

# Re De Cicco

IN THE MATTER OF:

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

**and**

**Lelio De Cicco**

2020 IIROC 07

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

Heard: December 20, 2019 in Toronto, Ontario

Decision: December 20, 2019

Reasons for Decision: February 28, 2020

**Hearing Panel:**

Frederick W. Chenoweth, Chair, Christopher Hill and Randee Pavalow

**Appearance:**

Natalija Popovic, Senior Enforcement Counsel

Jeremy Devereux, Counsel for the Respondent

Lelio De Cicco (present)

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## REASONS FOR DECISION ON ACCEPTANCE OF SETTLEMENT

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¶ 1 The Staff of the Investment Industry Regulatory Organization of Canada (“IIROC”) and Lelio De Cicco (“Respondent”) entered into a settlement agreement dated December 17, 2019 (“Settlement Agreement”). They submitted the Settlement Agreement to this Hearing Panel pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC for approval or rejection. The Settlement Agreement complies with Section 8428 of the IIROC Rules of Practice and Procedure. After considering the material filed, and the submissions made by Counsel, the Hearing Panel issued an order accepting the Settlement Agreement. The Settlement Agreement is attached hereto as Appendix A to the Reasons. These are the Panel’s reasons for making the order.

**The Contraventions**

¶ 2 The Respondent has admitted to the following contraventions of IIROC Rules:

- (a) Between August 2014 and September 2015, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to a client, to ensure that the acceptance of orders was suitable for a client, and to ensure the positions held in an account were suitable in relation to a client account managed by a power of attorney, contrary to Dealer Member Rules 1300.1(a), 1300.1(p) and 1300.1(r).

**Terms of Settlement**

¶ 3 The Respondent agrees to the following sanctions and costs:

- (a) global fine of \$60,000;
- (b) disgorgement of \$3,500;
- (c) rewrite of the Conduct and Practices Handbook exam within six months of the date of the acceptance of this Settlement Agreement;
- (d) strict supervision for two months; and
- (e) costs of \$3,000.

¶ 4 The Respondent has agreed to pay the amounts referred to above within 30 days of acceptance of the Settlement Agreement by the Hearing Panel unless otherwise agreed between Staff and the Respondent.

### **Background**

¶ 5 The Respondent had been a registered representative (“RR”) since 2000, and employed with Scotia Capital Inc. (“Scotia”) from 2009 to the date of the Hearing.

### **The Facts**

¶ 6 The facts are set out, in detail, in the Settlement Agreement, which is attached as Appendix A to these Reasons.

¶ 7 The following were of particular note:

- (a) The client was born in 1925 and was 90 years old when the Respondent became her RR. The client was a resident of British Columbia. In August 2011, the client appointed her son, an Ontario resident, as power of attorney without restrictions;
- (b) By order of the Superior Court of British Columbia dated September 10, 2013, the client was declared incapable of managing herself or her affairs by reason of mental infirmity arising from disease, age or otherwise, and her son was assigned as her committee. The client, at the time of the Hearing, was residing in a care facility in British Columbia. While the Respondent was the client’s RR and as a result of the contraventions to which the Respondent has admitted, and as a result of the trading allowed by the Respondent, the client’s account declined in value by approximately \$94,430, of which \$52,540 was due to trading losses. Approximately \$48,200 of the trading losses were the result of short-term options trading. The remaining \$41,890 decline in value was due to cash transfers to the client’s account for purposes of paying the client’s expenses;
- (c) By email dated October 1, 2015, the British Columbia Public Guardian directed Scotia to freeze the client’s account. During the Respondent’s tenure as RR for the client, the Respondent earned fees of approximately \$3,500. In July 2016, the account was moved to another financial institution;
- (d) By letter dated May 9, 2017, IIROC received a complaint from the B.C. Public Guardian. Thereafter, and in December 2017, Scotia reimbursed the client approximately \$141,000. The Respondent reimbursed Scotia for this amount, by way of withheld compensation with full payment completed by July 2019. Such payment included full disgorgement of all fees earned by the Respondent from the client’s account during the relevant period.

### **Seriousness of the Contravention**

¶ 8 Using due diligence to learn and remain informed of the essential facts relating to a client, to ensure that the acceptance of orders and the positions held in an account were suitable for a client, are at the heart

of an RR's responsibility. Accordingly, the Respondent's failure to use due diligence to accomplish those ends is a serious breach of Dealer Member Rules 1300.1(a), 1300.1(p) and 1300.1(r). A significant sanction was therefore required.

