Unofficial English Translation

Re Proulx

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Martin Proulx

2017 IIROC 47

Hearing Panel
of the Investment Industry Regulatory Organization of Canada
(Quebec District)

Hearing: September 20, 2017, in Montreal
Decision: October 4, 2017, in Montreal

Hearing Panel:
Michèle Rivet Ad.E., Chair; Michel Duchesne and Jean Jeannot
Appearances:
Fanie Dubuc, Enforcement Counsel for IIROC
Sébastien C. Caron, Counsel for Mr. Martin Proulx

DECISION ON SETTLEMENT AGREEMENT

¶ 1 This is a decision respecting a settlement agreement signed by Mr. Martin Proulx on June 29, 2017, and by Enforcement Counsel for Staff of IIROC on July 7, 2017.

¶ 2 The Settlement Agreement is appended to this decision and forms an integral part thereof.

¶ 3 Pursuant to section 82.15 of the IIROC Consolidated Rules, shall the Hearing Panel accept or reject the Settlement Agreement as presented? That is the question that the Hearing Panel must answer.

¶ 4 Mr. Proulx admits that, on or around July 27, 2015, he carried out two discretionary trades in a client's account without the account having been authorized and approved in writing as a "discretionary" account, contrary to IIROC Dealer Member Rule 1300.4.

¶ 5 Mr. Proulx consequently accepts the following penalties:

a) A fine in the amount of $15,000;

b) The obligation to pass the exam based on the Conduct and Practices Handbook Course within twelve (12) months following acceptance of this Settlement Agreement by the Hearing Panel.

Mr. Proulx agrees to pay IIROC costs in the amount of $5,000.

¶ 6 Before analyzing the facts in the matter, it is appropriate to review briefly what the powers of a hearing panel consist of.

I. POWERS OF A HEARING PANEL

¶ 7 The powers of a hearing panel over a settlement agreement are clearly set out in Rule 8200 entitled *Enforcement Proceedings*. As Rule 8215(5) states, after a settlement hearing, a hearing panel can accept or reject a settlement agreement. Its powers end there.[1]

¶ 8 Rule 8400 titled *Rules of Practice and Procedure* further states, in section 8428(6), that if the Respondent appears, facts not contained in the settlement agreement must not be disclosed to the hearing panel without the consent of all parties.

¶ 9 It is therefore up to the Hearing Panel to examine whether, given the contraventions admitted to by the Respondent, the sanctions agreed upon in the Settlement Agreement fall within a reasonable range of appropriateness. To this end, we must refer to both the *IIROC Sanction Guidelines* adopted on February 2, 2015, and the relevant case law.

¶ 10 Regarding the powers of the Hearing Panel, the case law is consistent.

¶ 11 In *Sole*, the decision handed down by a Toronto hearing panel on August 16, 2016[2] echoes the case law, as does, notably, the *Kloda* decision rendered in Quebec on December 8, 2016[3]:

- The Hearing Panel must accept the settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.[4]
- The agreement must be rejected if it is contrary to the public interest or likely to bring the administration of the IIROC Rules into public disrepute.[5]

¶ 12 For a better grasp of the role of the Hearing Panel, we refer to the trial judge in a criminal matter, who must rule on the joint sentencing recommendation of counsel for both prosecution and defense, by determining whether to accept or reject this joint recommendation.

¶ 13 In 2016, The Supreme Court of Canada, in *R. v. Anthony Cook*[6], re-examined the proper legal test that trial judges should apply in deciding whether it is appropriate in a particular case to depart from joint submission, namely: "whether the proposed sentence would bring the administration of justice into disrepute, or would otherwise be contrary to the public interest". [7] In this case, the Supreme Court accepted the appeal and concluded that "the sentence jointly proposed by the Crown and defence was not one that would bring the administration of justice into disrepute, nor was it otherwise contrary to the public interest".[8]

¶ 14 Justice Moldaver, writing on behalf of his colleagues[9], elaborates on the necessary stringency of the public interest test: "The prospect of a joint submission that carries with it a high degree of certainty encourages

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[1] *Re Turenne*, 2013 IIROC 43.

[2] *Re Sole*, 2016 IIROC 30.

[3] ***Re Kloda,*** 2016 IIROC 50.

[4] *Re Johnson*, 2012 IIROC 19.

