Unofficial English Translation

Re Biron

In the matter of:

The Rules of the Investment Industry Regulatory Organization of Canada

and

The By-Laws of the Investment Dealers Association of Canada

and

Daniel Biron

2012 IIROC 4

Investment Industry Regulatory Organization of Canada
Hearing Panel (Québec District Council)

Hearing held on January 11, 2012
Decision handed down on February 8, 2012
(18 paragraphs)

Hearing Panel:
Jean-Pierre Lussier, Esq. (Chairman), Mr. Normand Durette, Mr. Denis Marc Gagnon
Appearances:
Myriam Giroux-Del Zotto, Esq., for IIROC
Julie-Martine Loranger, Esq., for the Respondent

Decision

¶ 1 On January 11, 2012, counsel representing IIROC and counsel representing the Respondent appeared before our Hearing Panel in order to seek our acceptance of a Settlement Agreement negotiated between them in the month of November 2011. The Respondent was also personally in attendance at the hearing.

¶ 2 The Settlement Agreement which the parties wish to have ratified was the following:

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. Enforcement Staff (Staff) of the Investment Industry Regulatory Organization of Canada (IIROC) and Daniel Biron (the Respondent) consent to the settlement of this matter by way of this Settlement Agreement;

2. IIROC staff carried out an investigation (the Investigation) into the conduct of the Respondent;

3. On June 1, 2008, IIROC consolidated the regulatory and enforcement duties of the Investment Dealers Association (IDA) of Canada and Market Regulation Services Inc. Pursuant to the *Administrative and Regulatory Services Agreement* between the IDA and IIROC effective June 1, 2008, the IDA retained IIROC to provide services to carry out its regulatory duties.

4. The Respondent agrees to submit to the jurisdiction of IIROC;

5. The Investigation disclosed facts for which the Respondent may be disciplined by a Hearing Panel appointed pursuant to IIROC Transition Rule No. 1, Schedule C.1, Part C (the Hearing Panel).

II. JOINT SETTLEMENT RECOMMENDATION

6. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement;

7. The Respondent admits to the following violation of IIROC Rules and Guidelines:

   i) Between the month of October 2008 and up to, and including, March 4, 2009, he engaged in conduct that was unbecoming and detrimental to the public interest by acting as a portfolio manager in the account(s) of several of his clients although he was never registered in this capacity and without such accounts having been authorized by the IIROC dealer member as being "managed" accounts or without his clients having executed a managed account agreement, thereby breaching Rule 1300.7(a)(i), (b) and (c) of the IIROC Dealer Member Rules.

8. Staff and the Respondent agree to the following terms of settlement:

   a) A fine of $30,000;

   b) *Strict supervision* for a period of 18 months along with a requirement to file monthly strict supervision reports with the IIROC Registration Department;

   c) Retake and pass the Conduct and Practices Handbook course within six (6) months following the effective date of this Settlement Agreement.

9. The Respondent agrees to pay costs to IIROC in the amount of $3,000.

III. STATEMENT OF FACTS

(i) Acknowledgement of Facts

10. Staff and the Respondent agree with the facts set out in this Section III and acknowledge that the terms of settlement contained in the Settlement Agreement are based on those specific facts.

(ii) Factual Background

SUMMARY OF INAPPROPRIATE CONDUCT BY THE RESPONDENT

11. Between the month of October 2008 up to, and including, March 4, 2009, the Respondent carried out duties as a portfolio manager without being registered in that capacity. He recommended a strategy to some of his clients but did not contact his clients prior to executing each of the trades. The Respondent executed five hundred and eighty-five (585) trades in twenty-nine (29) brokerage accounts belonging to twenty-three (23) different clients without having the proper qualifications to act as a portfolio manager and without such accounts enabling him to carry out such activity.

THE RESPONDENT

12. During the month of August 2000, the Respondent was registered as a full-service registered representative in the employ of a brokerage firm recognized by the IDA;

13. From April 26, 2001 onward, the Respondent worked as a full-service representative for a brokerage firm that was a member of the IDA, namely BMO Nesbitt Burns Ltd. (BMO NB);

14. On June 1, 2008, the Respondent became a person regulated by IIROC;

15. On or about March 31, 2009, the Respondent was fired by BMO NB for having carried out discretionary transactions;

16. Since the month of April 2009, the Respondent has been registered as a registered retail representative with National Bank Financial Inc., which is also an IIROC dealer member.