### **Mitigation**

¶ 9 In determining an appropriate penalty, it was necessary to consider all the circumstances, including mitigation. The circumstances of mitigation which were taken into account include that:

- (a) the Respondent had no disciplinary history;
- (b) the Respondent appears to have cooperated fully with Staff during the investigation and chose to enter into a settlement agreement, all of which demonstrates that the Respondent acknowledges his contraventions, accepted his responsibilities for same and thereby avoided the necessity of a hearing on all the relevant issues;
- (c) Although the client's account suffered a loss, Scotia reimbursed the client approximately \$141,000. The Respondent reimbursed Scotia for this amount. The Respondent's reimbursement also included full disgorgement of all fees earned by the Respondent from the client's account during the relevant period.

### **Duty of a Hearing Panel Upon a Settlement Hearing**

¶ 10 It is clear from the jurisprudence emanating from the courts and IIROC hearing proceedings 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 that it meets the objectives of the disciplinary process, which are to maintain the integrity of the investment industry. We cite from the recent decision of the hearing panel in *Re CIBC World Markets Inc.*, 2011 IIROC 38.

¶ 11 Finally, hearing panels will not lightly interfere with a negotiated settlement. s was said in *Re Milewiski*, [1999] IDACD No. 17:

...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.

Or, as put by Winkler J. (albeit in another context) in *Gilbert v. CIBC*, [2004] O.J. 4260:

There is a presumption of fairness when a proposed class settlement negotiated at arms length .... is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

The test to be applied is whether the settlement is fair and reasonable ... This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give and take.

In our view, the settlement, negotiated as it was by the parties assisted by capable counsel, does not clearly fall "outside a range of appropriateness" and it should therefore be, and was, accepted by the panel.

¶ 12 We share the opinion expressed by the hearing panel in *Re Vorstadt*, 2012 IIROC 15 that the settlement process is an important one, which should be "encouraged and supported".

### **Guidelines and Other Decisions**

¶ 13 In determining whether the settlement was a reasonable one, the Panel has reviewed the IIROC Sanction Guidelines dated February 2, 2015. The Panel understood that although the guidelines were not

binding, they were useful in that they illustrated what penalties members of the industry thought were generally appropriate.

¶ 14 In addition to the guidelines set out above, the Panel also considered the submissions of Enforcement Counsel and Counsel for the Respondent. The Panel was referred to 15 previous decisions of IIROC panels and the Ontario Securities Commission. The cases were of substantial assistance in guiding the Panel.

### **Impact of the Penalty**

¶ 15 Monetary penalties are necessary to act as specific and general deterrence. The penalty composed of a fine of \$60,000, disgorgement of \$3,500 and costs of \$3,000 was a significant penalty. The penalty was sufficient to act as a specific deterrent to this Respondent and also sufficient to alert all members that a repeat of this contravention will attract significant consequences.

### **Result**

¶ 16 For all the above reasons, the Panel concluded that the settlement was a reasonable one. The settlement is therefore accepted by the Panel and the sanctions set out in the Settlement Agreement are ordered imposed.

Dated at Toronto, Ontario this 28<sup>th</sup> day of February, 2020.

Frederick W. Chenoweth

Christopher Hill

Randee Pavalow

## **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 Lelio De Cicco (“Respondent”).

### **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

### **Overview**

4. In July 2014, the Respondent became the Registered Representative (“RR”) for a 90-year-old client (the “Client”) whose son managed her account pursuant to a power of attorney (“POA”) and an order of the Supreme Court of British Columbia appointing him as the Client’s committee. The Client’s account was subject to oversight from the office of the Public Guardian and Trustee of British Columbia (the “B.C. Public Guardian”).
5. The Client’s account was transferred to the Respondent in July 2014 because of concerns raised by the Client’s former Registered Representative (“RR”). At that time, the Respondent did not take adequate steps

to know the client or ensure the positions held in the Client's account were suitable.

- Between August 2014 and September 2015 (the "Relevant Period"), the Respondent did not take adequate steps to prevent the Client's son, as POA and committee, from engaging in short-term trading, purchasing high-risk securities exceeding the Client's objectives and risk tolerance, and engaging in options trading in the account, none of which was suitable for the Client.

### Background

- The Respondent has been an RR since 2000 and has been an RR with Scotia Capital Inc. ("Scotia") from 2009 to the present.
- The Client was born in 1925 and was 90 years old when the Respondent became her RR. She was a B.C. resident. In August 2011, she appointed her son, an Ontario resident, as POA without restrictions.
- By Order of the Supreme Court of British Columbia dated September 10, 2013, the Client was declared incapable of managing herself or her affairs by reason of mental infirmity arising from disease, age or otherwise, and her son was appointed as her committee. The Client was residing in a care facility at that time.

