Re Smith

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada (IIROC)

and

Richard Stanford Smith

2016 IIROC 15

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

Heard: April 20, 2016
Decision: April 20, 2016
Written Decision: April 25, 2016

Hearing Panel:
Martin L. Friedland, C.C., Q.C. (Chair), David E. Lang and F. Michael Walsh
Appearances:
Andrew P, Werbowski, Senior Enforcement Counsel, IIROC
Richard Stanford Smith, not in attendance or represented by counsel

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REASONS FOR DECISION

INTRODUCTION

¶ 1 Staff of the Investment Industry Regulatory Organization of Canada ("IIROC") and the Respondent, Richard Stanford Smith ("Mr. Smith"" or "the Respondent"), entered into the attached Settlement Agreement, dated March 8, 2016.

¶ 2 The Settlement Agreement was presented to the Hearing Panel for acceptance on April 20, 2016.

¶ 3 The Respondent did not appear. He had planned to appear, but shortly before the hearing he informed counsel for IIROC that he could not do so for medical reasons. IIROC counsel stated that the Respondent asked him to convey to the Panel his full support of the Settlement Agreement and that his absence should not be interpreted as disrespect for the hearing process. There is no rule that requires the Respondent to appear and the Panel agreed with counsel for IIROC that in the circumstances it is desirable that we proceed with the hearing without the Respondent.

¶ 4 After hearing counsel for IIROC and considering the material filed, the Hearing Panel issued an order accepting the Settlement Agreement. These are our reasons for making that order.

SETTLEMENT AGREEMENT

¶ 5 Mr. Smith has been employed in the securities industry since July 1997. He was employed at BMO-Nesbitt Burns as a Registered Representative (Retail) from February 2007 until the termination of his employment in August 2013, during which the events that are the subject of the hearing took place. He was subsequently employed as a Registered Representative at another firm from December 2013 until January 2015.

He is currently not employed in the securities industry, but wishes to return to it.

¶ 6 The Respondent admits to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:

> Count 1: From January 1, 2013, until August 28, 2013 (the "Relevant Period") Richard Smith effected discretionary trades in thirty-five (35) accounts of twenty-one (21) individual clients, without the accounts having been approved and accepted as discretionary accounts, contrary to IIROC Dealer Member Rule 1300.4

¶ 7 Rule 1300.4 provides:

> 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 subsection (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.

¶ 8 The Respondent has never been licensed to operate discretionary accounts under Rule 1300.4, nor has he ever been registered as a Portfolio Manager. None of his clients provided any written authorization to Mr. Smith or to BMO to effect discretionary trades in their accounts. None of the accounts had been accepted or approved as discretionary accounts by BMO-Nesbitt Burns.

¶ 9 The required supervision and safeguards provided by Rule 1300.4 to prevent potentially improper trading were therefore not operating with respect to the trades that were the subject of the hearing.

¶ 10 Staff and the Respondent agreed to the following terms of settlement:

> (a) payment of a fine in the amount of $10,000;
>
> (b) close supervision for a period of 12 months upon becoming re-employed in the securities industry;
>
> (c) to rewrite the Conduct and Practices Handbook exam within 6 months of being re-employed in the securities industry; and
>
> (d) to pay costs to IIROC in the sum of $1500.

¶ 11 Details about the factual background to Count 1 is contained in the Settlement Agreement.

¶ 12 In brief, the Respondent's book of business included 123 individual client accounts and approximately $28 million in assets under management.

¶ 13 A client complained to the Respondent's Assistant Branch Manager about a delay in transferring an account to another firm. In the course of investigating that issue, BMO-Nesbitt Burns discovered that, for certain clients, the Respondent had been entering client orders without speaking to his clients at the time of the trade.

¶ 14 The Respondent identified 17 clients who held 25 accounts. He acknowledged to BMO-Nesbitt Burns that he would discuss in advance proposed securities transactions with the clients, but that he would determine the appropriate time to enter the orders. The clients later contacted by the Member confirmed that trades in

specific quantities of specific stocks were discussed with Mr. Smith in advance, but that Mr. Smith would decide when to enter the specific trades. These trades were placed up to two weeks after the initial discussions with the clients. The clients did not raise issues of unsuitable investments recommendations, nor did they complain about the management of their accounts.

¶ 15 In the course of the later IIROC investigation, Smith identified an additional 4 clients that held 10 accounts in which he exercised similar time discretion. There were therefore 21 clients with a total of 35 accounts.

¶ 16 During the relevant period, approximately 600 trades were made in the identified client accounts, primarily in blue chip U.S. and Canadian equities, although it was not possible to identify what percentage of these trades were discretionary trades.

STANDARD FOR REVIEWING A SETTLEMENT AGREEMENT

¶ 17 The standard for reviewing a Settlement Agreement was well-stated in a Pacific District hearing, *Re Johnson* (2012 IIROC 19), where the panel stated:

> "The test applicable to a decision whether to accept or reject a settlement is well-known. Simply put, a panel should accept such an agreement unless it considers the penalty provided for clearly to fall outside a reasonable range of appropriateness."

