

Re Tsao

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Howard Tsao

2022 IIROC 03

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

Heard: March 29, 2022 by videoconference

Decision: March 29, 2022

Reasons for Decision: March 31, 2022

Hearing Panel:

Barry H. Bresner, Chair, Leo Ciccone and Guenther W.K. Kleberg

Appearances:

April Engelberg, Enforcement Counsel

Anna Markiewicz, for Howard Tsao

Howard Tsao (present)

DECISION ON ACCEPTANCE OF SETTLEMENT

A. INTRODUCTION

¶ 1 This proceeding was commenced by a Notice of Hearing issued by the Investment Industry Regulatory Organization of Canada (“IIROC”) on September 15, 2021. This motion was brought by Notice of Motion issued by IIROC on March 23, 2022, scheduling a hearing, by videoconference call, to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC (“the Rules”), to accept a Settlement Agreement entered between Enforcement Staff of IIROC (“Staff”) and Howard Tsao (“Tsao” or “the Respondent”), pursuant to Section 8428 of the Rules.

¶ 2 The Settlement Agreement attached as Schedule “A” to these Reasons includes an agreed statement of facts in Part III. In accordance with Section 8428(6) of the Rules, the Hearing Panel was restricted to and relied upon the facts recited in the Settlement Agreement.

¶ 3 By way of overview, the Settlement Agreement addresses Tsao’s conduct: (a) in engaging in outside business activities without the approval of his Dealer Member, (b) in falsely advising the Dealer Member that he had resigned from three condominium boards for which he also acted as Registered Representative (“RR”), and (c) in failing to cooperate with the investigation by IIROC Staff by failing to attend a scheduled interview.

¶ 4 The sanctions provided for in the Settlement Agreement consist of (i) payment of a monetary sanction to IIROC of \$30,000, inclusive of disgorgement in the amount of \$13,229.35, (ii) a permanent ban from registration in any capacity with IIROC, and (iii) payment to IIROC of \$5,000 in costs.

¶ 5 For the reasons stated below, the Hearing Panel accepted the Settlement Agreement.

B. BACKGROUND FACTS

¶ 6 The detailed facts contained in the Settlement Agreement are briefly summarized as follows:

- a) Tsao was a RR at a branch of RBC Dominion Securities Inc. (“RBC DS”) from June 2017 until the termination of his employment on February 20, 2020. He has not been an IIROC registrant since his termination.
- b) In June 2017, Tsao disclosed to RBC DS that he was Treasurer and a Board Member for three condominium corporations (“the Condo Corps”) and he sought the approval of RBC DS to act as their RR while continuing his roles for the Condo Corps. RBC’s compliance department denied those requests in writing in October 2017. In the intervening months, the three accounts had been opened, with Tsao as RR, to hold Guaranteed Investment Certificates (“GICs”) for each Condo Corp.
- c) On October 10, 2017, after being advised that his requests for approval of his outside business activities had been denied, Tsao provided RBC DS with letters of resignation as Treasurer and Board Member of the Condo Corps. In fact, he did not resign from those roles. Further, in 2018 and 2019 he signed RBC DS’ annual disclosure forms, falsely representing that he had no outside business activities.
- d) With Tsao as RR, the accounts of the Condo Corps were invested in GICs and were operated as fee-based accounts until January 2019, when they were switched to commission-based accounts at the request of the Condo Corps. At that time, RBC DS reimbursed the Condo Corps approximately \$32,096.86 in fees, inclusive of \$29,259.55 charged to and paid by Tsao.
- e) Tsao had earned \$42,488.90 in fees for the accounts between September 2017 and December 2019, inclusive of the \$29,259.55 which he had to repay, leaving the balance of \$13,229.35 which will be disgorged as part of the monetary sanction in the proposed settlement.
- f) Enforcement Staff attempted to contact Tsao by letter in March 2020 and by telephone on 5 occasions between August 31 and September 25, 2020. Tsao did not respond to the letter or the voicemail messages. A further letter was sent on October 1, 2020 advising of a virtual interview date of October 29, 2020. On October 2, 2020, Tsao telephoned Staff to advise that he had been living out of the country and that he would not attend the interview as he was not planning to return to Canada or to seek registration with IIROC.
- g) Tsao retained counsel in November 2021 and has fully engaged in the proceeding since then.