[5] *Re Rotstein and Zackheim*, 2012 IIROC 27.

[6] *R. v. Anthony-Cook*, [2016] 2 S.C.R. 204.

[7] At paragraph (5).

[8] At paragraph (67).

[9] Abella, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

accused persons to enter a plea of guilty[10] (…). He asserts the importance of trial judges "exhibiting restraint, rejecting joint submissions only where the proposed sentence would be viewed by reasonable and informed persons as a breakdown in the proper functioning of the justice system".[11]

¶ 15 Justice Moldaver offers guidance to trial judges on the approach they should follow when they must examine a joint submission on sentence.[12]

¶ 16 Trial judges should approach the joint submission on an "as-is" basis. That is to say, the public interest test applies whether the judge is considering varying the proposed sentence or adding something to it that the parties have not mentioned[13], such as when he or she is considering "jumping" or "undercutting" a joint submission.[14] (…) When faced with a contentious joint submission, "trial judges will undoubtedly want to know about the circumstances leading to the joint submission — and in particular, any benefits obtained by the Crown or concessions made by the accused".[15] What's more, if the trial judge is not satisfied with the sentence proposed by counsel, he or she should "notify counsel that he or she has concerns, and invite further submissions on those concerns, including the possibility of allowing the accused to withdraw his or her guilty plea, as the trial judge did in this case."[16] Justice Moldaver adds that if the trial judge's concerns about the joint submission are not alleviated, the judge may allow the accused to apply to withdraw his or her guilty plea.[17] Trial judges who remain unsatisfied by counsel's submissions should provide clear and cogent reasons for departing from the joint submission.[18]

¶ 17 The Hearing Panel shall analyze the submission in accordance with this decision.

II. THE FACTS

¶ 18 Mr. Proulx, a registered representative with IIROC, has been employed with DS since December 2003.

¶ 19 On or around June 30, 2015, Mr. Proulx met with a client at the latter's home and recommended two trades, a sell transaction and a buy transaction, to be executed at a later date.

¶ 20 Mr. Proulx did not put in writing at the time, as the rules provide, the essential elements of the two transactions and their acceptance by the client, nor any of his explanations to the client regarding the recommended transactions.

¶ 21 The client deceased on July 18, 2015.

¶ 22 On or around July 27, 2015, Mr. Proulx attempted to contact his client to confirm the buy and sell transactions in the account. Unable to reach his client, he left a message in the latter's voicemail box.

¶ 23 Mr. Proulx nevertheless proceeded with the two transactions in his client's account, namely the sale of 1,000 shares in *Ishares DVSF Monthly Income* at $11.34, for a total of $11,340, and the purchase of 12,000 shares in *BNC RPAAS AU20*, for an amount of $12,000, without finalizing arrangements with his client a few

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[10] At paragraph (41).

[11] At paragraph (42).

[12] At paragraphs 49 to 61.

[13] At paragraph (51).

[14] At paragraph (52).

[15] At paragraph (53).

[16] At paragraph (58).

[17] At paragraph (59).

[18] At paragraph (60).

days prior to executing the transaction, concerning the security, the quantity to buy or sell, and the price and timing of the trade, as DS internal policy requires.

¶ 24 Learning of the client's death on August 6, 2015, a member of Mr. Proulx' team contacted the son to ask him to confirm by email that the voice message left by Mr. Proulx on July 27, 2015 was received, and that the two transactions that were carried out were accepted. The client's son did so, although he had no power of attorney to act prior to his father's death.

¶ 25 On or around December 3, 2015, the DS Compliance Department found that Mr. Proulx carried out transactions in the account on July 27, 2015, which Mr. Proulx had not reported at the time.

¶ 26 On December 14, 2015, Mr. Proulx received a letter (from DS) reprimanding him for having executed two discretionary trades in his client's account, and was placed under strict supervision for a six-month period.

III. THE ANALYSIS

¶ 27 Disciplinary sanctions have a dual purpose: not only do they constitute a specific sanction against a breach of the Rules, they must also be a means of deterrence. "In order to achieve this, sanctions should be significant enough to prevent and discourage future misconduct by the Respondent (specific deterrence), and to deter others from engaging in similar misconduct (general deterrence)."[19] The primary purpose is to maintain high standards of conduct in the securities industry, in order to protect market integrity and the public's confidence in the industry.

