

Re RBC Dominion Securities et al

IN THE MATTER OF:

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

and

RBC Dominion Securities Inc., Scotia Capital Inc., and TD Securities Inc.

2019 IIROC 30

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

Heard: November 1, 2019 in Toronto, Ontario

Decision: November 1, 2019

Written Reasons: December 2, 2019

Hearing Panel:

Paul M. Moore, Q. C., Chair, Colleen Wright, and Deborah Leckman

Appearance:

Elissa Sinha, Senior Enforcement Counsel

Ryan Morris, Counsel for RBC Dominion Securities Inc.

Maureen Doherty, Counsel for Scotia Capital Inc.

David Hausman, Counsel for TD Securities Inc.

ACCEPTANCE OF SETTLEMENT AGREEMENT

¶ 1 The following paragraphs set out our oral reasons for accepting the Settlement Agreement, which were delivered at the hearing.

Settlement Agreement

¶ 2 We accept the Settlement Agreement, signed in counterparts and dated October 17 and 23, 2019 between Staff and RBC Dominion Securities Inc., Scotia Capital Inc. and TD Securities Inc.

¶ 3 A copy of the Settlement Agreement is attached to these reasons.

¶ 4 In these reasons, we use terms as defined in the Settlement Agreement.

¶ 5 The agreed facts are set out in the Settlement Agreement.

Contravention

¶ 6 On May 8, 2018, the Respondents participated in trading in a security by means other than the entry of an order on a marketplace, contrary to the Universal Market Integrity Rule (UMIR) 6.4.

¶ 7 The panel determined that the actions of the Respondents did constitute a contravention of UMIR 6.4.

Agreed Penalties

¶ 8 The agreed penalties are:

- a) Each of the Respondents will pay a fine in the amount of \$500,000, and
- b) Each of the Respondents will pay costs in the amount of \$10,000.

Issues considered by the panel

¶ 9 The panel determined that it had to be satisfied regarding three considerations before it could accept the Settlement Agreement:

1. The agreed penalties had to be within an acceptable range taking into account similar cases.
2. The agreed penalties had to be fair and reasonable (*i.e.* proportional to the seriousness of the contravention taking into consideration all the circumstances) and should appear to be so to members of the public and industry.
3. The agreed penalties should serve as a deterrent to the Respondents and to members of the industry.

¶ 10 To be satisfied on these three considerations required an understanding of the particular facts of the case, the circumstances surrounding the transactions, and the impact on the Respondents of the agreed penalties.

Importance of the settlement process

¶ 11 It is usually in the public interest that matters be settled where possible rather than be determined through contested hearings. The reasons for this are often that an earlier determination of a dispute is better than a later determination. Settlements are usually less expensive than contested hearings, and there is less congestion in the administrative justice system when matters are settled. Finally, where all parties agree, the result is often more palatable to the parties and society than in a contested hearing where the winner takes all.

¶ 12 For these reasons, a panel considering the acceptance of a settlement agreement will try to reach a determination of acceptance. It will recognize that settlements are often hotly debated with much compromise and give-and-take between the parties in order to reach an acceptable position agreeable to all parties. Furthermore, the panel will recognize that it is not privy to all the facts and the motivations and considerations that each of the parties have in coming to a solution that is agreeable to them.

The role of the panel

¶ 13 The role of a panel considering whether to accept a settlement agreement and its agreed penalties is different from the role of a panel determining an appropriate penalty in a contested hearing.

¶ 14 Each needs to consider precedents and the law and, most importantly, the particular facts and circumstances of the case, including the particular circumstances of the specific respondents.

¶ 15 However, unlike a panel in a contested hearing that must determine the actual sanctions and costs that appear appropriate to it, a panel in a hearing to consider a settlement agreement has only two options under IIROC Rules: to accept the agreed settlement with its penalties because the agreed penalties are acceptable, or to reject the agreed settlement because the agreed penalties are not acceptable, or because the panel has

not been given enough information for it to come to a determination that the agreed penalties are acceptable.

