

Re Conacher

IN THE MATTER OF:

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

and

Sean Conacher

2018 IIROC 15

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

Heard: March 29, 2018 at the City of Toronto

Oral Decision: March 29, 2018

Written Decision: May 8th, 2018

Hearing Panel:

Fred Chenoweth, Chair, Selwyn Kossuth and Peter Dymott

Appearance:

Charles Corlett, Enforcement Counsel of the Investment Industry Regulatory Organization of Canada
Alexandra Grishanova, Counsel for Sean Conacher

In Attendance:

Sean Conacher

REASONS FOR DECISION

Introduction

¶ 1 A Hearing Panel of the Investment Industry Regulatory Organization of Canada (“IIROC”) was convened on March 29, 2018 in accordance with Rule 15 of the IIROC Dealer Member Rules of Practice and Procedure, to review a Settlement Agreement (“Settlement Agreement”) dated March 26th, 2018 negotiated between the Enforcement Department of IIROC (“Staff”) and Sean Conacher (“Respondent”) assisted by his counsel, in accordance with Section 8215 and Section 8428 of the IIROC Dealer Member Rules (“the Rules”).

¶ 2 The Settlement Agreement was submitted to the Hearing Panel for its acceptance or rejection. After considering the material filed and the oral submissions of Staff and counsel for the Respondent, the Panel unanimously accepted the Settlement Agreement and issued an order accordingly. These are the Panel’s reasons for doing so.

The Allegations

¶ 3 In the Settlement Agreement, the Respondent admits the following contravention of IIROC Rules:

- (a) Between June 2013 and October 2013, Sean Conacher, the ultimate designated person at Blackwatch Capital Corp., permitted trades to be executed that he knew or ought reasonably to have known would not comply with applicable regulatory requirements, contrary to UMIR 2.3.

Statement of Facts

¶ 4 Staff and the Respondent agreed with the facts set out in paragraphs 6 to 16, inclusive, of the Settlement Agreement and acknowledged that the terms of the settlement contained in the Settlement Agreement were based upon those specific facts. The Settlement Agreement containing the facts to which the parties have agreed is attached as Appendix “A” to these Reasons.

¶ 5 By way of overview, Staff and the Respondent agreed that between June 2013 and October 2013 (the “Relevant Period”), Sean Conacher (“Conacher”) was a propriety trader and the ultimate designated person (“UDP”) at Blackwatch Capital Corp. (“Blackwatch”).

¶ 6 Again, by way of overview, Staff and the Respondent agreed that during the relevant period, Conacher allowed a U.S. based client (the “Client”), to enter orders directly on an IIROC-regulated marketplace through a firm inventory account assigned to him at Blackwatch. Conacher knew or ought reasonably to have known that permitting the Client to enter orders and execute trades directly to the marketplace through a firm inventory account, would result in a failure to comply with applicable regulatory requirements.

Discussion

¶ 7 In coming to its conclusion in this matter, the Panel considered the facts as set out above, the submissions of Staff and counsel for the Respondent, IIROC Sanction Guidelines, and the decision to which the Panel was referred. In particular, the Hearing Panel considered that they should not reject the Settlement Agreement unless the penalties proposed therein “clearly fall outside a reasonable range of appropriateness” given the conduct of the Respondent.

Milewski (Re), [1999] I.D.A.C.D. No. 17 at page 13-14.

¶ 8 The Hearing Panel also considered “that the rejection of a joint submission by a trial judge should occur only when it is in the public interest, in the sense that the proposed submission is so unhinged from the circumstances of the offence and the offender, that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down”.

Re Cavalris, 2017 IIROC 4

¶ 9 In the context of the principles set out above, the Panel concluded that the facts admitted by the Respondent constitute misconduct in contravention of the IIROC Rules.

Penalty Discussion

¶ 10 The Panel accepted the submissions of Staff counsel that the following key factors outlined in the Guidelines should be taken into account in determining whether the proposed sanctions are appropriate in this case.

- (a) The number, size and character of the transactions at issue;
- (b) Whether the respondent engaged in numerous acts and/or a pattern of misconduct;
- (c) Whether the Respondent engaged in the misconduct over an extended period of time;
- (d) Whether the misconduct was intentional, wilfully blind, or reckless with respect to regulatory requirements;
- (e) Extent of harm to clients or other market participants;
- (f) Extent of harm to market integrity or the reputation of the marketplace;
- (g) Level of vulnerability of the injured or affected client(s).