¶ 7 It is common ground that, in engaging in the described conduct, the Respondent contravened IIROC Dealer Member Rule 18.14 and Consolidated Rule 1400 by engaging in an unauthorized outside business activity and misleading his Dealer Member about that activity between June 2017 and February 2020. It is also agreed that the Respondent contravened section 8104 of Consolidated Rule 8100 by failing to cooperate with the investigation by Enforcement Staff between March 2020 and October 2020.

C. ROLE OF THE SETTLEMENT HEARING PANEL

¶ 8 Pursuant to IIROC Rule 8215(5), a Settlement Hearing Panel must decide whether to accept or reject the proposed settlement. In making that determination, a Hearing Panel will consider whether the proposed sanction falls within a reasonable range of appropriateness, consistent with the IIROC Sanction Guidelines (“the Guidelines”) and prior IIROC decisions.

¶ 9 As stated in *Bereskin (Re)*, 2010 IIROC 37, the role of the Settlement Hearing Panel is to assess whether the sanctions “strike a reasonable balance between fairness to the Respondent in the circumstances, and the

need to protect the investing public, the industry membership, the integrity of the discipline process, the integrity of the securities markets and prevention of a repetition of the offense.”

¶ 10 It is well established in the IIROC jurisprudence that a Settlement Hearing Panel is not tasked with deciding whether it would have imposed the same sanctions as those agreed through negotiation by the parties. Rather, the question is whether the proposed sanctions fall within a reasonable range. In that regard, settlement hearing panels have consistently relied on Milewski (Re), [1999] I.D.A.C.D. No.17, for the principle that negotiated settlements should not be interfered with lightly and that it is in the public interest to encourage and support the settlement process.

¶ 11 As was stated in *Cavalaris (Re)*, 2017 IIROC 4:

“Settlements are to be supported as a means of encouraging negotiation and compromise to arrive at an expeditious resolution of appropriate disciplinary proceedings. Accordingly, a joint submission in the regulatory context would be rejected only where the proposal, if accepted, would lead to the conclusion that the regulatory scheme had broken down or was otherwise not in the public interest.”

¶ 12 Similarly, in *Laurentian Bank Securities Inc. (Re)*, 2017 IIROC 38, the hearing panel concluded that even when the sanctions agreed to in a settlement agreement are at the low end of the reasonable range, the settlement should be accepted unless it would be contrary to public order or would bring the administration of justice into disrepute.

D. APPLICATION OF THE GUIDELINES

¶ 13 In assessing the fairness and reasonableness of the proposed sanctions for the admitted misconduct by the Respondent, particular attention was paid to the period of time over which the conduct occurred, the nature and number of the impugned transactions, whether the conduct was intentional, wilfully blind or reckless, the harm to the integrity of the markets, the need for specific and general deterrence, the mitigating factors and prior decisions on sanction in like circumstances.

¶ 14 Tsao deliberately and actively misled RBC DS regarding his outside business activities. He did so in 2017 by expressly representing that he had resigned from his positions with the Condo Corps when he had not, in fact, done so. He perpetuated that falsehood in failing to disclose his continuing role as Treasurer and Board Member in his annual disclosure forms in 2018 and 2019. That conduct demonstrates a degree of moral turpitude which warrants a very serious sanction.

¶ 15 There is nothing in the agreed facts which would explain or excuse the Respondent’s non-disclosure. That can be contrasted with the facts in *Trueman (Re)*, 2016 IIROC 29 and *Lilly (Re)*, 2020 IIROC 21.