UNAUTHORIZED PORTFOLIO MANAGER

17. On or about the month of October 2008, the Respondent recommended to some of his clients the implementation of a trading strategy based on the Horizons BetaPro S&P/TSX 60 Bull Plus ETF (HBP/TSX) security;

18. The explanations which the Respondent gave to his clients amounted to a trading strategy based on a mathematical formula which he applied in order to determine the timing of the sale or purchase of the HBP/TSX security;

19. To save time, during the period between the month of October 2008 up to, and including, March 4, 2009, the Respondent did not contact his clients prior to executing each of the trades in their respective brokerage accounts;

20. However, he did periodically contact them once the trades had been consummated;

21. During the period between the month of October 2008 up to, and including, March 4, 2009, the Respondent executed an aggregate of five hundred and eighty-five (585) discretionary trades with respect to the HBP/TXS security in twenty-nine (29) accounts held by twenty-three (23) of his clients;

22. None of the twenty-three (23) clients in question in respect of whose accounts discretionary trades were carried out had signed a managed account agreement which would have enabled the Respondent to transact on a discretionary basis in their respective brokerage accounts;

23. In addition, none of the accounts belonging to these twenty-three (23) clients had been approved by BMO NB as a "managed" account;

24. Finally, at no moment in time was the Respondent registered as a portfolio manager.

MITIGATING FACTORS

25. No complaints were made by any of the twenty-three (23) clients in question in whose accounts discretionary trades had been effected;

26. None of the twenty-three (23) clients in question in whose accounts discretionary trades had been carried out suffered any financial harm as a result of these trades.

IV. TERMS OF SETTLEMENT

27. This settlement is agreed upon in accordance with IIROC Dealer Member Rules 20.35 to 20.40 inclusive, and Rule 15 of the Dealer Member Rules of Practice and Procedure;

28. The Settlement Agreement is subject to acceptance by the Hearing Panel;

29. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel;

30. The Settlement Agreement will be presented to the Hearing Panel at a hearing (the Settlement Hearing) for approval. Following the conclusion of the Settlement Hearing, the Hearing Panel may either accept or reject the Settlement Agreement;

31. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his rights under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal;

32. 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 matters disclosed in the Investigation;

33. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel;

34. Staff and the Respondent agree that, if the Hearing Panel accepts the Settlement Agreement, they, or anyone on their behalf, will not make any public statements inconsistent with the Settlement Agreement;

35. Unless otherwise stated, any monetary penalties and costs assessed against the Respondent are payable immediately upon the effective date of the Settlement Agreement;

36. Unless otherwise stated, any suspensions, bars, exclusions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

¶ 3 Having heard the representations of counsel, we have agreed to give effect to this Agreement as of January 11, 2012 and we stated that the grounds for our acceptance of the Settlement Agreement would be forwarded to them at a later date. Such grounds are embodied in this decision.

¶ 4 Upon a reading of the Agreement, the violation which the Respondent acknowledges having perpetrated is that of acting for a period of five months as a portfolio manager in the account of several clients without ever having been registered as a portfolio manager and without such accounts having been authorized as managed accounts by the firm or without the clients in question having executed a managed account agreement.

¶ 5 The role of a Panel to which a Settlement Agreement is submitted is not the same as during a substantive hearing. In the latter case, the Panel must determine what appropriate penalty to impose as a result of the breach allegedly committed by the Respondent.

¶ 6 Where a Settlement Agreement is entered into, the Panel cannot substitute its own discretion for that exercised and agreed to by the parties. Its role is restricted to assessing the reasonableness of the penalty negotiated between the parties. And assessing such reasonableness means verifying whether such penalty falls within the range of possible penalties for such a violation. In other words, this means that, if the penalty is not unreasonable in light of the totality of the circumstances, the Panel must give effect thereto, even if it would not necessarily have reached the same conclusion if it had been called upon to impose penalties in respect of this violation.

¶ 7 In this respect, the Panel acknowledges that a Settlement Agreement is a sound procedure which is to be encouraged within the confines of the disciplinary process. It involves negotiation and compromise on the part of both parties. And, to the extent that the result is not unreasonable and meets the objectives sought to be achieved through disciplinary regulation, in particular the protection of the public and the reputation of securities trading, the Panel must give effect thereto.

¶ 8 These are not new principles and they have often been affirmed by other Hearing Panels. We take the liberty of quoting in this respect two matters, namely that of *Graydon Elliott Capital Corporation*[1] and that of *Gaudet*[2].

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1 Reported at (2007) IDA, October 29, 2007;

2 Reported at (2010) IIROC 29, July 13, 2010;

¶ 9 In *Graydon Elliott Capital Corporation*, Paragraph 9 of the decision reads as follows :

> "9. The Panel accepts that its role under the By-laws in reviewing a Settlement Agreement is not the same as its role considering penalty following a hearing on the remits. As has been said in a number of cases, in considering a Settlement Agreement, the Panel should not simply substitute its discretion to that of Staff in negotiating the settlement. The Panel must be cognizant of the importance of the settlement process, and it should not interfere lightly in a negotiated settlement. We acknowledge that the settlement process is one of negotiation and compromise and the penalty imposed may be somewhat different than one imposed following a hearing where similar findings are made and the Panel determines the penalty."

