

# Re Brophy

IN THE MATTER OF:

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

**and**

**Steven Henry Brophy**

2018 IIROC 52

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

Heard: November 21, 2018 in Toronto, Ontario

Decision: November 21, 2018

Written Reasons: December 13, 2018

## **Hearing Panel:**

Emily Cole, Chair, Edward Jackson and Julie Badurina

## **Appearance:**

Natalija Popovic, for IIROC Staff

Shara Roy and Robert Trenker, for the Respondent

Also present:

Steven Henry Brophy, the Respondent

Valérie Quintal, Senior Counsel and Vice-President, Wealth Management Litigation, BMO Nesbitt Burns Inc.

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## **REASONS FOR ACCEPTING A SETTLEMENT AGREEMENT**

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¶ 1 This was a hearing under section 8215 of the IIROC Consolidated Enforcement, Examination and Approval Rules to consider a settlement agreement between Staff of IIROC and the Respondent, Steven Henry Brophy.

¶ 2 After reviewing the proposed Settlement Agreement and the material filed by Staff and hearing the submissions of counsel for Staff and the Respondent, the hearing panel accepted the settlement agreement attached. Here are the reasons for our decision:

### **The Contraventions**

¶ 3 The Respondent admits that between March 2014 and June 2015, he failed to adequately supervise Graeme Robert Kirkland, contrary to Dealer Member Rule 38.4.

### **The Sanctions**

¶ 4 The Respondent agrees to the following sanctions and costs:

1. A fine of \$75,000;
2. To re-write the CSI Branch Managers Course examination;
3. To attend a full day one-on-one training on new issues and conflict of interest supervision to be provided by BMO, within 60 days of the acceptance of the settlement agreement; evidence in writing of completion of this training shall be provided to IIROC; and

4. Costs of \$5,000.

¶ 5 The Respondent also agrees to pay the amounts set out above within 30 days of the date of the acceptance of the settlement agreement.

### **Issues**

¶ 6 The issues to be determined by this panel before it can accept the proposed settlement are whether the agreed sanctions are within an acceptable range, are fair and reasonable and will serve as a deterrent to the Respondent and to the industry.

*Re Donnelly, 2016 IIROC No.23*

### **The Circumstances**

¶ 7 A summary of the agreed facts follows:

¶ 8 The Respondent has been an investment advisor with his own book of business at BMO from 1987 to the present.

¶ 9 In addition, in 1998, the Respondent became a Branch Manager and continues in this additional capacity at BMO (this registration category is now entitled Supervisor).

¶ 10 This settlement concerns the Respondent's failure to supervise Graeme Robert Kirkland, a BMO Nesbitt Burns Inc. Registered Representative.

¶ 11 In late 2012, the Respondent who was then a Divisional Branch Manager was made aware, by Mr. Kirkland's then supervisor, of concerns about the high level of commissions Mr. Kirkland was generating from purchases of new issues in fee-based client accounts.

¶ 12 In March 2014, the Respondent became directly responsible for supervising Mr. Kirkland.

¶ 13 Between March 2014 and June 2015, Mr. Kirkland's new issue purchases almost doubled from \$42 million to over \$81 million, and as a direct result his new issue commissions in 2014 were approximately triple those earned in 2013.

¶ 14 As Mr. Kirkland's supervisor, from March 2014, the Respondent was responsible for allocating bought deal new issues to Mr. Kirkland and was therefore intimately familiar with the volume of Mr. Kirkland's purchases of new issues. Yet the Respondent failed to take any steps to rein in Mr. Kirkland's conduct.

¶ 15 It was not until June 2015, six months after the Respondent was made aware of concerns by senior staff at BMO head office about the high level of commissions Mr. Kirkland was generating from new issue purchases that the Respondent took any steps to actively supervise Mr. Kirkland's new issue trading.

### **Seriousness of the Contraventions**

¶ 16 Rule 38.4 provides that:

A Supervisor must fully and properly supervise each partner, Director, Officer, Registered Representative, Investment Representative or agent in accordance with the supervisory responsibilities assigned to the Supervisor, the Rules of the Corporation and the written policies and procedures of the Dealer Member so as to ensure their compliance with the Rules of the Corporation and all other laws, regulations and policies applicable to the Dealer Member's securities and commodity futures business.