¶ 16 *Re Trueman* also involved a failure to disclose an outside business interest. The respondent advised that he did not intend to deceive or mislead and that, as he did not own the outside firm and had no beneficial interest in the client accounts, he did not appreciate that the outside interest had to be disclosed. Staff confirmed that there was no suggestion of moral turpitude or intention to mislead. In those circumstances, the approved sanction was a fine of \$25,000 and successful completion of the Chief Compliance Officer qualifying examination. On a cautionary note, however, it was also pointed out, in the concurring reasons of David Lang, that:

“6. One should never forget the fundamental principle of outside business activity and disclosure. For the respondent and anybody else who might read these reasons in the future, it should be very clear that these are fundamental protections in the securities industry regulatory framework and we cannot tolerate people who do not adhere to them.”

¶ 17 *Re Lilly* involved a failure to disclose an outside business activity by the CCO of a Dealer Member. The hearing panel was concerned that, given the respondent’s position and prior disciplinary record, the relatively

small fine of \$15,000 imposed under the settlement agreement was inappropriate. However, that fine was approved in light of additional information provided at the hearing, which satisfied the panel that the respondent intended to disclose and seek approval of the outside business activity if and when it turned into an actual activity and business. The respondent believed that disclosure was premature as no business was ever done and the activity was at a preliminary exploratory stage. He received no benefit from his conduct, no persons suffered loss because of his nondisclosure, and it was an isolated incident.

¶ 18 The mitigating factors in *Re Trueman* and *Re Lilly* are absent in the present matter. Tsao intentionally misled RBC DS regarding his continuing roles with the Condo Corps, while inappropriately profiting from his role as their RR. The disclosure of outside business interests is a fundamental principle of the securities regulatory system, as it permits Dealer Members to identify and address any potential or actual conflicts of interests. In the present matter, the conflict was initially disclosed by Tsao. That disclosure enabled RBC DS to assess the potential for conflict and to refuse to approve Tsao's continued involvement as Treasurer and Board Member of the Condo Corps. Tsao's deceitful conduct defeated the very purpose of the disclosure requirement. In the circumstances, considerations of specific and general deterrence and the protection of the integrity of the markets, make a permanent ban from registration in any capacity and a disgorgement of fees both necessary and justified.

¶ 19 The Respondent's failure to cooperate in the investigation is also a serious matter. As stated in *Nelson (Re)*, 2019 IIROC 22 (at para. 36):

“First, let it be said that there is a general principle that the requirement to cooperate in any investigation is fundamental to maintaining an efficient, competitive market environment and also to maintain the integrity of the securities system and protect the public interest.”

¶ 20 The jurisprudence recognizes that a failure to cooperate in an investigation should be treated seriously because IIROC cannot fulfill its regulatory mandate without the cooperation of current or former registrants (see e.g., *Stock (Re)*, 2021 IIROC 24; *Trites (Re)*, 2010 IIROC 48).

¶ 21 In *Sole (Re)*, 2018 IIROC 19, the panel was referred to 24 cases decided between 2002 and 2017, which involved a failure to cooperate. In all but two of those cases, the sanction was a permanent ban on registration and a fine of \$50,000. While the failure to cooperate is usually tied to other underlying contraventions which may affect the sanction in any given case, it is fair to say that a failure to cooperate, in and of itself, has justifiably been viewed as a serious matter deserving of a meaningful sanction.

¶ 22 Tsao's deceitful conduct in pursuing an outside business interest which he knew had not been approved by his Dealer Member, coupled with his failures to cooperate in the investigation more than justify the monetary sanction of \$30,000 coupled with a permanent ban from registration in any capacity with IIROC and costs of \$5,000. While the monetary sanction is at the low end of the reasonable range, it does include disgorgement of the fees received by Tsao as RR for the Condo Corps. As noted above, our role is not to second guess the settlement terms negotiated between Enforcement Staff and the Respondent's counsel. As pointed out in *Re Laurentian Bank Securities Inc.*, supra, a hearing panel should approve a settlement that contains sanctions which the panel considers to be at the low end of a reasonable range of appropriateness, provided that it is not contrary to public interest and does not bring the administration of justice into disrepute.