¶ 18 There are many similar statements. See, for example, *Re Sloan* (2014 IIROC 35); *Re Dirani* (2014 IIROC 09); *Re Taggart* (2013 IIROC 24); *Re Scotia Capital* (2013 IIROC 38); *Re Jiwa and Hoffar* (2012 IIROC 9); *Re Rotstein and Zackheim* (2012 IIROC 27); *Re Portfolio Strategies Securities Inc.* (2012 IIROC 36), *Re Ast* (2012 IIROC 38), all stemming from *Re Milewski* ([1999] I.D.A.C.D. no. 17), where the Panel stated:

> "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."

CONCLUSION

¶ 19 The penalty agreed to in the circumstances of this case does not fall "outside a reasonable range of appropriateness." Rather, the Panel considers it an appropriate penalty.

¶ 20 The penalty might appear to some to be on the lighter side, but there are a number of mitigating factors.

¶ 21 There were no client complaints regarding losses or suitability issues. The procedure adopted by the Respondent was to accommodate his clients, who were content with the arrangement that had developed. However, the timing of the trade was in issue.

¶ 22 The arrangement was against IIROC Rules and the Respondent knew that he should not exercise time discretion with respect to the transactions.

¶ 23 The Respondent has already paid a heavy price for his admitted transgressions. He has been unemployed for 18 months, which can, in large part, be attributed to these charges.

¶ 24 As a result of not finding employment, the Respondent has suffered financially and has demonstrated his financial hardship to IIROC Staff. A number of IIROC cases have taken into account the financial circumstances of the respondent in imposing a monetary penalty. See, for example, *Re Sloan* (2014 IIROC 35); *Re Klemke* (2011 IIROC 14, paragraph 43) and *Re Magna Partners Ltd.* (2010 IIROC 49, paragraph 6).

¶ 25 Given the Respondent's current employment status and the fact that he provided satisfactory evidence to Staff as to the financial impact of the monetary sanctions and costs, the Settlement Agreement provides that the fine and costs would not commence until the Respondent was employed in the securities industry.

¶ 26 Further, the Respondent has no prior history of wrongdoing and accepted responsibility for his conduct.

¶ 27 Moreover, he cooperated with IIROC. Indeed, he did more than cooperate. He demonstrated proactive and exceptional cooperation by acknowledging the discretionary trading violations and identifying other client accounts that were previously unknown to IIROC Staff. His admission shortened the length of time required to investigate the matter and led to an early resolution.

¶ 28 The terms of the Settlement Agreement are in line with other comparable cases that were cited by Counsel for IIROC: See *Re Karim* (2015 IIROC 04), *Re Sloan* (2014 IIROC 35) and *Re Beck* (2012 IIROC 41), all of which resulted in somewhat higher monetary penalties because the conduct in those cases was more serious than in this one, which was restricted to discretionary timing of trades.

¶ 29 Arriving at a reasonable settlement is to be encouraged. We agree with the statement in *Re Portfolio Strategies Securities Inc.* (2012 IIROC 36 at paragraph 10) that "the settlement process is an important one which should be encouraged and supported."

¶ 30 For the above reasons, the Panel accepted the Settlement Agreement.

Dated at Toronto this 25th day of April 2016

Martin L. Friedland, Chair

David E. Lang

F. Michael Walsh

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff ("Staff") and the Respondent, Richard Smith, ("Smith" or the "Respondent") consent and agree to the settlement of this matter by way of this agreement (the "Settlement Agreement").
2. The Enforcement Department of IIROC has conducted an investigation ("the Investigation") in the Respondent's conduct.
3. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C (the "Hearing Panel").

II. JOINT SETTLEMENT RECOMMENDATION

4. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
5. The Respondent admits to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:

   Count 1: From January 1, 2013 until August 28, 2013, (the "Relevant Period") Richard Smith effected discretionary trades in thirty-five (35) accounts of twenty-one (21) individual clients, without the accounts having been approved and accepted as discretionary accounts, contrary to IIROC Dealer Member Rule 1300.4.

6. Staff and the Respondent agrees to the following terms of settlement:
   a) Payment of a fine in the amount of $10,000;
   b) Close supervision for a period of 12 months upon becoming re-employed in the securities industry; and

c) To rewrite the CPH within 6 months of becoming re-employed in the securities industry.

7. The Respondent agrees to pay costs to IIROC in the sum of $1,500.

III. STATEMENT OF FACTS

(i) Acknowledgment

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

(ii) Factual Background

Overview

9. In August 2013, the assistant branch manager at Smith's Dealer Member investigated a complaint that a client's request to transfer an account had not taken place in a timely fashion. As a result of this internal investigation, it was determined that Smith had used discretion with respect to the timing of the purchase of securities in certain client accounts.

