Re Jacobsen

IN THE MATTER OF:

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

and

Ivan Jacobsen

and

Keith Jacobsen

2013 IIROC 59

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

Heard: July 29, 2013
Decision: August 30, 2013

Hearing Panel:
John Rogers, Chair, Michael Johnson and Rob Travers
Appearances:
Paul Smith, Enforcement Counsel for the Investment Industry Regulatory Organization of Canada
George E. H. Cadman, QC, Boughton Law Corporation, Barristers and Solicitors, for the Respondent, Ivan Jacobsen

---

DECISION

¶ 1 A Hearing Panel of the Investment Industry Regulatory Organization of Canada ("IIROC") was convened on July 29, 2013 in accordance with Rule 15 of the IIROC Dealer Member Rules of Practice and Procedure to review a settlement agreement ("Settlement Agreement") dated the 14th day of June, 2013 negotiated between the Enforcement Department of IIROC and Ivan Jacobsen and Keith Jacobsen (collectively "the Respondents") in accordance with Rules 20.35 to 20.40, inclusive, of Part 10 of the IIROC Dealer Member Rules (the "Rules") and Rule 15 of the Dealer Member Rules of Practice and Procedure.

Statement of Facts

¶ 2 The Settlement Agreement contains certain facts agreed to by IIROC Staff and the Respondents for the purpose of the Settlement Agreement. A summary of these facts is as follows:

1. The Respondent, Ivan Jacobsen, ("IJ"), is 67 years old. He was first registered in 1993. The Respondent, Keith Jacobsen, ("KJ"), IJ's son, was first registered in 2003. Neither IJ nor KJ are currently registered. IIROC acknowledges that IJ is retired and does not intend in the future to seek registration in any capacity in the investment industry.
2. Until August 2007, the Respondents worked together in partnership at the Whitehorse office of IIROC Dealer Member, Canaccord Capital Corporation ("Canaccord"), sharing all of the commissions which were generated from transactions.
3. The Canaccord office (the "Office") at which the Respondents worked was a small office and only included people who worked for IJ's team.

4. In August 2007, KJ stopped working at the Office in order to pursue other business interests and by January 2009 he had officially surrendered his registration. He later reinstated his registration in April of 2010 and remained registered until January 2011.

5. To replace KJ, IJ hired RM to work as his assistant and, although RM was not licensed, starting in September 2007 IJ instructed and allowed RM to accept trading instructions and to place orders for clients. RM's compensation was calculated as a percentage of the commissions generated from all transactions in the Office.

6. Although RM planned to secure registration, he was not properly licensed until June 2008.

7. By April of 2010, KJ had returned to work at the Office and participated with IJ and RM in sharing the commissions generated by the Office three ways.

8. Over the seven month period from July 2010 to and including January 2011, the Respondents' clients participated in eight private placements of securities. Of these clients, at least 21 were unqualified to participate in these private placements. However, the Respondents permitted these clients to make 31 purchases of unregistered securities for an aggregate purchase price of $167,758. Of these impugned transactions, the lowest single transaction was $2,000 and the highest single transaction was $42,000, with the average value of these transactions being approximately $5,400.

9. The reason that these clients were not qualified to participate in these private placements was that although they attested to the fact that they had financial assets exceeding $1,000,000 and that they therefore were "accredited investors", as this term is defined in National Instrument 45-106, in fact this was not the case and they did not actually qualify as accredited investors.

10. The Respondents in facilitating these transactions gave no consideration to the terms of the accredited investor qualification and simply completed whatever paperwork was necessary to enable the sale of prospectus exempt securities to clients whom they knew, or ought to have known, were not qualified to purchase these securities.

11. In May of 2011, RM contacted the Canaccord head office and advised of the unregistered activities in which he had been engaged and also provided information regarding the sale of the private placements to unqualified purchasers. IJ resigned, and Canaccord closed the Office.

Contravention

¶ 3 The Settlement Agreement contains the Respondents' admissions that:

1. Between July 2010 and January 2011, KJ acted contrary to IIROC Dealer Member Rule 1300.1(a) by failing to use due diligence to ensure that his clients qualified as "accredited investors" as defined in National Instrument 45-106 before facilitating their purchase of securities offered pursuant to prospectus exemptions.

2. Between July 2010 and January 2011, IJ acted contrary to IIROC Dealer Member Rule 1300.1(a) by failing to use due diligence to ensure that his clients qualified as "accredited investors" as defined in National Instrument 45-106 before facilitating their purchase of securities offered pursuant to prospectus exemptions.

