

# Re Black

IN THE MATTER OF:

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

**and**

**Merlyn Black**

2020 IIROC 33

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

Heard: September 28, 2020 in Toronto, Ontario

Decision: September 28, 2020

Reasons for Decision: October 2, 2020

**Hearing Panel:**

The Hon. Karen Weiler, M.C., Chair, Dave Persaud and Nick Pallotta

**Appearance:**

Kathryn Andrews, Senior Enforcement Counsel

Janice Wright, for Merlyn Black

Merlyn Black (present)

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## REASONS FOR DECISION ON ACCEPTANCE OF SETTLEMENT

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### I. INTRODUCTION

¶ 1 This Panel was convened to consider whether the Settlement Agreement entered into between the Enforcement Staff of the Investment Industry Organization of Canada (“IIROC”) and Merlyn Black, a Registered Representative at a Dealer Member of IIROC and the Respondent in these proceedings, should be accepted.

¶ 2 In the Settlement Agreement, the Respondent admits that between June 2017 and May 2018, he effected discretionary trades in the accounts of three clients without prior written authorization and without the account being properly designated or approved as a discretionary account contrary to IIROC Dealer Member Rule 1300.4.

¶ 3 Rule 1300.4 provides as follows:

A Registered Representative may not exercise discretionary authority over a customer account unless:

- a) the Dealer Member has designated a Supervisor or Supervisors to be responsible for discretionary accounts;

- b) the customer has given prior written authorization in compliance with Rule 1300.5;
- c) a Supervisor designated under section (a) has approved the account as a discretionary account and recorded that approval;
- d) the Registered Representative authorized to effect discretionary trades for the account has actively dealt in, advised on or performed analysis for a period of two years with respect to all types of products which are to be traded on a discretionary basis; and
- e) the account is maintained at the Dealer Member of the Registered Representative.

¶ 4 By way of penalty, the Respondent agreed to pay a fine of \$10,000, disgorge his commission in the amount of \$3,401, and costs of \$1,500 within 30 days unless otherwise agreed. In addition, the Respondent re-wrote and passed the Conduct and Practice Handbook (“CPH”) exam in January 2019. He also agreed to be placed under enhanced Strict Supervision for one year from the date of his registration and approval with his new Dealer Member as a Registered Representative.

¶ 5 At the conclusion of the Settlement Hearing, we adjourned, deliberated, agreed to accept the joint submission of counsel and accepted the Settlement Agreement with reasons to follow. These are those reasons. The Agreed Facts taken from the Settlement Agreement verbatim are incorporated by reference into these reasons. The Settlement Agreement in its entirety is appended as Exhibit A to these reasons.

## **II. AGREED FACTS**

### **Overview**

¶ 6 Previously the Respondent was a Registered Representative at a CIBC WM branch office in Sudbury, Ontario. Between June 2017 and May 2018 (the “Relevant Period”), the Respondent purchased various financial institution structured products (the “Notes”) in three clients’ accounts without fully discussing the timing of each trade with the clients in advance.

¶ 7 The Respondent was not a licensed Portfolio Manager. None of the client accounts discussed below were managed or discretionary accounts.

### **Background**

¶ 8 The Respondent has been an IIROC registrant since 1993. He was a Registered Representative at CIBC WM and had approximately 120 clients during the Relevant Period. The Respondent left CIBC WM on November 23, 2018. The Respondent is currently working at another Dealer Member firm in Sudbury, Ontario.

### **The Notes**

¶ 9 All twelve of the Notes purchased during the Relevant Period in EB, LP and MM’s accounts were issued by the Bank of Nova Scotia (“BNS”), the Bank of Montreal (“BMO”) or the Canadian Imperial Bank of Commerce (“CIBC”).

¶ 10 The Respondent purchased different types of Notes. Some of the Notes had an objective of providing a regular payment while others increased the maturity payment as time passed. Ten of the Notes performed well and were called by the issuer. Five of the Notes were called after the Relevant Period and after the Respondent left CIBC. Two of the Notes are still trading because the underlying security is currently not performing in a manner that allows for the Note to be called.

### **Client EB**

¶ 11 EB was born in 1933 and was a widow. Prior to the Relevant Period, she had been a client for a number of years. EB had two accounts with the Respondent: a RIF account and a non-registered account.

¶ 12 Between July 2017 and March 2018, the Respondent purchased two CIBC Notes and three BMO Notes in EB's accounts without discussing the timing of each of these trades with her in advance. EB checked her monthly statements to see if her investments were up or down but she did not understand the activity section of the statements.

¶ 13 The Respondent received net commission of \$666 for the above Notes purchased in EB's accounts.