Background

10. Smith was initially employed in the securities industry in July 1997. He was employed at BMO-Nesbitt Burns as a Registered Representative (Retail) from February 2007 until the termination of his employment in August 2013. He was subsequently employed by Pace Securities Corp. as a Registered Representative (Retail) from December 2013 until January 5, 2015. He is currently not employed in the securities industry.

11. Smith has never been licensed to operate discretionary accounts, nor has he ever been registered as a Portfolio Manager.

12. Smith's book of business included 123 individual client accounts and approximately $28 million in assets under management. Of these 123 accounts, approximately 20% were fee-based accounts and the remaining 80% were commission-based.

13. FG was one of Smith's clients at BMO-Nesbitt Burns. FG complained to Smith's Assistant Branch Manager about a delay in transferring an account to another firm. In investigating the complaint, it was determined that the reason for the delay of the transfer was an unsettled trade. FG indicated that he was not aware that any trade was outstanding.

14. The BMO-Nesbitt Burns internal investigation then revealed that for certain clients, Smith had been entering client orders without speaking to his clients at the time of the trade. Smith identified seventeen (17) clients who held twenty-five (25) accounts. He acknowledged that he would discuss in advance proposed securities transactions with the clients, but that he would determine the appropriate time to enter the orders.

15. Of the 17 clients identified by Smith, 6 were members of the same family. Of the 25 accounts, 10 were personal accounts of that family, or corporate accounts controlled by a member of that family.

16. BMO-Nesbitt Burns contacted a random sampling of the clients identified by Smith. The clients confirmed that trades were discussed with Smith in advance, but that Smith would decide when to enter the specific trades. Trades were placed on occasion up to two weeks after the initial discussion with the client. The clients did not raise issues of unsuitable investment recommendations nor did they complain about the management of their accounts.

17. In the course of the IIROC investigation, Smith identified an additional four (4) clients that held 10 accounts in which he exercised similar time discretion. The 35 total identified client accounts represented approximately 17.5% of Smith's assets under management.

18. During the Relevant Period approximately 600 trades were made in the identified client accounts. These

trades were primarily in blue chip U.S. and Canadian equities. Smith was not able to identify which of these trades, if any, were authorized in advance by the clients and which were discretionary.

19. The trades identified in Appendix "A" were made in the identified client accounts in the Relevant Period.

Accounts not accepted or approved as discretionary accounts

20. None of the clients provided any written authorization to Smith or to BMO to effect discretionary trades in their accounts. Smith was not registered to maintain discretionary and/or managed accounts. None of the accounts had been accepted or approved as discretionary accounts by BMO-Nesbitt Burns.

Discussions with the Clients

21. Smith had discussions with the clients in advance of the transactions and the clients were aware of the securities to be bought or sold, the price and the quantity, but the timing of the transaction was left to Smith.

Aggravating and Mitigating Factors

22. Smith knew that he should not exercise time discretion with respect to the transactions and as such, his conduct was deliberate. He did so to accommodate his clients, who were content with the arrangement that had developed.

23. There were no client complaints regarding losses or suitability issues.

24. Smith does not have any previous disciplinary history.

25. Smith demonstrated proactive and exceptional cooperation by acknowledging the discretionary trading violations and identifying other client accounts that were previously unknown to Staff. Smith's admission shortened the length of time required to investigate this matter and led to an early resolution.

26. Given Smith's current employment status and the fact that he provided satisfactory evidence to Staff as to the financial impact of the monetary sanctions and costs, the terms of the settlement and costs set out in paragraphs 6 and 7 will commence upon re-employment in the securities industry.

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, unless otherwise agreed to by the parties.

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/her/its right 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 imposed upon the Respondent are payable

immediately upon the effective date of the Settlement Agreement.

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

AGREED TO by the Respondent at the City of "King City" in the Province of "Ontario", this "8th" day of "March, 2016.

"Richard Stanford Smith"

"Witness" **Respondent**

AGREED TO by Staff at the City of "Toronto" in the Province of "Ontario", this "24th" day of "March", 2016.

"Charles Corlett", Witness **"Andrew P. Werbowski"**

Senior Enforcement Counsel on behalf of Staff of IIROC

ACCEPTED at the City of "Toronto" in the Province of "Ontario", this "20th" day of "April", 2016, by the following Hearing Panel:

Per: "Martin Friedland"

Panel Chair

Per: "David Lang"

Panel Member

Per: "F. Michael Walsh"

Panel Member

Appendix "A"

Client	# of Accounts	# of Transactions in Relevant Period
1	1	25
2	1	29
3	2	39
4	2	22
5	2	15
6	2	17
7	2	7
8	2	35
9	4	167
10	1	61
11	1	22
12	1	1
13	1	49
14	1	23
15	1	7
16	1	33
17	5	26
18	2	11
19	1	6

20	1	5
21	1	19
TOTAL	35	619