3. Between September 2007 and June 2008, IJ acted contrary to then By-law 29.1 of the Investment Dealers Association of Canada by allowing his assistant, RM, from time to time and when IJ was not available to do so, to accept trading instructions and to place orders for clients before RM was properly licensed to do so.

Terms of Settlement

¶ 4 In the Settlement Agreement, IIROC and the Respondents agree to the following terms of settlement:

1. That KJ:

a. shall pay a fine in the amount of $15,000;

b. shall pay an additional amount of $2,096 as being the amount he earned in commissions as a result of his admitted violation;

c. before he can apply for re-registration in any capacity with a Dealer Member firm, that he successfully complete the Conduct and Practices Handbook Course offered through the Canadian Securities Institute; and

d. shall pay the sum of $2,500 as a contribution towards IIROC's investigation and prosecution costs; and

2. That IJ:

a. shall pay a fine in the amount of $25,000;

b. shall pay an additional amount of $2,096 as being the amount he earned in commissions as a result of his admitted violation;

c. is permanently prohibited from acting in any supervisory capacity for a Dealer Member firm;

d. before he can apply for re-registration in any capacity with a Dealer Member firm, that he successfully complete the Conduct and Practices Handbook Course offered through the Canadian Securities Institute; and

e. shall pay the sum of $2,500 as a contribution towards IIROC's investigation and prosecution costs.

IIROC's Submissions

¶ 5 In his submissions, IIROC counsel referred us to IIROC's Disciplinary Sanction Guidelines (the "Guidelines") and previous relevant decisions of hearing panels.

Relevant Precedent Decisions

¶ 6 In *Re:Cornacchia* 2011 IIROC 25 following a disciplinary hearing based upon an agreed upon set of facts to the effect that the respondent had sold unregistered securities to 12 clients for a total investment of $47,400 without ensuring that the accredited investor documentation was accurate, the hearing panel imposed a fine of $10,000; the requirement to disgorge $1,768 in commissions; and the requirement to re-write and successfully pass the Conduct and Practices Handbook Course offered through the Canadian Securities Institute.

¶ 7 In *Re: Igra* 2009 IIROC 29 the hearing panel accepted a settlement agreement in which the respondent acknowledged that before facilitating the purchase of unregistered securities he did not use due diligence to ensure that the 14 clients who made 21 purchases of unregistered securities in 5 private placements, with transactions ranging in size from a low of $4,300 to a high of $52,000, were qualified as accredited investors. The respondent agreed to a fine of $10,000; the requirement to re-write and successfully pass the Conduct and Practices Handbook Course offered through the Canadian Securities Institute; and the requirement to pay costs in the amount of $2,500.

Disciplinary Sanction Guidelines

¶ 8 In his reference to the Guidelines, IIROC counsel noted that they set out the key factors a hearing panel should consider in conjunction with the imposition of sanctions. It was the submission of IIROC counsel that when considering these key factors we should take into account that in the matter at hand there was no harm done to the Respondents' clients in that these clients clearly knew what they were doing and wanted to purchase the securities they acquired; that neither of the Respondents has a prior disciplinary record; that by participating in the settlement process it was clear that the Respondents accepted responsibility for their actions; and that there were no client complaints.

¶ 9 With specific reference to Guideline 5.3 entitled "Allowing an Unregistered Person to Trade – Dealer

Member Rule 29.1", IIROC counsel noted that this Guideline provides that the duty to ensure that an employee has met all of the registration and proficiency requirements to enable him to be properly registered falls not only on the Dealer Member, but also on its supervisory staff, including branch managers, UDP's and ADP's. In the matter at hand IIROC counsel submitted, IJ was the branch manager at the Office. Therefore, although RM's study for registration was in progress and RM eventually did become registered as was required by RM's employer, Canaccord, the onus was on IJ as the branch manager of the Office to ensure that RM did not engage in activity for which registration was required prior to in fact becoming registered.

¶ 10 Guideline 5.3 lists as recommended sanctions a minimum fine of $5,000, a suspension from registration, and the imposition of conditions upon continued registration, including the rewriting of qualifying exams. Included in the matters for a hearing panel to consider in determining whether the application of these recommended sanctions was appropriate are the possibility that the contravention was unintentional, whether or not the unregistered person had a registration pending, and the impact of the contravention on clients.

¶ 11 IIROC counsel submitted that the agreed upon sanctions in the Settlement Agreement are very fair, are well within the parameters of other settlement agreements accepted by hearing panels, including the decisions referenced above, and that they are consistent with the Guidelines.