¶ 28 Does the weighting of the various aggravating and mitigating factors allow the Hearing Panel to accept this settlement agreement and to conclude that the sanctions are appropriate as defined by the applicable law? Several elements, stated in the Guidelines, must be considered in order to analyze these different factors.

¶ 29 In Mr. Proulx' case, it should be emphasized that this is an isolated act, involving two transactions carried out the same day; thus the respondent did not engage in numerous acts or misconduct over an extended period of time.

¶ 30 It must also be noted that there is no evidence of harm to the client's assets.

¶ 31 Mr. Proulx has no relevant disciplinary history; he did not attempt to obtain a financial benefit from his misconduct; he has already been subject to internal discipline by DS for this breach. Finally, as the Enforcement Counsel notes, Mr. Proulx provided all the required assistance to IIROC in the investigation of the misconduct, and consequently did not in any way attempt to delay the investigation or to conceal any documentary information.

¶ 32 All of these elements constitute important mitigating factors in the analysis of Mr. Proulx's misconduct.

¶ 33 But it must also be noted that while Mr. Proulx did not attempt to conceal his misconduct, at no time did he discuss it with the relevant authorities at DS.

¶ 34 Moreover, there is no doubt that Mr. Proulx was familiar with the existing rules in the matter.

¶ 35 These are consequently elements that must be considered aggravating factors.

¶ 36 Finally, let us say that any misconduct that abuses the integrity of the capital markets and the public interest must be severely sanctioned.

¶ 37 Counsel for both parties have cited various authorities.

¶ 38 In *Giroux-Garneau*[20], the decision handed down in November 2016 imposed an aggregate fine of

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[19] IIROC Sanction Guidelines, Part I – Sanction Principles for IIROC Disciplinary Proceedings , February 2, 2015

[20] *Re Giroux-Garneau* 2016 IIROC 46.

$35,000, a 10-year prohibition from approval and costs in the amount of $10,000 on Ms. Giroux-Garneau, for omitting to inform the firm of a client's death for four months, for knowingly contravening the firm's internal policies and procedures, which provided that a representative had a duty of disclosure in the event of a client's death, and for deriving an unlawful financial benefit by appropriating some $16,000. Ms. Giroux-Garneau never admitted her guilt in the matter, nor did she repay the money to the estate. On the other hand, she had no disciplinary history.

¶ 39 Other decisions cited differ from the matter before us, either by the duration of the offence[21] and the number of trades effected[22] and, finally, because the member also had a disciplinary history.[23]

¶ 40 In *Taggart*[24], a decision which accepted a settlement agreement, here again the misconduct occurred over a longer period, namely three years, during which time Mr. Taggart executed discretionary trades in the accounts of three related clients, without obtaining prior authorization and acceptance of the accounts as discretionary accounts. Moreover, there is no indication that these trades might not have been suitable for the clients and the strategy employed was not intended to benefit Mr. Taggart financially. The settlement agreement provided a financial penalty of $15,000 and costs in the amount of $3,000.

¶ 41 From all these decisions, and from the body of relevant case law, we retain that disciplinary history, the long period over which the misconduct was committed, the extent of harm to the clients, and their vulnerability, the financial benefit derived from the misconduct, failure to cooperate in the investigation and to admit to the misconduct, all of these elements constitute aggravating factors and add to the severity of the sanction. None of these are to be found in Mr. Proulx's conduct.

¶ 42 Mr. Proulx' contravention is the isolated act of a member who has been in practice since 2003 and has no disciplinary history. Though reprehensible and, from the outset, contrary to the applicable rules, this conduct is correctly and severely taken into account by the proposed sanctions. The sanctions are severe but remain in the appropriate range.

¶ 43 Obviously, the proposed sanctions will not tend to place the administration of justice into disrepute and are in no way contrary to the public interest.[25] Quite the contrary, they are helping to protect the public and the integrity of the financial markets.

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[21] *Re Tersigni* 2016 IIROC 19: Duration of misconduct 5 years, a large number of unauthorized trades, the respondent was uncooperative. Penalties included an aggregate fine in the amount of $25,000, rewriting the CPH examination within 12 months following reapproval and 6 months of close supervision, plus costs of $25,000.