¶ 17 Written policies and procedures are only the first step in a rigorous compliance program. Member Dealers depend upon the people in their organizations such as the Respondent to proactively and diligently supervise the activities of their Investment Advisors. Failure to do so results in cracks in the system and permits misconduct.

### **Aggravating and Mitigating Factors**

¶ 18 In accepting this settlement, we considered the facts agreed to by the parties including the fact that the Respondent did eventually address Mr. Kirkland’s misconduct and there were no suitability issues.

¶ 19 We also considered the fact submitted by counsel that there was no evidence of personal gain by the respondent. The IIROC investigator advised the panel that the personal compensation received by the Respondent as a result of the high level of commissions generated by Mr. Kirkland was de minimis.

¶ 20 Mr. Kirkland, on the other hand made substantial personal gains from his misconduct as his new issue commissions during the relevant time period (2014 over 2015) approximately tripled. Mr. Kirkland settled with IIROC Staff in October 2017. In addition to making a \$22,600 payment to certain clients to compensate them as part of the settlement of their complaint, Mr. Kirkland paid a \$90,000 fine to IIROC inclusive of disgorgement and an additional \$10,000 costs.

¶ 21 We are mindful of the proper standard of review of a settlement agreement which is not to substitute our own assessment of appropriate penalties but rather to determine whether those agreed to are reasonable. Resolutions reached by parties after thorough negotiations by competent counsel are to be encouraged and supported as they save time and resources.

*Re Melville, 2014 IIROC 51*

¶ 22 Even where a settlement is at the lower end of a reasonable range of appropriate resolutions, we should not reject it so long so as it is within the reasonable range and in the public interest.

*Re Laurentian Bank Securities, 2017 IIROC 38*

¶ 23 The Respondent has been in the industry for over 30 years and has no prior contraventions. In addition to paying the monetary penalty of \$75,000 and costs of \$5,000, he has agreed to re-write the CSI Branch Managers Course examination within three months of November 21, 2018, the date the settlement agreement was accepted and to attend a full day of one-on-one training on new issues and conflict of interest supervision to be provided by BMO, within 60 days of the date the settlement agreement was accepted.

¶ 24 In addition, we trust the embarrassment and loss of reputation the Respondent has suffered will further discourage him from failing in his responsibilities again.

¶ 25 Having considered the facts and circumstances of this case and the precedents provided, we find the agreed sanctions are within a reasonable range, are fair and reasonable and will deter the Respondent and others in the industry. We see no reason not to accept the proposed settlement agreement.

¶ 26 The Respondent, Steven Henry Brophy is ordered to pay a \$75,000 fine and \$5,000 costs within 30 days of the date the settlement agreement was accepted. He is also ordered to report to IIROC Staff before the deadlines agreed to his successful completion of the CSI Branch Managers Course examination and the additional training.

¶ 27 Thank you to counsel for their assistance with this matter.

Dated at Toronto, Ontario this 13 day of December, 2018.

Emily Cole

Edward Jackson

Julie Badurina

## **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 Steven Henry Brophy (“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. Starting in March 2014, the Respondent was responsible for the supervision of Graeme Robert Kirkland (“Kirkland”), a Registered Representative at BMO Nesbitt Burns Inc. (“BMO”).
5. In late 2012, in his role as Divisional Branch Manager, he was made aware by Kirkland’s supervisor (the “Former Supervisor”) of concerns about the level of commissions Kirkland was generating from purchases of new issues in fee based client accounts.
6. When the Respondent became Kirkland’s supervisor in March 2014, he was responsible for allocating bought deal new issues to Kirkland.
7. In January 2015, he was made aware of concerns by senior staff at BMO head office about the level of commissions Kirkland was generating. Six months later, in June 2015 the Respondent began to take steps to review Kirkland’s new issue commissions.
8. Between March 2014 and June 2015, Kirkland’s new issues purchases almost doubled from \$42 million to over \$81 million, and as a direct result his new issue commissions in 2014 were approximately triple those earned in 2013.
9. By June 2016, when Kirkland left BMO, his purchases of new issues over his tenure totaled in excess of \$85 million.
10. The Respondent failed to adequately supervise the high level of commissions generated by Kirkland’s purchase of new issues in client accounts in circumstances where he knew of ongoing concerns over such commissions, did not take steps to more closely supervise his activity and to restrict the purchases of new issues.