Submissions of IJ's Counsel

¶ 12 In his submissions, IJ's counsel stressed the fact that the Settlement Agreement acknowledges that IJ is no longer working in the investment industry and that he has no intention of returning to the industry. He noted that, as was acknowledged by IIROC counsel, neither of the Respondents has a prior disciplinary record, that they cooperated fully with IIROC investigators, and that there is before us no evidence of client losses. Indeed, IJ's counsel noted, IIROC's counsel has confirmed that when contacted by IIROC investigators, the Respondents' clients affirmed the transactions in question. He pointed out that there is no evidence of fraud or deceptive conduct that might attract a more serious penalty.

¶ 13 IJ's counsel submitted that the agreed upon penalties in the Settlement Agreement clearly fall within a reasonable range of appropriateness and for that reason that we should accept the Settlement Agreement.

Decision

¶ 14 We accept the Settlement Agreement agreeing with the submissions of IIROC counsel and counsel for IJ that it is in the public interest to do so.

Reasons

¶ 15 Rule 20.36 empowers a hearing panel upon the conclusion of a settlement agreement hearing to either accept or reject the settlement agreement under consideration. However, neither in Rule 20.36 nor elsewhere in the Rules is there guidance as to what criteria a hearing panel should use in making this decision.

Appropriateness of Penalty

¶ 16 Past decisions of hearing panels determining whether or not to accept a settlement agreement are of assistance in providing such guidance. *Milewski* [1999] I.D.A.C.D. No. 17, Bulletin No. 2605, August 5, 1999, and *Re: Clark* [1999] I.D.A.C.D. No.40, Bulletin No. 2674, December 14, 1999 suggest that the test for a hearing panel to use in determining whether or not to accept the sanctions contained in a settlement agreement was one which considered a number of factors. These factors include whether or not the agreed upon sanctions strike a reasonable balance between fairness to the respondent in the circumstances but at the same time encouraging the prevention of a repetition of the acknowledged offense; and the need to protect the investing public, the industry membership, the integrity of the disciplinary process, and the integrity of the securities markets.

¶ 17 In addition, these decisions suggest that the hearing panel should determine whether or not a penalty clearly falls outside a "reasonable range of appropriateness". If, in the opinion of the hearing panel, the penalty clearly falls outside this reasonable range, the hearing panel should not accept the settlement agreement. Otherwise it should do so. The rationale behind this approach is that a hearing panel should be cognizant of the

settlement process and should not interfere in a negotiated settlement by attempting to substitute its discretion for that of the parties. However, given that the settlement process does involve a strong element of compromise, these decisions caution that future hearing panels must be careful in using decisions involving settlement agreements for precedent purposes.

Sanctions Reasonably Appropriate

¶ 18 In response to a question from us, IIROC counsel confirmed that prior to entering into the securities transactions, the subject of the matter before us, that each of the Respondents' clients had signed documents confirming that the client was an accredited investor and that therefore that this client was qualified to come within the accredited investor exemption established by National Instrument 45-106. When questioned as to how far an Approved Person was expected to inquire into a client's affairs to determine whether or not the document signed by the client was correct, IIROC counsel took the position that as part of the obligation imposed upon an Approved Person under the Know Your Client Rule, it is incumbent upon the Approved Person to determine whether or not the client's affirmation in a signed document that he or she was an accredited investor is correct from the Approved Person's knowledge of that client. And that if the Approved Person knows that it is not correct, that the Approved Person should not permit the sale of the unregistered securities to that client.

¶ 19 The Settlement Agreement states that in May 2011, RM contacted the head office of Canaccord and advised them of the unregistered activities in which he had been engaged as well as information regarding the sale of private placements at the Office. The Settlement Agreement goes on to state that in response to RM's allegations, IJ resigned his employment with Canaccord and the Office was closed. It would appear to be these events which led to IIROC's initial investigation of the activities of the Respondents. We were advised that the subsequent allegations by IIROC contained in Counts 1 and 2 arose from the difference in client information between the New Client Account Application Form ("NCAAF") for the Respondents' 21 clients and the information contained in the accredited investor form subsequently signed by those clients. In other words, the basis of the contraventions admitted to by the Respondents with respect to the 21 unqualified clients was that despite the marked discrepancy between a client's NCAAF and the statements agreed to in that client's subsequent accredited investor documentation, the Respondents still permitted the purchase of unregistered securities to be completed by those clients.