Re Jones 2014 IIROC 15: Duration of misconduct one year, four counts: discretionary trading, unsuitable use of margin account, misrepresentation, breach of internal policy in regard to email communications, no harm to client. The respondent had a prior disciplinary record in a similar matter. Penalties include a fine of $48,000 and $15,000 in costs.

[22] *Re Beck* 2012 IIROC 41: Duration of misconduct 7 months, 35 discretionary trades, financial losses of some $7,000, benefit to member $3,300, the member was a branch manager. Penalties included a fine of $20,000, disgorgement of profits, rewrite the CPH exam within six months from return to industry and $15,000 in costs.

Re Smith 2016 IIROC 15: Duration of misconduct 8 months, discretionary trading in 35 accounts held by 21 clients, the respondent had no disciplinary history and accepted responsibility for his conduct, he demonstrated to IIROC staff the impact of the financial sanctions and costs. Penalties include a fine of $10,000, 12 months of close supervision, rewriting the CPH exam and $1,000 in costs.

[23] *Re Shamseer* 2011 IIROC 5: Duration of misconduct 6 months, the respondent effected 19 discretionary trades without the client's authorization, disciplinary history in a similar matter. Penalties include a fine in the amount of $50,000, a 6-month suspension, rewriting the CPH examination, 12 months of close supervision, and $5,000 in costs.

[24] *Re Taggart* 2013 IIROC 24.

[25] *R. v. Anthony-Cook*, [2016] 2 S.C.R. 204.

IV. CONCLUSION

¶ 44 FOR THESE REASONS,

The Hearing Panel accepts the Settlement Agreement as appended and presented to the Hearing Panel and gives effect to it from this date.

Montréal, October 4, 2017

Michèle Rivet

Panel Chair

Michel Duchesne

Panel Member

Jean Jeannot

Panel Member

SETTLEMENT AGREEMENT

PART I - INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada (IIROC) will issue a notice of application to announce that a settlement hearing will be held before a Hearing Panel (the Hearing Panel) to consider whether, pursuant to IIROC Consolidated Rule 8215, the Hearing Panel should accept a settlement agreement (the Settlement Agreement) between IIROC staff (Staff) and Martin Proulx (the Respondent).

PART II - JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent jointly recommend that the Hearing Panel accept the Settlement Agreement in accordance with the terms set forth below.

PART III – AGREED FACTS

3. For purposes of the Settlement Agreement, the Respondent agrees with the facts set out in Part III of this Settlement Agreement.

Summary

4. On or around July 27, 2015, the Respondent carried out two discretionary trades in the account of his client MG (the client) who deceased on July 18, 2015.

5. On December 14, 2015, the Respondent received a letter from Desjardins Securities Inc. (DS) reprimanding him for having carried out two (2) discretionary trades in his client's account and was placed under strict supervision for six (6) months.

Registration History

6. The Respondent has been a registered representative with IIROC, as well as with its predecessor, the Investment Dealers Association of Canada (IDA), since May 2004.

7. The Respondent has been in the employ of DS since December 2003, and remains so to this day.

Discretionary Trading

8. The client opened his account with the Respondent at DS in March 2007.

9. The client's account was never preauthorized or preapproved as a "discretionary account".

10. The Respondent confirmed to IIROC Staff that on or around June 30, 2015, he met with his client at the latter's home.

11. The Respondent confirmed to IIROC Staff that, at this meeting, he recommended two trades to his client, a sell transaction and a buy transaction, to be executed at a later date.

12. According to the Respondent, at this meeting, he allegedly discussed the essential elements of these transactions with his client, such as the security, the quantity to buy and sell, the price and the timing of the trade. Still according to the Respondent, his client allegedly agreed that the trades should be executed according to these parameters.

13. However, the Respondent did not put in writing, as the rules provide, the essential elements of these two transactions, as well as their acceptance by the client.

14. Furthermore, the Respondent did not put in writing, as the rules provide, the explanations in connection with the recommendations made to his client in respect of the trades.

15. The client deceased on July 18, 2015.

16. According to the Respondent, on or around July 27, 2015, he attempted to contact his client to confirm the buy and sell transactions in the account. Finding himself unable to reach his client, he left a message in the latter's voicemail box.

17. Following this voice message, the Respondent made no further attempt to contact his client.

18. According to the internal policies at DS, the Respondent had an obligation, a few days prior to executing the transaction, to agree with his client on the security, the quantity to buy or sell, and the price and timing of the trade.