¶ 23 The mitigating factors in any case are relevant to assessing the reasonableness of a proposed settlement. Tsao has no prior disciplinary history with IIROC. He has participated in the process after he retained counsel in November 2021 and, by settling, he has recognized his misconduct, accepted his responsibilities and saved the time and expense of a hearing on the merits.

¶ 24 In the circumstances, the agreed sanctions are fair and fall within the reasonable range of sanctions for such conduct. The sanctions satisfy the need for specific and general deterrence and do not offend the public

interest.

E. CONCLUSION

¶ 25 Taking into account the public interest, the agreed facts and the relevant factors described in the Guidelines and the jurisprudence, for the reasons stated above, the Panel accepts the Settlement Agreement agreed by the parties and the sanctions provided for in that Agreement.

Dated at Toronto, Ontario this 31 day of March 2022.

Barry H. Bresner

Leo Ciccone

Guenther W.K. Kleberg

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 IIROC Rules, a hearing panel (“Hearing Panel”) should accept the settlement agreement (“Settlement Agreement”) entered into between the staff of IIROC (“Staff”) and Howard Tsao (“Tsao”).

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and Tsao 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, Tsao agrees with the facts as set out in this Settlement Agreement.

Overview

4. This Settlement Agreement concerns Tsao’s outside business activity without the approval of his Dealer Member. Tsao advised his Dealer Member that he had resigned from three condominium boards for which he also acted as RR, when he had not. Tsao also failed to cooperate with Staff’s investigation by not attending a scheduled interview.

Background

5. Tsao was a Registered Representative (“RR”) at a branch of RBC Dominion Securities Inc. (“RBC DS”) between June 2017 and February 2020. Tsao was terminated from RBC DS on February 20, 2020 and has not been an IIROC registrant since.

The Outside Business Activity

6. In June 2017, Tsao disclosed to RBC DS that (1) he served as Treasurer and Board Member for three condominium corporations (the “Condominium Corps”); and (2) he wanted to open accounts for the Condominium Corps at RBC DS and serve as their RR. Tsao requested that RBC DS approve his activities with the Condominium Corps as an outside business activity (“OBA”).
7. RBC DS’s internal policies and procedures require RRs to complete an OBA/Plan of Supervision Request Form (“OBA Request Form”) and submit it to the RBC compliance department (“Compliance”) for approval.

8. Tsao submitted three OBA Request Forms (one for each Condominium Corp) to Compliance in June 2017.
9. Accounts for the three Condominium Corps were opened at RBC DS starting on July 27, 2017. The Condominium Corps held Guaranteed Investment Certificates (“GICs”) in their respective accounts. Tsao was the RR for all of the Condominium Corps’ accounts.

The Outside Business Activity Request was Denied by RBC DS

10. Compliance denied all three OBA Request Forms in October 2017. Tsao was informed in writing at the time that his OBA requests were denied by Compliance.

Tsao Advised RBC DS that he had Resigned from the OBA

11. Since the OBA Request Form was denied, Tsao advised RBC DS that he would resign as Treasurer and Board Member for the Condominium Corps. Tsao provided RBC DS three signed letters of resignation (one for each Condominium Corp) on October 10, 2017.
12. Tsao signed Annual Attestation disclosure forms for 2018 and 2019 indicating that he had no OBAs.

Tsao Misled RBC DS and Did Not Resign from the OBA

13. Tsao did not actually resign from his role as Treasurer and Board Member of the Condominium Corps, despite advising RBC DS that he had done so.
14. Tsao continued as RR of record for the Condominium Corps.