¶ 20 An element of the Settlement Agreement that we found troubling was the fact that in it IJ has agreed to a provision prohibiting him from in the future acting in any supervisory capacity for a Dealer Member firm. It would appear that this prohibition is included as a result of his failure to properly supervise RM. In the agreed upon facts, the Settlement Agreement provides that RM from September 2007 until June 2008 engaged in activities for which he was not registered. During this time period, RM was studying to become registered and should, therefore, have been fully cognizant of the fact that he was engaged in activities that were contrary to the Rules. In addition, one is wont to ask why it was not until 2011, three years after he had become registered, that RM came forward and acknowledged the breaches of the Rules. Although were an actual disciplinary hearing on this matter to be held further facts might come forward which might lead us to a different conclusion, we believe that on the facts before us this prohibition is too harsh a penalty.

¶ 21 We understand the fact that IJ is 67 years old, that he has retired from the investment industry, and that he has no intention of returning to employment in the investment industry. Therefore, in his personal context the effect of such a prohibition is not as onerous as it might be to a younger person intent on remaining in the investment industry. However, we wish to emphasize that on the facts before us, if the Settlement Agreement was not in existence, we would have considered such a permanent ban as being much too onerous a penalty for the contravention agreed to, especially in light of the lack of evidence of harm to clients.

¶ 22 With this caveat, considering the Guidelines, the precedents above cited, and the fact that both counsel before us have recommended that we approve the Settlement Agreement, we find that the sanctions agreed upon in the Settlement Agreement meet the test of being within a reasonable range of appropriateness and we have, therefore, approved the Settlement Agreement.

Dated at Vancouver, British Columbia, this 30th day of August, 2013.

John Rogers, Chair

Michael Johnson

Rob Travers

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff and each Respondent, Ivan Jacobsen ("Ivan") and Keith Jacobsen ("Keith") consent and agree to the settlement of this matter by way of this settlement agreement (the "Settlement Agreement").
2. The Enforcement Department of IIROC has conducted an investigation (the "Investigation") into the conduct of both Ivan and Keith (the "Respondents").
3. On June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment Dealers Association of Canada ("IDA") and Market Regulation Services Inc. Pursuant to the Administrative and Regulatory Services Agreement between the IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for the IDA to carry out its regulatory functions.
4. The Respondents consent to be subject to IIROC's jurisdiction.
5. The Investigation discloses matters for which the Respondents 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

6. Staff and the Respondents jointly recommend that the Hearing Panel accept this Settlement Agreement.
7. The Respondents admit the following contraventions of IIROC Rules and IDA By-Laws:
   a) Keith admits that between July 2010 and January 2011, he acted contrary to IIROC Dealer Member Rule 1300.1 (a) by failing to use due diligence to ensure that his clients qualified as "accredited investors" as defined in National Instrument 45-106 before facilitating their purchase of securities offered pursuant to prospectus exemptions.
   b) Ivan admits that between July 2010 and January 2011, he acted contrary to IIROC Dealer Member Rule 1300.1 (p) by failing to use due diligence to ensure that his clients qualified as "accredited investors" as defined in National Instrument 45-106 before facilitating their purchase of securities offered pursuant to prospectus exemptions.
   c) Ivan admits that between September 2007 and June 2008, he acted contrary to IDA By-law 29.1 by allowing his assistant RM, from time to time and when Ivan was not available to do so, to accept trading instructions and place orders for clients before he was properly licensed to do so.
8. Staff and Keith agree to the following terms of settlement:
   a) Keith shall pay a $15,000 fine;
   b) Keith will also pay an additional $2,096, the amount he earned in commissions as a result of the violation;
   c) Before he can re-register in any capacity with a Dealer Member firm, Keith must successfully

complete the Conduct and Practices Handbook Course through the Canadian Securities Institute.

9. Staff and Ivan agree to the following terms of settlement:

   a) Ivan shall pay a $25,000 fine;

   b) Ivan will also pay an additional $2,096, the amount he earned in commissions as a result of the violation;

   c) Ivan is permanently prohibited from acting in any supervisory capacity for a Dealer Member firm;

   d) Before he can re-register in any capacity with a Dealer Member firm, Ivan must successfully complete the Conduct and Practices Handbook Course through the Canadian Securities Institute.

10. In addition to the fines agreed to above Ivan and Keith shall each pay $2,500 to IIROC as a contribution towards IIROC's investigation and prosecution costs, for a total of contribution of $5,000.

III. STATEMENT OF FACTS

(i) Acknowledgment

11. Staff and the Respondents 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

12. From July 2010 through January 2011 when they were both RRs and working at the Whitehorse branch of Canaccord Capital Corporation, Ivan and Keith sold prospectus exempt securities to clients whom they knew, or ought to have known, were not qualified to purchase them. Separately, from September 2007 to June 2008, Ivan, who was a supervising branch manager, instructed and allowed an unlicensed assistant to accept trading instructions and place orders on behalf of clients in Ivan's absence before that person became registered.