¶ 10 In the matter of *Gaudet*, the Panel relied on several other precedents in order to reach a similar conclusion. Paragraph 4 of this decision reads as follows:

> "4. We adopt what was said by the Panel in *Re Darcy Alan Higgs*, a February 9, 2010 decision concerning a settlement agreement pursuant to Rule 20-36 of the IIROC Rules as follows :
>
> > [4] There are two broad related principles that apply in connection with a decision to accept or reject a settlement;
> >
> > [5] The first is succinctly stated in the following passage from the decision in *Re Milewski* [[1999] I.D.A.C. No. 17, August 5, 1999, at page 11]:
> >
> > > 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 the settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.
> >
> > [6] Secondly, in the recent decision of the Saskatchewan Court of Appeal in *Rault* v. *Law Society of Saskatchewan* [2009 SKCA (Can LII)], the court cited with approval and applied to an administrative tribunal the principles applicable to joint submissions on sentencing in criminal cases described by the Alberta Court of Appeal in *R.* v. *G.W.C.* [2000 ABCA 333 (Can LII)], namely, that there is an obligation on the tribunal to give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable; or contrary to the public interest; and, it should not be departed from unless there are good or cogent reasons for doing so."

¶ 11 It is with these principles in mind that we considered the Settlement Agreement. In terms of case law, we considered four precedents, namely the matters of *Karcz*[3], *Osman*[4], *Shamseer*[5] and *Bardsley*[6].

¶ 12 Each of these cases involved violations for having acted as a portfolio manager without being registered in such capacity or for having carried out discretionary trades.

¶ 13 In *Bardsley*, the offender was fined $25,000, received a one-year suspension in respect of supervisory duties, a four-month suspension in any capacity whatsoever, was required to pass the Conduct and Practices Handbook examination and was assessed costs in the amount of $5,000. One should note that, at the time of the imposition of the penalty, the respondent was no longer a registrant. He had also been disciplined by his firm ($50,000 fine, removal of his management duties and strict supervision for six months). The violation involved eight clients over a period of three to four years.

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3 (2010) IIROC 22, May 18, 2010;
4 (2006) IDA, December 19, 2006;
5 (2011) IIROC 5, January 24, 2011;
6 (2010) IIROC 15, March 25, 2010;

¶ 14 In *Shamseer*, the matter involved discretionary trades in the account of a client for a period of five months. The offender was fined $50,000, received a six-month suspension, was required to pass the Conduct and Practices Handbook examination, was subject to strict supervision for a period of 12-month, followed by strict supervision for a period of six months and required to pay $5,000 in costs. One must, however, note an especially aggravating circumstance in this case, namely the fact that the respondent had a prior disciplinary record for a similar offense a short time previously.

¶ 15 In *Osman*, the respondent had carried out portfolio management duties for a period of approximately fifteen (15) months without being registered in such capacity. He had acted as such 33 times for groups of 20 to 106 clients. He was fined $40,000, received a one-month suspension, was subjected to strict supervision for six months, and required to pass the Conduct and Practices Handbook examination and to pay costs in the amount of $1,000.

¶ 16 In the matter of *Karcz*, the respondent had carried out 842 discretionary trades in the accounts of eight clients during a period of eight months. He was fined $20,000, was subjected to strict supervision for a period of 12 months and was required to rewrite the Conduct and Practices Handbook examination. He was also ordered to pay $15,000 in costs.

¶ 17 Our Panel is in agreement with counsel of record that the case of the Respondent Daniel Biron, in terms of seriousness, falls on a spectrum between the matters of *Karcz* and *Osman*. Mr. Biron, as we shall recall, was fired by his firm specifically for the wrongdoing in question. The duration of the violations was restricted to a period of five months and none of his clients complained. A fine in the amount of $30,000, plus $3,000 in costs, together with strict supervision for a period of 18 months and the requirement to pass the Conduct and Practices Handbook course within six months represent a penalty that falls within the parameters of reasonableness in light of all the circumstances and the objective of general deterrence, protection of the public and the reputation of the securities business.

¶ 18 Consequently, our Panel accepts the Settlement Agreement and gives effect thereto as of January 11, 2012.

AND WE HAVE SIGNED:

February 3, 2012

Normand Durette, member of the Hearing Panel

February 1, 2012

Denis Marc Gagnon, member of the Hearing Panel

February 8, 2012

Jean-Pierre Lussier, Esq., Chairman of the Hearing Panel