¶ 16 A panel considering whether to accept a settlement agreement cannot substitute for the agreed penalties those penalties that it might prefer to have in the circumstances.

¶ 17 If the panel believes it needs more information in order to make a determination that the agreed penalties are acceptable, rather than rejecting the settlement agreement, the parties may, if they so choose to do so, provide additional information that the panel believes it needs in order to come to a favourable decision. Or indeed, the parties may agree to change the agreed penalties to meet what the panel believes is required for an acceptance in order to avoid a rejection by the panel. But the panel cannot impose a change unilaterally.

¶ 18 Where additional information is provided to the panel, this will usually be mentioned in the reasons for acceptance of the settlement agreement.

Important factors

¶ 19 We noted the “Additional Factors” set out in paragraphs 20 to 24 of the Settlement Agreement.

¶ 20 In particular, the breach of UMIR 6.4 did not cause harm to any of the Respondents' clients. None of the compensation earned by the Respondents in connection with the Canadian Natural Resources Limited (CNQ) Transaction came at the expense of their clients. The Respondents participation in the CNQ Transaction enabled Canadian institutional and retail investors to participate in the CNQ Transaction at a discount to the market price.

¶ 21 As IIROC counsel mentioned, there was nothing wrong with this transaction in itself.

¶ 22 However, UMIR 6.4 is an important rule. It requires that trades be entered on a marketplace. This promotes transparency, a level playing field for market participants, and market integrity.

¶ 23 Some panel members were not convinced that the information in paragraphs 21 and 23 of the Settlement Agreement was relevant or credible, and we gave little or no weight to them in coming to our decision to accept the Settlement Agreement.

¶ 24 The Respondents acknowledged their conduct at an early stage of Staff's investigation. The Respondents' prompt acknowledgement reduced the resources and time required to investigate this matter and led to an early resolution. The agreed penalties represent a significant portion of the revenues generated by the Respondents for the CNQ shares that they settled with Canadian clients.

¶ 25 The panel did not consider it necessary in this case for the agreed penalties to include disgorgement of the profits made by the Respondents from the bought deal and underwriting distribution for two reasons. First, the misconduct was not in willful disregard of UMIR 6.4; clients were not harmed; there was public disclosure; the bought deal and distribution were made available to Canadians. Secondly, the profits were derived from the bought deal and underwriting, which were not improper in themselves, and not from the misconduct itself.

¶ 26 We did consider the precedent cases referred to us, which were not really all that helpful in providing guidance because their facts were quite different from the agreed facts in this case. We also considered the IIROC Sanctions Guidelines.

¶ 27 In the final analysis, we accepted the Settlement Agreement as it was in the public interest to do so because we were satisfied regarding the three considerations mentioned above in paragraph 9 of these reasons.

Conclusion

¶ 28 The panel concluded that in all circumstances of this matter the agreed penalties are within the reasonable range of acceptability, are fair and reasonable, and provide an adequate specific and general deterrent. The panel therefore accepted the Settlement Agreement because it was in the public interest for us to do so.

Dated at Toronto, Ontario this 2 day of December 2019.

Paul M. Moore

Colleen Wright

Deborah Leckman

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 RBC Dominion Securities, Scotia Capital Inc., and TD Securities Inc. (collectively, the Respondents).

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondents 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 Respondents agree with the facts as set out in Part III of this Settlement Agreement.

Background

4. The Respondents, RBC Dominion Securities (RBC DS), Scotia Capital Inc. (Scotia), and TD Securities Inc. (TDSI) are IIROC Dealer Member Firms.
5. Canadian Natural Resources Limited (CNQ) is a Canadian oil and gas producer whose shares are interlisted on the Toronto Stock Exchange (TSX) and the New York Stock Exchange (NYSE). Prior to May 2018, Royal Dutch Shell plc (Shell) held 97,560,975 shares in CNQ, about 8% of CNQ’s issued and outstanding shares.