The Respondents and the Whitehorse office

13. Ivan was first registered in 1993. Keith, who is Ivan's son, was first registered in 2003.

14. At the material time, Ivan and Keith worked together in a partnership at Canaccord's Whitehorse office and shared all of the commissions which were generated from transactions. The Whitehorse office was a small office and only included people who worked for Ivan's team.

15. Beginning in August 2007, Keith essentially stopped working at Canaccord in order to pursue other business interests. By January 2009, he had officially surrendered his registration. He later reinstated his registration from April 2010 – January 2011.

16. To replace Keith, in August 2007, Ivan hired RM to work as his assistant. Although RM planned to obtain his securities license, he was not properly licensed until June 2008.

17. Although RM was not licensed, Ivan still instructed and allowed RM to accept trading instructions and place orders for clients, starting in September 2007.

18. Like Keith, RM was compensated with a percentage from the commissions generated from all transactions in the office.

19. By April 2010, Keith had returned to work full time as an RR. After April 2010, Keith, Ivan and RM shared the commissions three ways.

20. In May 2011, RM contacted Canaccord head office and advised them of the unregistered activity he

had engaged in. RM also provided information regarding the sale of private placements at the Whitehorse office. In response to RM's allegations, Ivan resigned and the Whitehorse office of Canaccord was closed.

21. Neither Ivan nor Keith is currently registered with a Dealer Member firm. Ivan is 67 years old. He is retired and no longer registered with IIROC. IIROC acknowledges that Ivan does not intend to seek registration in any capacity, or return to the industry.

Private Placements and Accredited Investors

22. The Respondents' business included selling securities which were offered for sale by issuing companies without a prospectus having been filed. Canadian securities legislation dictates that unless the purchasing client qualifies for an established exemption, the sale of such securities – commonly known as private placements – is prohibited.

23. One of the most commonly recognized and relied upon exemptions is known as the Accredited Investor Exemption. An "*accredited investor*" may properly purchase a private placement.

24. The Accredited Investor Exemption is established by National Instrument 45-106. It identifies various factors which qualify an individual as an "*accredited investor*". One of the more commonly relied upon factors is ownership of "financial assets exceeding $1,000,000." Specifically, this qualification is set out in section 2.3 (j) as follows:

> (j) an individual who, either alone or with a spouse, beneficially owns, directly or indirectly, financial assets having an aggregate realizable value that before taxes, but net of any related liabilities, exceeds $1,000,000.

25. "Financial Assets" are further defined to include cash and securities but not real estate or a personal residence.

26. Over seven months from July 2010 through January 2011, the Respondents' clients purchased exempt securities by submitting documents attesting to the fact that they were an "*accredited investor*" because they had financial assets exceeding $1,000,000. The endorsement of the necessary documents and the resulting purchase of exempt securities were facilitated by the Respondents.

27. During this period, the Respondents, working together, allowed unqualified clients to participate in eight different private placements. At least 21 unqualified clients made 31 purchases totaling $167,758. The lowest single transaction was $2,000 and the highest was $42,000. The next highest transaction was $14,000 and the average was $5,400.

28. In facilitating the transactions, the Respondents gave no consideration to the Accredited Investor Exemption and simply completed whatever paperwork would enable the clients to make the purchase.

IV. TERMS OF SETTLEMENT

29. 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.

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

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

32. 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.

33. If the Hearing Panel accepts the Settlement Agreement, the Respondents waive their rights under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.

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 in relation to the matters disclosed in the Investigation.

35. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
36. Staff and the Respondents 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.
37. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondents are payable immediately upon the effective date of the Settlement Agreement.
38. 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.
39. This Settlement Agreement may be signed in counterparts.

AGREED TO by the Respondent Ivan Jacobsen at Whitehorse, Yukon this 5th day of June, 2013.

_____ _____

WITNESS **RESPONDENT**

AGREED TO by the Respondent Keith Jacobsen at Whitehorse, Yukon this 5th day of June, 2013.

_____ _____

WITNESS **RESPONDENT**

AGREED TO by IIROC Staff at Vancouver, British Columbia this 14th day of June, 2013.

"Shannon Mathieson" "Paul Smith"

WITNESS **PAUL SMITH**

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

ACCEPTED at Vancouver, British Columbia, this 29th day of July, 2013, by this IIROC Hearing Panel:

Per: "John Rogers"
Panel Chair

Per: "Robert Travers"
Panel Member

Per: "Michael Johnson"
Panel Member