¶ 11 The Panel noted in particular, that the contravention to which the Respondent had admitted was acknowledged by all parties to involve in excess of 100 transactions per day over a period of four months.

¶ 12 The Panel also became aware, during the course of the Hearing, and as a result of the terms of the Settlement Agreement, that:

- (a) The Respondent's employment at Blackwatch was terminated due to matters unrelated to this proceeding in October 2013;
- (b) The Respondent is now not a registrant with IIROC and has been out of the industry for approximately 5.5 years;
- (c) The Respondent has no intention of being involved in the investment industry.

¶ 13 More specifically, when coming to its view with respect to the retroactive three months suspension set out in the Settlement Agreement, the Panel considered the case of *Smith (Re)*, which stood for the proposition that in an appropriate case, retroactive suspensions may be utilized. The Panel also accepted the proposition put forward by Staff counsel, that nothing turned on whether the Respondent's suspension was retroactive or present, in that, the Respondent is now not a registrant and has been out of the industry for approximately 5.5 years.

Smith (Re), 2014 IIROC 16 at paras 3-4

¶ 14 In coming to its conclusion, the Panel was mindful that the primary goal of securities regulation is the protection of the investor. In addition, to protection of the public, the goals of securities regulation also include fostering public confidence in the capital markets and securities industry. In reviewing the facts agreed to in the Settlement Agreement, the Panel was satisfied that the contraventions to which the Respondent had admitted were serious. Having said that, the Panel was also satisfied that the penalties set out in the terms of settlement accomplished the goals of security regulation set out above, including the Panel's obligation to give due weight to both general and specific deterrents.

Pezim v British Columbia (Superintendent of Brokers), [1994] 2 S.C.R. 557

Result

¶ 15 For all the above reasons, the Hearing Panel, agreed to accept the Settlement Agreement herein.

¶ 16 Accordingly, the Hearing Panel imposed the following penalties on the Respondent:

- (a) A fine in the amount of \$15,000 payable by the Respondent to IIROC;
- (b) A suspension of access to IIROC-regulated marketplaces for three months effective from October 2013, when the Respondent ceased to be an approved person;
- (c) Costs of \$2,000 payable by the Respondent to IIROC.

Dated at Toronto, Ontario, this 8th day of May, 2018.

Fred Chenoweth

Chair

Selwyn Kossuth

Peter Dymott

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada (“IIROC”) will issue a Notice of Motion 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 Sean Conacher (“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. Between June 2013 and October 2013 (the “Relevant Period”), Sean Conacher (“Conacher”) was a proprietary trader and the Ultimate Designated Person (“UDP”) at Blackwatch Capital Corp. (“Blackwatch”).
5. During the Relevant Period, Conacher allowed a U.S. based client (the “Client”) to enter orders directly on an IIROC-regulated marketplace through a firm inventory account assigned to him at Blackwatch. Conacher knew or ought reasonably to have known that permitting the Client to enter orders and execute trades directly to the marketplace through a firm inventory account would result in a failure to comply with applicable regulatory requirements.

Background

6. During the Relevant Period, Blackwatch was a Dealer Member and a Participant under UMIR, primarily engaged in proprietary trading using algorithmic trading software. However, Blackwatch was not at that time engaged in the business of providing direct electronic access (“DEA”) to clients and did not have any DEA clients. In late October 2013, Conacher left Blackwatch. Blackwatch resigned from membership in IIROC effective November 27, 2014.
7. In March 2013, Conacher began discussions with the Client, who was interested in entering into a DEA (or “Direct Market Access or DMA”)¹ arrangement to trade on Canadian equity marketplaces through proprietary algorithmic trading software. The Client had previously traded using its algorithmic trading software with another Canadian investment dealer, but after its relationship with the dealer discontinued, it was looking for a new partner to support its trading. The Client also discussed with Conacher a potential partnership arrangement to combine its electronic trading expertise and infrastructure with those of Blackwatch.
8. In May 2013, the Client opened a cash account with Blackwatch. Conacher handled the account opening. At the time, there was some uncertainty as to whether a margin account was required for the algorithmic trading, as the Client account was expected to be “flat” at the end of each trading day. In the end, Conacher advised the Client to open a margin account and an application was made with Blackwatch’s carrying broker.