#### **Client LP**

¶ 14 LP was born in 1947 and was a widow. Prior to the Relevant Period, she had been a client for a number of years. LP had three accounts with the Respondent: a RSP/RIF account, a non-registered account and a TFSA account.

¶ 15 On nine occasions between July 2017 and May 2018, the Respondent purchased nine different Notes in one or more of LP's accounts without fully discussing the timing of each of these trades with her in advance. All of these Notes were BNS, BMO or CIBC products. Nine of the purchases were made in LP's RIF account, four purchases in her TFSA account and eight purchases in her non-registered account.

¶ 16 The Respondent received net commission of \$2,249 for the above Notes purchased in LP's accounts.

#### **Client MM**

¶ 17 MM was born in 1941 and was divorced and then widowed. Prior to the Relevant Period, she had been a client for a number of years. During the Relevant Period, MM had two accounts with the Respondent.

¶ 18 Between June 2017 and March 2018, the Respondent purchased five different Notes on six occasions in MM's accounts without fully discussing the timing of each of these trades with her in advance. All of these Notes were BNS, BMO or CIBC products. MM closed her accounts in May 2018.

¶ 19 The Respondent received net commission of \$486 for the above Notes purchased in MM's accounts.

#### **Other**

¶ 20 The Respondent:

- (a) does not have a previous disciplinary history;
- (b) has expressed remorse for the conduct described above;
- (c) successfully re-wrote the CPH examination in January 2019; and,
- (d) further to the November 26, 2019 decision of the Registration Subcommittee of the Ontario District Council, on consent, the Respondent has agreed to be placed under enhanced Strict Supervision for one year from the date of his registration and approval with his new Dealer Member as a Registered Representative.

### **III. THE SUBMISSIONS OF COUNSEL**

¶ 21 Both counsel for IIROC and the Respondent emphasized that there is no issue with respect to the suitability of the notes purchased by the Respondent. It is simply a question of timing. With respect to the question of whether there was financial loss, counsel could only say that there had been a great deal of negotiation back and forth and that they had nothing to add to the agreed statement of facts. Of the twelve

notes, ten performed well (five of the notes having been called after the relevant period). Two were still trading and have not been called because the underlying security is not performing in a manner that allows the security to be called.

¶ 22 The Respondent has been a registered representative since 1993, a period of 27 years, and this is his first disciplinary offence. He agrees that his conduct was in breach of IIROC Rules and has entered into a Settlement Agreement. By re-writing the CPH examination which he successfully passed and by agreeing to enhanced Strict Supervision for a period of one year with his new firm where he works as a Registered Representative, the Respondent has taken remedial measures towards restoring confidence that he will comply with IIROC Rules in the future.

¶ 23 Counsel also drew our attention to the decision in [Re Dykeman 2017 IIROC 49](#), and pointed out that the circumstances of that case are very similar to the one before us. The fine of \$10,000 and costs of \$1,500 imposed in that case are identical to those proposed here.

#### IV. OUR TASK AND OUR DISPOSITION

¶ 24 The Panel is obliged to accept or reject the Settlement Agreement: Rule 8215(5) of the Consolidated Rules.

¶ 25 In deciding whether to approve the Settlement Agreement, our task was to determine whether, in the circumstances set out in the Agreed Facts, the penalty agreed upon in the Settlement Agreement fell within a reasonable range of appropriateness. See *Re Dykeman, supra* at para 18 and cases cited therein; [Re Smith 2016 IIROC 15](#) at paras 17-18; [Re Bereskin 2010 IIROC 37](#) at paras 4-5.

¶ 26 In deciding whether the penalty fell within a reasonable range of appropriateness we took into consideration the particular circumstances of the Respondent and this offence, the submissions of counsel, the range of penalties given for similar offences in similar circumstances, and the public interest. As part of the public interest we considered whether the penalty was sufficient to protect the public in that it would act as a deterrent to similar conduct by the Respondent, deter others and protect the integrity of the investment industry. These considerations are expressed in one formulation or another in many cases. See *e.g.* [Re Donnelly 2016 IIROC 23](#) at para 5; *Re Dykeman, supra* at paras 17, 24, 29; [Re Melville 2014 IIROC 51](#) at para 10. We also took into consideration the efficient administration of justice in having appropriate cases settled and the fact that, if accepted, the Settlement Agreement would bring an end to the matter and save further litigation costs.

¶ 27 Having regard to the considerations outlined above, we are of the opinion that the penalty agreed upon in the Settlement Agreement, namely a fine of \$10,000, disgorgement of commission of \$3,401 plus costs of \$1,500 payable within 30 days, is within a reasonable range of appropriateness. Accordingly, we accepted the Settlement Agreement.

Dated at Toronto, Ontario this 2 day of October 2020.