19. On or around July 27, 2015, the Respondent therefore proceeded with the two transactions in his client's account, namely the sale of 1,000 shares in Ishares DVSF Monthly Income, at $11.34, for a total of $11,340, and the purchase of 12,000 shares in BNC RPAAS AU20, for an amount of $12,000.

20. The two transactions mentioned in paragraph 19 hereof were executed without the Respondent having obtained the client's consent a few days prior, as the internal policies of DS provided.

21. The stock purchase and sale transactions were executed nearly a month after the meeting of June 30, 2015 and nine (9) days after his client's death.

22. The Respondent confirmed to IIROC staff that he was informed of his client's death on August 6, 2015 following a call from the client's son.

23. The Respondent confirmed to IIROC staff that when the client's son called to announce his father's death, a member of the Respondent's team asked the son to email an acknowledgment of receipt of the voice message left by the Respondent on July 27, 2015, and to state in that email that he accepted the two trades that were executed.

24. On August 6, 2015, the client's son sent the Respondent the requested email in which he confirmed that he agreed with the trades that were executed in his father's account on July 27, 2015.

25. The Respondent confirmed to IIROC staff that this email had been solicited from his client's son as a "supporting document".

26. The client's son had been appointed liquidator and executor of the estate, but he did not have power of attorney to give instructions on his father's account for the period pre-dating his death.

27. On or around November 27, 2015, an account in the name of the client's estate was opened at DS.

28. On or around December 3, 2015, the Compliance Department at DS found that the Respondent had proceeded with transactions in the account on July 27, 2015, namely nine (9) days after the client's death.

29. The Respondent confirmed to IIROC staff that between August 6 and December 3, 2015, he did not inform the management or the Compliance Department of DS of the fact that he had executed transactions in the client's account after the date of death.

30. On December 14, 2015, the Respondent received a letter from DS reprimanding him for having effected two discretionary trades in his client's account and was placed under strict supervision for a six-month period.

PART IV – CONTRAVENTION

On or around July 27, 2015, the Respondent carried out two discretionary trades in a client's account, without the account having been authorized and approved in writing as a "discretionary" account, contrary to IIROC Dealer Member Rule 1300.4.

PART V - TERMS OF SETTLEMENT

31. The Respondent accepts the following penalties and costs:

    a) A fine in the amount of $15,000; and

    b) The obligation to pass the exam based on the Conduct and Practices Handbook Course within twelve (12) months following acceptance of this Settlement Agreement by the Hearing Panel.

    The Respondent agrees to pay IIROC costs in the amount of $5,000.

32. If the Hearing Panel accepts this Settlement Agreement, 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

33. If the Hearing Panel accepts the 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 paragraph 9 below.

34. 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 in Part III of this Settlement Agreement.

PART VII – SETTLEMENT ACCEPTANCE PROCEDURE

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

36. The Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing held in accordance with the procedures described in Rule 8215 and Rule 8428, as well as any other procedure that may be agreed between the parties.

37. Staff and the Respondent agree that the Settlement Agreement shall constitute the entirety of the agreed facts presented at the Settlement Hearing, unless the parties agree that additional facts should be presented. If the Respondent does not appear at the Settlement Hearing, Staff may communicate additional material facts at the request of the Hearing Panel.

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

39. 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 same allegations or to related allegations.

40. The terms of the Settlement Agreement shall remain confidential until their acceptance by the Hearing Panel.

41. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and the full text of the Agreement will be posted on the IIROC website. IIROC will also publish a summary of the facts, contraventions and penalties agreed to in the Settlement Agreement.

42. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees that neither he nor anyone on his behalf will make any public statements inconsistent with the Settlement Agreement.

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

PART VIII – SIGNATURE OF THE SETTLEMENT AGREEMENT

44. The Settlement Agreement may be executed in several counterparts, and such counterparts together shall constitute one and the same agreement binding the parties.

45. The fax or electronic copy of any signature will be treated as an original signature.

DATED this 29th day of June 2017.

(s) Witness

Witness

(s) Martin Proulx

Martin Proulx

DATED this 7th day of July 2017.

(s) Linda Vachet

Witness

(s) Fanie Dubuc

Fanie Dubuc

Enforcement Counsel, for IIROC Enforcement staff