Commissions and Fees Earned

15. The Condominium Corps each held an account which were comprised of investments in GICs. They were each operated as fee-based accounts until January 2019 when they were switched to commission-based accounts per the Condominium Corps’ request. Due to delay in switching the accounts to commission-based, RBC DS reimbursed the Condominium Corps approximately \$32,096.86 in fees. Of this amount, \$29,259.55 was charged to and paid by Tsao.
16. Tsao earned \$42,488.90 in fees for the accounts between September 2017 and December 2019. This includes the \$29,259.55 that he had to pay back.

Failure to Cooperate with Enforcement Staff’s Investigation

17. Enforcement Staff first attempted to contact Tsao regarding its investigation in March 2020 by sending Tsao a letter and providing him with the opportunity to respond. Tsao did not provide a response.
18. Between August 31 and September 25, 2020 Enforcement Staff telephoned Tsao five times. Tsao never answered the telephone. Enforcement Staff left a voicemail four times. Tsao never responded to the voicemails.
19. On October 1, 2020, a letter was sent to Tsao’s residential address advising of a virtual interview date of October 29, 2020.
20. On October 2, 2020, Tsao telephoned Enforcement Staff and advised that he had been living outside of Canada since his termination from RBC DS and had been renting the property listed as his residential address in Canada. He also indicated that he had a limited internet connection. During this phone call, Enforcement Staff again advised of the virtual interview date. Tsao indicated that he did not plan on attending the interview because he did not intend to return to Canada and did not intend to seek registration with IIROC again.
21. Tsao did not attend the scheduled interview or communicate with Enforcement Staff any further regarding his non-attendance.

22. In November 2021, Tsao retained counsel and became fully engaged in the proceeding.

Mitigating Factors

23. By settling, Tsao has saved the need for a hearing and has indicated acceptance of his responsibilities.

24. Tsao does not have any disciplinary history with IIROC.

PART IV – CONTRAVENTIONS

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

- (i) Between June 2017 and February 2020, Tsao engaged in an outside business activity by serving as Treasurer and Board Member for three condominium corporations for which he was also the Registered Representative and misled his Dealer Member about the activity, contrary to Dealer Member Rule 18.14 and Consolidated Rule 1400.
- (ii) Between March 2020 and October 2020, Tsao failed to cooperate with Enforcement Staff who were conducting an investigation, contrary to section 8104 of Consolidated Rule 8100.

PART V – TERMS OF SETTLEMENT

26. Tsao agrees to the following sanctions and costs:

- (i) Tsao will pay a monetary sanction of \$30,000, which includes disgorgement in the amount of \$13,229.35;
- (ii) Tsao will pay costs of \$5,000;
- (iii) Tsao will be permanently banned from registration in any capacity with IIROC.

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

PART VI – STAFF COMMITMENT

28. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against Tsao 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.

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

PART VII – PROCEDURE FOR ACCEPTANCE OF SETTLEMENT

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

31. 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.

32. Staff and Tsao 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 Tsao does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.

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

34. If the Hearing Panel rejects the Settlement Agreement, Staff and Tsao may enter into another settlement agreement or Staff may proceed to a disciplinary hearing based on the same or related allegations.
35. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
36. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full of 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.
37. If this Settlement Agreement is accepted, Tsao agrees that neither he nor anyone on his behalf, will make a public statement inconsistent with this Settlement Agreement.
38. The Settlement Agreement is effective and binding upon Tsao and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

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

DATED this “22” day of March, 2022.

“Witness”
Witness

“Howard Tsao”
Howard Tsao

“Witness”
Witness

“April Engelberg”
April Engelberg “March 23, 2022”
Enforcement Counsel on behalf of Enforcement
Staff of the Investment Industry Regulatory
Organization of Canada

The Settlement Agreement is hereby accepted this “29” day of “March”, 2022 by the following Hearing Panel:

- Per: “Barry Bresner”
Panel Chair
- Per: “Guenther Kleberg”
Panel Member
- Per: “Leo Ciccone”
Panel Member