Karen Weiler

Dave Persaud

Nick Pallotta

## **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 Mr. Merlyn Black (the “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. Previously the Respondent was a Registered Representative at a CIBC WM branch office in Sudbury, Ontario. Between June 2017 and May 2018 (the “Relevant Period”), the Respondent purchased various financial institution structured products (the “Notes”) in three clients’ accounts without fully discussing the timing of each trade with the clients in advance.
5. The Respondent was not a licensed Portfolio Manager. None of the client accounts discussed below were managed or discretionary accounts.

#### **Background**

6. The Respondent has been an IIROC registrant since 1993. He was a Registered Representative at CIBC WM and had approximately 120 clients during the Relevant Period. The Respondent left CIBC WM on November 23, 2018. The Respondent is currently working at another Dealer Member firm in Sudbury, Ontario.

#### **The Notes**

7. All twelve of the Notes purchased during the Relevant Period in EB, LP and MM’s accounts were issued by the Bank of Nova Scotia (“BNS”), the Bank of Montreal (“BMO”) or the Canadian Imperial Bank of Commerce (“CIBC”).
8. The Respondent purchased different types of Notes. Some of the Notes had an objective of providing a regular payment while others increased the maturity payment as time passed. Ten of the Notes performed well and were called by the issuer. Five of the Notes were called after the Relevant Period and after the Respondent left CIBC. Two of the Notes are still trading because the underlying security is currently not performing in a manner that allows for the Note to be called.

#### **Client EB**

9. EB was born in 1933 and was a widow. Prior to the Relevant Period, she had been a client for a number of years. EB had two accounts with the Respondent—a RIF account and a non-registered account.
10. Between July 2017 and March 2018, the Respondent purchased two CIBC Notes and three BMO Notes

in EB's accounts without discussing the timing of each of these trades with her in advance. EB checked her monthly statements to see if her investments were up or down but she did not understand the activity section of the statements.

11. The Respondent received net commission of \$666 for the above Notes purchased in EB's accounts.

#### **Client LP**

12. LP was born in 1947 and was a widow. Prior to the Relevant Period, she had been a client for a number of years. LP had three accounts with the Respondent: a RSP/RIF account, a non-registered account and a TFSA account.
13. On nine occasions between July 2017 and May 2018, the Respondent purchased nine different Notes in one or more of LP's accounts without fully discussing the timing of each of these trades with her in advance. All of these Notes were BNS, BMO or CIBC products. Nine of the purchases were made in LP's RIF account, four purchases in her TFSA account and eight purchases in her non registered account.
14. The Respondent received net commission of \$2,249 for the above Notes purchased in LP's accounts.

#### **Client MM**

15. MM was born in 1941 and was divorced and then widowed. Prior to the Relevant Period, she had been a client for a number of years. During the Relevant Period, MM had two accounts with the Respondent.
16. Between June 2017 and March 2018, the Respondent purchased five different Notes on six occasions in MM's accounts without fully discussing the timing of each of these trades with her in advance. All of these Notes were BNS, BMO or CIBC products. MM closed her accounts in May 2018.
17. The Respondent received net commission of \$486 for the above Notes purchased in MM's accounts.

#### **Other**

18. The Respondent:
  - (a) does not have a previous disciplinary history;
  - (b) has expressed remorse for the conduct described above;
  - (c) successfully re-wrote the Conduct and Practices Handbook ("CPH") examination in January 2019; and,
  - (d) further to the November 26, 2019 decision of the Registration Subcommittee of the Ontario District Council, on consent, the Respondent has agreed to be placed under enhanced Strict Supervision for one year from the date of his registration and approval with his new Dealer Member as a Registered Representative.

#### **PART IV – CONTRAVENTIONS**

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

Between June 2017 and May 2018, the Respondent effected discretionary trades in the accounts of three clients, contrary to IIROC Dealer Member Rule 1300.4.

#### **PART V – TERMS OF SETTLEMENT**

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

- (a) A fine in the amount of \$10,000;
  - (b) Disgorgement of commission in the amount of \$3,401; and
  - (c) Costs in the amount of \$1,500.
21. 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**

22. 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.
23. 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**

24. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
25. 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.
26. 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.
27. 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.
28. 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.
29. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
30. 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.
31. 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.
32. 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**

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

**DATED** this “29<sup>th</sup>” day of July, 2020.

“Merlyn Black”

Respondent Merlyn Black

“Kathryn Andrews”

Kathryn Andrews

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

The Settlement Agreement is hereby accepted this “28” day of “September”, 2020 by the following Hearing Panel:

Per: “Karen Weiler”

Panel Chair

Per: “Nick Pallotta”

Panel Member

Per: “Dave Persaud”

Panel Member

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