### The Opening of the Account

- In mid-May 2014, the Client's son opened a fee-based account for the Client at Scotia with an RR (the "Scotia RR") following a referral by a Scotia Private Wealth banking representative (the "Banking Representative"). At that time the Client's account objectives and risk tolerance were recorded as:

Objective		Risk Tolerance	
Income	20%	Low	20%
Long Term Capital Appreciation	60%	Medium	60%
Short Term Capital Appreciation	20%	High	20%

- In June 2014, following the sale of the Client's residence, her son deposited over \$450,000 in the account.
- By an Irrevocable Letter of Direction dated June 4, 2014, the Client's son directed Scotia not to release any funds, other than income earned, from the account to any person, including himself as POA, without the prior written consent of the B.C. Public Guardian. The Scotia RR signed off on the Irrevocable Letter of Direction on behalf of Scotia.
- On June 9, 2014, the Client's son inquired with the Scotia RR about utilizing options trading in the Client's account. The Scotia RR recommended an options strategy that he thought would be appropriate for the account consisting of covered calls to enhance income, and to collect premiums and dividends on the securities held.
- In order to implement the options strategy, on June 10, 2014, the Scotia RR completed a client account update. The Client's recorded objectives and risk tolerance were changed to:

Objective		Risk Tolerance	
Income	0%	Low	0%
Long Term Capital Appreciation	50%	Medium	50%
Short Term Capital Appreciation	50%	High	50%

- Before the Scotia RR could implement the options strategy, the Client's son engaged in unsolicited short-term trading in the account. By mid-June, the Scotia RR had executed 55 unsolicited trades, 25 of which short-term trades. The Scotia RR also executed 23 solicited trades all of which were purchases establishing

new positions in the account.

16. Subsequently, the Scotia RR advised the Client's son that he was unwilling to facilitate any further short-term trading, which he did not think was suitable for the account.

### **The Transfer of the Account to the Respondent**

17. With the Client's son's agreement, on June 15, 2014, the Scotia RR contacted his supervisor as well as the Banking Representative and requested that the account be moved to another RR at Scotia.
18. On June 17, 2014, the Banking Representative contacted the Respondent and forwarded an email from the Scotia RR about the latter's concerns with the Client's son's short-term trading in the account.
19. The Banking Representative had never referred an account to the Respondent prior to the referral of the Client's account.
20. The Respondent read and understood the Scotia RR's email outlining the latter's concerns about the short-term trading in the Client's account.
21. On July 29, 2014, the Respondent became the RR for the Client's account, after having met with the Banking Representative to discuss the referral. The Respondent had signed a new Irrevocable Letter of Direction on July 28, 2014; the terms of which were the same as the one signed by the Scotia RR in June 2014. The Respondent did not contact the Scotia RR or his team for any further information about the Client.
22. During the Relevant Period, regular monthly withdrawals averaging approximately \$3000 were made from the Client's account and transferred to her bank account in B.C. The Respondent did not obtain the consent of the B.C. Public Guardian prior to doing so; however, the withdrawal amounts were consistent with the care facility expenses of the Client.

### **The Respondent's Failure to Know the Client**

23. The Respondent met with the Client's son on July 29, 2014. The purpose of the meeting was to transfer the account to the Respondent. At this time, the Respondent did not have substantive discussions about the account with the son. The Respondent advised the son that he wanted to meet with him to discuss the account once responsibility for the account had been transferred to the Respondent. Prior to that transfer, the Respondent was not able to view the holdings in the account.
24. The Respondent did not have any further meetings with the Client's son. The Respondent on several occasions tried to arrange a second meeting with the Client's son to review the account in detail, but the Client's son did not agree to attend a meeting. All subsequent discussions were by phone and were brief. The Respondent did not review or discuss the details of the Client's account with the son in those calls because the Respondent continued to expect that there would be a second meeting with the Client's son.
25. The Respondent had concerns with the suitability and historical trading in the account from the outset, based on the email he had received from the Scotia RR. It is the Respondent's evidence that he intended to address those concerns when he met with the Client's son for a second time, after he became RR of record; however, he ultimately failed to do so.