The CNQ Transaction

6. In late 2017 and early 2018, RBC DS and TDSI each considered making a bid to be lead underwriter of Shell’s disposition of its CNQ holdings. Employees of RBC DS and TDSI contacted IIROC to inquire, in general terms, about the availability of an exemption from the requirements of UMIR 6.4 for lead underwriters. IIROC Staff advised that, generally speaking, an exemption could be available for the take-

on trade but the un-winding trade would need to be printed on a marketplace.

7. In May 2018, Goldman Sachs & Co. LLC (GS), a U.S. broker-dealer, was selected to act as lead underwriter for the block trade to acquire Shell's CNQ shares on a "bought deal basis" and sell those shares at a specified and disclosed discount from the closing market price. The transaction was to be effected pursuant to Regulation M of the United States Securities and Exchange Commission and related requirements of the United States Financial Industry Regulatory Authority (FINRA) (collectively, the U.S. Requirements).
8. On May 7, 2018, the Respondents were invited to participate in the underwriting syndicate with GS.
9. Late in the day on May 7, 2018, an Agreement of Purchase and Sale was finalized between GS and the Respondents. Each member of the syndicate agreed to underwrite the purchase of one quarter of Shell's 97,560,975 shares at a price of USD \$33.90 per share (CNQ Transaction). CNQ was trading at USD\$35.11 so the price per share represented a 3.4% discount to the then market price for the CNQ shares on the NYSE.
10. GS was responsible for all settlement and delivery and would take-on the CNQ shares from Shell as principal and settle all trades to institutional clients pursuant to the U.S. Requirements. The Respondents would only settle trades to their retail clients, it being determined by the Respondents and agreed by GS that Canadian and U.S. retail investors ought to be given an opportunity to participate in the CNQ Transaction. The retail allocation was anticipated to be (and ultimately was), a small portion of the overall transaction.
11. After market close on May 7, 2018, the Respondents marketed CNQ shares at USD\$34.10. The Respondents conveyed expressions of interest to GS, who was responsible for settling all trades.
12. On May 7, 2018 at 7:50 pm, GS provided a final allocation of CNQ shares to the Respondents. GS also indicated that it would make the required Regulation M Filing with FINRA and the New York Stock Exchange. The Regulation M Filing stated the total number of shares sold and the sale price.
13. Shortly thereafter, Shell issued a press release about the CNQ Transaction. The press release stated the number of CNQ shares sold to the syndicate and the total proceeds of the sale, and identified the Respondents as members of the syndicate.
14. On May 7, 2018 at 10:08 pm, GS contacted RBC DS to advise that, despite its initial intention to settle the CNQ trades, it was not then in a position to deliver CNQ shares to certain Canadian institutions who did not have accounts with GS or required currency conversion. RBC DS then relayed this information to TDSI and Scotia.
15. GS took on all of the CNQ shares from Shell as principal on behalf of the syndicate. GS then directly settled all of the unwinding trades it was able to effect. However, in order for the Respondents to settle allocations to their retail investors as well as to the Canadian institutional accounts that GS was not then in a position to settle, the Respondents accepted those shares from GS and settled the trades with their clients in place of GS on behalf of the syndicate. Specifically, the Respondents settled the following CNQ shares:
 - a) RBC DS and TDSI collectively settled 13,195,173 CNQ shares with Canadian institutional accounts;
 - b) RBC DS settled 385,000 CNQ shares with Canadian retail accounts;
 - c) Scotia settled 395,000 CNQ shares with Canadian retail accounts; and

- d) TDSI settled 197,000 CNQ shares with Canadian retail accounts.
16. The Respondent settled the CNQ shares by way of journal entries and did not enter the trades that they settled on behalf of the accounts described above on a marketplace or seek an exemption from IIROC for doing so.
 17. Pursuant to UMIR 6.4, the trades settled by the Respondents ought to have been entered on a marketplace unless they obtained an exemption pursuant to UMIR 6.4(2)(b) or another exemption listed in UMIR 6.4 applied.
 18. The Respondents relied on the steps taken by GS as lead underwriter, including the Regulation M Filing that GS submitted to FINRA and the New York Stock Exchange, to discharge their regulatory obligations. However, the Regulation M Filing by GS did not provide sufficient transparency to IIROC or Canadian market participants and did not relieve the Respondents from the requirements of UMIR 6.4.
 19. UMIR 6.4 and the requirement to enter trades on a marketplace promotes transparency and a level playing field for market participants.