¹As known prior to amendments to UMIR effective March 1, 2014.

9. Blackwatch's carrying broker delayed opening the margin account. By the time Conacher left Blackwatch in October 2013, no margin account had been opened. There was still no agreement with Blackwatch's carrying broker on the fee that the Client would be charged per trade once it started trading through the margin account. The standard trade ticket charges applicable to the Client's trades at the time would have made the algorithmic trading uneconomic due to the high volume of trades the Client intended to undertake on a daily basis.

The Client's Trading

10. In June 2013, Conacher permitted the Client's software to execute four "test" trades in the cash account to ensure the settlement systems between the carrying broker and Blackwatch were functioning correctly.
11. Shortly thereafter, Conacher agreed that the Client could provide a list of securities to trade with its algorithmic trading software in order to analyze the performance of the strategy in the Canadian market and to allow the Client to maintain its market presence while still awaiting the opening of the margin account. The trading was executed through Conacher's inventory account at Blackwatch, using Blackwatch's capital. Conacher understood that all profits and losses generated by the trading would be for his own account.
12. The arrangement that Conacher made with the Client was not documented in any agreement. At the time of Conacher's departure from Blackwatch, negotiations with the Client regarding the trading rates and other terms of their relationship were still ongoing.
13. While the trading facilitated by Conacher was done on a relatively small scale and constituted a small percentage of the trading the Client had undertaken in the Canadian marketplace previously and in relation to what the Client intended to undertake once the margin account was open, it continued for a period of four months, until Conacher's employment at Blackwatch was terminated due to matters unrelated to this proceeding.
14. After Conacher's departure, Blackwatch terminated the Client's access and closed the Client's account. The Client requested payment from Blackwatch for the profits generated by the algorithmic trading software through Conacher's inventory account, which it believed to be over \$55,000. In late December 2013, Blackwatch reached a compromise with the Client, paying the Client approximately \$26,000.

Failure to Comply with Regulatory Requirements

15. As the UDP and an experienced trader, Conacher knew or ought reasonably to have known that permitting the Client to execute trades through his firm's inventory account would result in a failure to comply with applicable regulatory requirements.
16. Conacher knew or ought reasonably to have known that:
 - (i) Blackwatch did not have approved written policies and procedures relating to providing direct access to clients and to supervising orders entered directly by a client and routed to a marketplace through Blackwatch's trading system;
 - (ii) the Client's orders and trades did not have the required or accurate designations and identifiers as the orders and trades were identified as inventory trading originating from Blackwatch.

PART IV – CONTRAVENTIONS

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

Between June 2013 and October 2013, Sean Conacher, the Ultimate Designated Person at Blackwatch

Capital Corp., permitted trades to be executed that he knew or ought reasonably to have known would not comply with applicable regulatory requirements, contrary to UMIR 2.3.

PART V – TERMS OF SETTLEMENT

18. The Respondent agrees to the following sanctions and costs:
 - (i) a fine of \$15,000 payable by the Respondent to IIROC;
 - (ii) a suspension of access to IIROC-regulated marketplaces for 3 months effective from October 2013 when the Respondent ceased to be an Approved Person.
 - (iii) costs of \$2,000 payable by the Respondent to IIROC.
19. 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

20. 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.
21. 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

22. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
23. 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.
24. 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.
25. 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.
26. 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.
27. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
28. 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.
29. 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.

30. 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

31. This Settlement Agreement may be signed in one or more counterparts, which together will constitute a binding agreement.
32. An electronic copy of any signature will be treated as an original signature.

DATED this “29th” day of March, 2018.

“Witness” _____

Witness

“Sean Conacher” _____

Respondent

DATED this “26th” day of March, 2018.

“Witness” _____

Witness

“Charles Corlett” _____

Charles Corlett

Director, Enforcement Litigation on behalf of
Enforcement Staff of the Investment Industry
Regulatory Organization of Canada

The Settlement Agreement is hereby accepted this “29th” day of March, 2018 by the following Hearing Panel:

Per: “Frederick Chenoweth” _____

Panel Chair

Per: “Peter Dymott” _____

Panel Member

Per: “Selwyn Kossuth” _____

Panel Member

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