### **Registration History**

11. The Respondent has been an investment advisor with his own book of business at BMO from 1987 to the present.
12. In addition, in 1998, the Respondent became a Branch Manager and continues in this additional capacity at BMO (this registration category is now entitled Supervisor).

### **Responsibility for Supervision of Kirkland**

13. Kirkland began working at BMO in 2009. Starting in 2011, Kirkland’s Former Supervisor was responsible for supervision at the branch level with a direct reporting line to the Respondent as Branch Divisional Manager.
14. In March 2014, the Respondent was responsible for supervision of Kirkland and was aware of Kirkland’s allocations of new issues. Throughout March 2014 to June 2015 (“the Relevant Period”) the Respondent took no measures to limit Kirkland’s requests for allocations of new issues, leading to high levels of commissions.

### **Kirkland’s New Issues Purchases and Commissions**

15. The majority of Kirkland's client accounts were fee-based. During the Relevant Period, Kirkland significantly increased his purchase of new issues in approximately 78% of his client accounts.
16. Kirkland earned a percentage of the commissions paid to BMO by the issuers of the securities ("New Issue Commissions").
17. By his own admission, New Issue Commissions influenced Kirkland to recommend the purchase of new issues to his clients.

#### **Existing Concerns with the New Issue Commissions**

18. When the Respondent became Kirkland's supervisor, he was already aware of the Former Supervisor's concerns about Kirkland's use of new issues and turn (revenue on assets). In particular, the Respondent was aware that:
  - Starting in early 2012, the Former Supervisor or his delegates repeatedly queried Kirkland about his New Issue Commissions, including the high turnover, high volume of new issue purchases, and increasing level of New Issue Commissions; and
  - By January 2013, the Former Supervisor required Kirkland to provide a written rationale for his requests for new issue allocations.
19. The Former Supervisor asked Kirkland to explain how he determined what clients the new issues were suitable for, whether he had explained to each and every client the potential risks of IPOs, and why he was purchasing high volumes of new issues.

#### **Kirkland's Purchases of New Issues While the Respondent was Supervisor**

20. Accordingly, when the Respondent became Kirkland's supervisor he was aware that Kirkland was "active" in new issues. He also had concerns that while his commissions from his AUM were increasing, Kirkland was not growing his AUM. There were no concerns with the suitability of the new issues.
21. The Respondent had access to reports on Kirkland's commission levels in March 2014 and first started reviewing them in April 2014.
22. The Respondent was aware that between March and December 2014, Kirkland increased his purchases of new issues; and in particular that:
  - Kirkland roughly tripled his net commissions from new issue purchases in 2014 compared with 2013 from approximately \$118,000 to \$358,000;
  - Kirkland's AUM in 2014 (of approximately \$35 million) decreased slightly from 2013. Despite this, Kirkland more than doubled the dollar value and percentage of purchases of new issues from approximately \$12 million to \$34 million between 2013 and 2014;
  - Kirkland made purchases of several new issues for roughly 78% of his client accounts;
  - In the case of the five largest new issues purchased during this time, Kirkland earned net commissions of over \$200,000. He earned over \$90,000 on one day in March 2014 when two structured product new issues settled; and
  - Kirkland's new issues purchases grew from approximately \$42 million in 2013 to \$67 million in 2014.

#### **Head Office Concerns with Kirkland's New Issue Commissions**

23. In January 2015, the Respondent became aware that a senior executive in the BMO head office had raised concerns about Kirkland's high level of commissions in the context of Kirkland's eligibility for a BMO production award.
24. In a series of January 2015 emails among BMO staff, including the Respondent and a senior executive, discussed that:

- Kirkland’s commissions were “double” what they should be in light of his AUM and that “compliance [should] look into [Kirkland’s] trading patterns/style/programs”;
- Kirkland was conducting increasingly more new issue business relative to other RRs;
- It was unusual that a relatively new advisor with a small book size would get so much access to new issues;
- Kirkland was purchasing new issues for about 30 to 50% of his clients and account fees plus new issues purchases inflated his commissions;
- The Respondent was reviewing Kirkland’s trades every day and did not have any concerns with his trading; and
- The Respondent was working with Kirkland to focus him on growing his AUM and not simply obtaining his production from his existing asset base.