### **The Unsuitable Trading**

26. During the Relevant Period, 180 trades were executed in the account, 137 of which were marked unsolicited. Of the 180 trades, 67 were entered by the Respondent. The remaining 113 trades were entered by licensed assistants in the Respondent's branch.
27. Though the Respondent did not have any substantive discussions about suitability and trading in the

account, he asked the Client's son to stop the trading he was doing in the account. The Client's son then placed orders by calling licensed assistants in the branch instead of calling the Respondent. The Respondent advised the assistants not to take orders from the Client's son. However, the Client's son aggressively pressed the assistants to place the orders.

28. The Client's son engaged in short-term trading purchased securities that exceeded the account's risk tolerance, and engaged in speculative options trading. On May 29, 2015, in response to inquiries about the level of risk in the account by Scotia Compliance Staff, the Respondent updated the recorded account objectives and risk tolerance as indicated below.

Objective		Risk Tolerance	
Income	0%	Low	0%
Long Term Capital Appreciation	70%	Medium	70%
Short Term Capital Appreciation	30%	High	30%

29. The Client's son signed the update form; however, there is no evidence that the Respondent discussed these changes with him prior to his sign off.
30. Between December 2014 and September 2015, the overall high-risk component of the account increased from 51% to 82%.
31. Between July 2015 and August 2015, the Client's son traded securities that were held for periods of between two to fourteen days. This trading was inherently risky.
32. Between August 2014 and February 2015, the Client's son traded in USD options by buying and selling calls. This trading was speculative.
33. The Respondent acknowledges that he should have acted sooner to prevent the Client's son from conducting unsuitable trading in the Client's account.

**Account Losses and Complaint**

34. By letter dated September 30, 2015, the B.C. Public Guardian directed Scotia to freeze the Client's account. At the time, the account value was approximately \$371,000.
35. During the Relevant Period, the trading in the account resulted in a decline in value of approximately \$94,430, of which \$52,540 was due to trading losses. Approximately \$48,200 of the trading losses were the result of the short-term and options trading. The remaining \$41,890 decline in value was due to cash transfers to the Client's bank account.
36. By email dated October 1, 2015, and after the B.C. Public Guardian directed Scotia to freeze the Client's account, the Respondent recommended to the B.C. Public Guardian that one of the larger holdings in the account be sold because it had significantly increased in value. The B.C. Public Guardian did not provide instructions to sell. If the position had been sold, the trading losses may have been reduced by approximately \$23,000, to \$29,450.
37. The Respondent earned fees from the Client's fee based account of approximately \$3500 over the Relevant Period.
38. In July 2016, the account was moved to another financial institution.
39. By letter dated May 9, 2017, IIROC received a complaint from the B.C. Public Guardian. The complaint alleged, among other things, that the Client's son as POA and committee had acted contrary to the Irrevocable Letter of Direction and that the Client's account had sustained substantial losses.
40. In December 2017, Scotia reimbursed the Client approximately \$141,000. The Respondent has reimbursed

Scotia for this amount, by way of withheld compensation, with full payment completed in July 2019. Such payment included full disgorgement of all fees earned by the Respondent from the Client's account during the Relevant Period.

#### **PART IV – CONTRAVENTIONS**

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

Between August 2014 and September 2015, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to a client, to ensure that the acceptance of orders was suitable for a client, and to ensure the positions held in an account were suitable, in relation to a client account managed by a power of attorney, contrary to Dealer Member Rules 1300.1(a), 1300.1(p) and 1300.1(r).

#### **PART V – TERMS OF SETTLEMENT**

42. The Respondent agrees to the following sanctions and costs:
- a) Global Fine of \$60,000;
  - b) Disgorgement of \$3500;
  - c) Rewrite of Conduct and Practices Handbook exam within six months of the date of the acceptance of this settlement agreement;
  - d) Strict supervision for two months; and
  - e) Costs of \$3000.
43. 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**

44. 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 paragraph below.
45. 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**

46. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
47. 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.
48. 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.
49. 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.

50. 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.
51. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
52. 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.
53. 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.
54. 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**

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

**DATED** this “16” day of “Dec”, 2019.

“Witness”

Witness

“Lelio DeCicco”

**Lelio DeCicco**

**DATED** this “17” day of “Dec”, 2019.

“Witness”

Witness

“Natalija Popovic”

**Natalija Popovic**

Enforcement Counsel on behalf of Enforcement  
Staff of the Investment Industry Regulatory  
Organization of Canada

The Settlement Agreement is hereby accepted this “20<sup>th</sup>” day of “Dec”, 2019 by the following Hearing Panel:

Per: “Frederick W. Chenoweth”

Panel Chair

Per: “Christopher Hill”

Panel Member

Per: “Ranee Pavalow”

Panel Member