IIROC Staff Acknowledges the following Additional Factors

20. The breach of UMIR 6.4 did not cause harm to any of the Respondents' clients. None of the compensation earned by the Respondents in connection with the CNQ Transaction came at the expense of their clients. The Respondents' participation in the CNQ Transaction enabled Canadian institutional and retail investors to participate in the CNQ Transaction at a discount to the market price.
21. The Respondents had never participated in a cross-border syndicate of this nature for a block trade distribution of an interlisted security and expected that GS would settle all institutional trades until GS communicated that it was not in a position to do so at the last minute.
22. IIROC has published Guidance regarding the availability of exemptions from the requirements of UMIR 6.4 and the process for seeking such an exemption, however the Guidance does not specifically address exemptions in the case of a bought deal conducted by a US-Canadian syndicate in accordance with the US Requirements.
23. Under the U.S. Requirements, securities distributed pursuant to Regulation M are not printed on any marketplace and the required transparency to U.S. regulators is provided in the Regulation M filing.
24. The Respondents acknowledged their conduct at an early stage of Staff's investigation. The Respondents' prompt acknowledgement reduced the resources and time required to investigate this matter and led to an early resolution. The agreed penalty represents a significant portion of the revenues generated by the Respondents for the CNQ shares that they settled with Canadian clients.

PART IV – CONTRAVENTION

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

On May 8, 2018, the Respondents participated in trading in a security by means other than the entry of an order on a marketplace, contrary to UMIR 6.4.

PART V – TERMS OF SETTLEMENT

26. The Respondents agrees to the following sanctions and costs:

- a) Each of the Respondents will pay a fine in the amount of \$500,000; and
 - b) Each of the Respondents will pay costs in the amount of \$10,000.
27. If this Settlement Agreement is accepted by the Hearing Panel, the Respondents agree to pay the amounts referred to above within 30 days of such acceptance unless otherwise agreed between Staff and the Respondents.

PART VI – STAFF COMMITMENT

28. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondents 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.
29. If the Hearing Panel accepts this Settlement Agreement and the Respondents fail to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondents. 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

30. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
31. 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.
32. Staff and the Respondents 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 Respondents, or any of them, do not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.
33. If the Hearing Panel accepts the Settlement Agreement, the Respondents agree to waive all rights under the IIROC Rules and any applicable legislation to any further hearing, appeal and review.
34. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondents may enter into another settlement agreement or Staff may proceed to a disciplinary hearing based on the same or related allegations.
35. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
36. 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.
37. If this Settlement Agreement is accepted, the Respondents agrees that neither they nor anyone on their behalf, will make a public statement inconsistent with this Settlement Agreement.
38. The Settlement Agreement is effective and binding upon the Respondents and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

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

DATED this "23rd" day of October, 2019.

"Witness"

Witness

"Witness"

Witness

"Witness"

Witness

"RBC Dominion Securities"

RBC Dominion Securities

"Scotia Capital Inc."

Scotia Capital Inc.

"TD Securities Inc."

TD Securities Inc.

"Ricki Ann Newmarch"

Witness

"Elissa Sinha"

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

The Settlement Agreement is hereby accepted this "1" day of "November", 2019 by the following Hearing Panel:

Per: "Paul Moore Q.C."

Panel Chair

Per: "Colleen Wright"

Panel Member

Per: "Deborah Leckman"

Panel Member

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