a cheque to the respondent. The respondent did not disclose the Power of Attorney or the loan to his Dealer Member. The client became uncomfortable with the Power of Attorney, which he revoked on January 20, 2018. The respondent repaid the loan in full on March 1, 2018. The sanctions included a fine of \$25,000 plus \$1,000 as costs.

¶ 26 In *Re Prusky*,¹⁰ the respondent engaged in personal financial dealings with a client without her Dealer Member firm's knowledge or approval, contrary to IIROC Dealer Member Rule 43. There was just one client, one incident, and one security in the conduct in question. The respondent received no compensation for her

⁹*Coccimiglio (Re)*, 2019 IIROC 27.

¹⁰*Prusky (Re)*, 2017 IIROC 43.

dealings. The agreed penalty was a fine of \$20,000 and a cost award of \$1,000.

¶ 27 In *Re Toh*,¹¹ the respondent engaged in personal financial dealings with clients when he received (through his wife) approximately \$122,275.00 from two clients without disclosing these financial dealings to his firm and thereby engaged in conduct unbecoming or detrimental to the public interest contrary to IDA By-Law 29.1. As mentioned by the hearing panel in that case, “There was no further information provided concerning the purpose or terms of the payments to Toh or whether any of the funds had been returned to the clients”. In January 2010, the respondent made a voluntary assignment in bankruptcy and he remains unemployed and on long term disability. The penalties that the parties agreed upon were: a two-year prohibition on registration with IIROC; a fine of \$20,000, and as a condition of reapproval in any capacity, the respondent had to successfully complete the CPH examination.

CONCLUSION

¶ 28 The Settlement Agreement indicated that Mr. Small has no disciplinary history with IIROC. No specific information in the Settlement Agreement referred to Mr. Small’s financial situation, at the time of the borrowing, nor to the extent of the use of the Power of Attorney during more than four years nor to any consequences to the person from whom the money was borrowed. The Hearing Panel would have liked to have more information on these aspects to assess the Settlement Agreement better and more completely.

¶ 29 Mr. Small expressed to the Hearing Panel that the penalties might be too severe. He however agreed to them to close the matter. We respect the views of Mr. Small. The Hearing Panel wants to emphasize the complete collaboration of Mr. Small with IIROC.

¶ 30 Considering:

- The agreed facts in the Settlement Agreement,
- The role of the Hearing Panel with respect to a settlement agreement,
- IIROC Rule 43,
- The IIROC Sanction Guidelines, the need to protect the investing public, to strengthen market integrity and to prevent and discourage future misconduct and to deter others from engaging in similar misconduct, and
- The precedents examined.

DECISION:

¶ 31 The Hearing Panel determined that:

- The nature and the extent of the penalties agreed upon by the parties in the Settlement Agreement fall within the scope of penalties imposed for similar contraventions.
- The agreed upon penalties fall within the reasonable range of appropriateness.

¶ 32 The Hearing Panel therefore accepted the proposed Settlement Agreement.

Dated at Montréal, Quebec this 22 day of November 2021.

Michèle Rivet

Daniel Houle

Yves Ruest

¹¹*Toh (Re)*, 2011 IIROC 51.

SETTLEMENT AGREEMENT

PART I - INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada (IIROC) will issue a notice of application to announce that a settlement hearing will be held before a Hearing Panel (the Hearing Panel) to consider whether, pursuant to Rule 8215 of IIROC's Enforcement, Examination and Approval Rules, it should accept a settlement agreement (the Settlement Agreement) between Staff of IIROC (Staff) and Michael Small (the Respondent).

PART II - JOINT SETTLEMENT RECOMMENDATION

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

PART III – AGREED FACTS

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

Registration History

4. The Respondent has been a registered representative with IIROC as well as its predecessor, the Investment Dealers Association of Canada (IDA), since March 2008.
5. From May 2015 to December 2019, the Respondent was employed and registered with National Bank Financial Inc. (NBF).
6. The Respondent has not been an IIROC registrant since December 2019.
7. The Respondent has no disciplinary history with IIROC.

Particulars

8. On or around May 23, 2015, client A opened an account with NBF, through the Respondent.
9. Client A is an immediate family member of the Respondent and is a Related Person under the meaning of the *Income Tax Act*.
10. Since around April 25, 2015, the Respondent had acted as Power of Attorney for client A, under a general mandate to that effect.
11. The Respondent did not declare the situation to his employer, either when the account was opened or afterwards.
12. In no case was NBF informed in a timely manner, nor did it approve this arrangement between the Respondent and client A.
13. Moreover, the Respondent allegedly proceeded to borrow money from client A, between March and October 2019:
 - March 27, 2019 \$2,000
 - April 24, 2019 \$2,000
 - June 7, 2019 \$1,300
 - October 18, 2019 \$1,000
 - Total : \$6,300
14. The Respondent did not declare this situation to his employer.

15. Consequently, NBF was not informed in a timely manner nor did it approve these loans made to the Respondent by client A.

PART IV – CONTRAVENTIONS

16. By reason of the conduct described above, the Respondent contravened IIROC Dealer Member Rule 43:
- Count 1:** Between March and October 2019, the Respondent had personal financial dealings with a client, who is also a Related Person as defined in the *Income Tax Act*, when he borrowed money from the latter without his employer’s knowledge, contrary to Rule 43.2(3) of the IIROC Dealer Member Rules.
- Count 2:** From May 2015 to December 2019, the Respondent acted as Power of Attorney for a client, who is also a Related Person as defined in the *Income Tax Act*, without his employer’s knowledge, contrary to Rule 43.2(5) of the IIROC Dealer Member Rules.

PART V - TERMS OF SETTLEMENT

17. The Respondent accepts the following penalties and costs:
- a) A fine in the amount of \$20,000;
 - b) The obligation to pass the Conduct and Practices Handbook (CPH) Course exam, in the event of re-registration; and
 - c) Costs in the amount of \$2,500 payable to IIROC.
18. If the Hearing Panel accepts this Settlement Agreement, 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

19. If the Hearing Panel accepts the 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 paragraph below.
20. If the Hearing Panel accepts the Settlement Agreement and the Respondent does not abide by the terms thereof, Staff of IIROC may initiate proceedings against the Respondent pursuant to Rule 8200. These proceedings may be based on, but are not limited to, the facts set out in Part III of this Settlement Agreement.

PART VII – SETTLEMENT ACCEPTANCE PROCEDURE

21. The Settlement Agreement is subject to acceptance by the Hearing Panel.
22. The Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing held 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.
23. 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.
24. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights, under IIROC rules and any applicable legislation, to a disciplinary hearing, review or appeal.
25. 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 in relation to the same allegations

or to related allegations.

26. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
27. 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.
28. If this Settlement Agreement is accepted, the Respondent agrees that neither she nor anyone on her behalf will make a public statement inconsistent with this Settlement Agreement.
29. The Settlement Agreement shall become effective and binding upon the Respondent and Staff from the date of its acceptance by the Hearing Panel.

PART VIII – SIGNATURE OF THE SETTLEMENT AGREEMENT

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

DATED this August 11, 2021.

(s) Michael Small

Michael Small

Respondent

DATED this August 10, 2021.

(s) Francis Larin

Francis Larin

Senior Enforcement Counsel,

on behalf of Staff of IIROC

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