**Client Complaint Against Kirkland**

25. In February 2015, the Respondent received client complaints from SA and PM about Kirkland. These clients citing concerns about investment performance relative to fees charged, and the motivations for trade recommendations. Kirkland had purchased new issues in these clients’ accounts.
26. The complaint resulted in an IIROC investigation and Kirkland was disciplined in 2017.
27. In an October 2017 settlement with IIROC, Kirkland admitted that he failed to consider and address a potential material conflict of interest between himself and his clients that resulted from his recommendations, purchases of, and commissions from, new issues.

**Review of Kirkland’s Purchase of New Issues after June 2015**

28. Starting in June 2015, the Respondent requested assistance from head office to commence a review of Kirkland’s purchase of new issues; he identified that the goal of the review was “to suspend [Kirkland] from any future new issue purchases.”
29. In July and August 2015, the Respondent worked with a head office compliance officer (the “Compliance Officer”) and the Respondent’s assistant supervisor to address Kirkland’s use of new issues.
30. At the Compliance Officer’s further recommendation, in October 2015, the Respondent commenced a practice of requiring Kirkland to provide written rationales when requesting new issues.
31. After June 2015 new issue purchases continued to increase reaching a total in excess of \$85 million. Kirkland’s increase in new issues purchases is summarized below:

<b>Time Period</b>	<b>Approximate Duration</b>	<b>Increase in New Issues Purchases</b>
March 2014 to June 2015	16 months	+\$39 million [from \$42 to > \$81 million ]
June 2015 to June 2016	12 months	+\$4.4 million [from \$81 to > \$85 million ]

**The Respondent’s Failure to Supervise**

32. During the Relevant Period the Respondent failed to adequately supervise the level of New Issue Commissions generated by Kirkland in circumstances where he knew of ongoing concerns over such commissions, including failing to:
  - Take adequate steps to more closely supervise and restrict Kirkland’s activity; and
  - Require that Kirkland provide written rationales for his use of new issues and scrutinize those rationales.
33. The following factors are noted:

- Respondent has no discipline history;
- The Respondent did ultimately address the issues around Kirkland's use of new issues;
- There was no concern with the suitability of the new issues Kirkland purchased; and
- BMO has implemented initiatives for Tier 1 and Tier 2 supervision of new issues since the settlement with Kirkland, which includes a mandatory compliance training for branch supervisors. The Respondent has attended the training.

#### **PART IV – CONTRAVENTIONS**

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

Between March 2014 and June 2015, the Respondent failed to adequately supervise Graeme Robert Kirkland, contrary to Dealer Member Rule 38.4.

#### **PART V – TERMS OF SETTLEMENT**

35. The Respondent agrees to the following sanctions and costs:
- a) A fine of \$75,000;
  - b) To re-write the CSI Branch Managers Course examination;
  - c) The Respondent shall attend a full day one-on-one training on new issues and conflict of interest supervision to be provided by BMO, within 60 days of the acceptance of this settlement; evidence in writing of completion of this training shall be provided to IIROC; and
  - d) Costs of \$5,000.
36. 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**

37. 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.
38. 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**

39. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
40. 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.
41. 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.
42. 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.

43. 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.
44. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
45. 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.
46. If this Settlement Agreement is accepted, the Respondent agrees that neither [he/she/it] nor anyone on [his/her/its] behalf, will make a public statement inconsistent with this Settlement Agreement.
47. 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**

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

**DATED** this “19” day of “October”, 2018

“Witness”  
 \_\_\_\_\_  
 Witness

“Steven Henry Brophy”  
 \_\_\_\_\_  
**Steven Henry Brophy**

“Eric Mucchi”  
 \_\_\_\_\_  
 Witness

“Natalija Popovic”  
 \_\_\_\_\_  
**Natalija Popovic**  
 Enforcement Counsel on behalf of Enforcement  
 Staff of the Investment Industry Regulatory  
 Organization of Canada

The Settlement Agreement is hereby accepted this “21<sup>st</sup>” day of “Nov.”, 2018 by the following Hearing Panel:

- Per: “Emily Cole”  
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 Panel Chair
- Per: “Julie Badurina”  
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 Panel Member
- Per: “Edward Jackson”  
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 Panel Member