

Re Kirkland

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Graeme Robert Kirkland

2017 IIROC 56

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

Heard: November 20, 2017 in Toronto, Ontario

Decision: January 4, 2018

Hearing Panel:

Edward T. McDermott, Chair, Deborah Archer and Ron Smith

Appearances:

Natalija Popovic and Kathryn Andrews, Senior Enforcement Counsel for IIROC

Kevin Richard for Graham Robert Kirkland

DECISION

PURPOSE OF HEARING

¶ 1 This Hearing Panel was constituted pursuant to the provisions of the Consolidated Enforcement, Examination and Approval Rules (the “Rules”) of the Investment Industry Regulatory Organization of Canada (“IIROC”) including in particular sections 8203, 8205, 8215 and 8428 thereof.

¶ 2 The Notice of Motion which initiated this hearing is dated October 23, 2017 and states that a hearing will be held on November 20, 2017 at the IIROC premises located at 121 King Street West, Suite 2000, Toronto, Ontario for the purpose of determining whether a Settlement Agreement entered into between the staff of IIROC and the Respondent, Graeme Robert Kirkland (“Kirkland” or the “Respondent”), pursuant to a written agreement dated October 19, 2017 (a copy of which is attached as a schedule to this Decision) will be accepted or rejected by the Hearing Panel in accordance with the provisions of the Rules.

¶ 3 There was no issue between the parties as to whether the application and the Notice of Motion for the Settlement Hearing had been properly commenced, served and filed in accordance with the terms of the Rules.

¶ 4 This Hearing Panel accordingly convened at 10:00 a.m. on October 20, 2017 at the place set forth in the Notice of Motion. At that time, both parties were represented by counsel but Mr. Kirkland was not able to be in attendance.

¶ 5 The Hearing Panel then proceeded to review the terms of the Settlement Agreement and received the submissions and representations of counsel for IIROC and the Respondent, Mr. Kirkland, both of whom requested this Hearing Panel to accept the Settlement Agreement and impose the sanctions provided for therein.

SETTLEMENT AGREEMENT

¶ 6 The Hearing Panel also reviewed the form of the Settlement Agreement and was satisfied that it contained the requirements of a Settlement Agreement as set forth in Rule 8215(2).

¶ 7 The Hearing Panel advised all present in the room that the Settlement Agreement and its terms as well as the content of this Hearing were to be held in confidence unless and until this Hearing Panel accepted the Settlement Agreement.

¶ 8 The Hearing Panel accordingly received and gave careful consideration to the Settlement Agreement and the submissions of the parties in support of such agreement. At the conclusion of these presentations during which a number of questions were raised with counsel by members of this Hearing Panel, the Panel recessed the hearing in order that it could deliberate on the information and submissions that had been presented to it with respect to its decision as to whether it should accept or reject the Settlement Agreement. Following such recess, the Hearing Panel advised the parties that it would be reserving its decision pending further consideration and deliberation by the Panel.

¶ 9 The following constitutes the reasons for the decision of this Hearing Panel which led it to conclude that the Settlement Agreement should be accepted.

THE ROLE OF THE HEARING PANEL

¶ 10 The Hearing Panel considered the decisions of previous Hearing Panels placed before us by counsel for IIROC relating to the role of this Hearing Panel in deciding whether it should accept or reject the Settlement Agreement to which the parties to this proceeding have agreed.

¶ 11 The Hearing Panel noted that in previous cases the majority of the members of this Panel have endorsed the standard and scope of review of the Settlement Agreement as set forth in the decision in *Re Faber 2014 IIROC 14* (approved in *Re Melville 2014 IIROC 51*) in which the Panel stated as follows:

The Role of the Hearing Panel

9. Under the provisions of IIROC's Rule 20.36, it is open to this Hearing Panel to either accept or reject the Settlement Agreement tendered upon us by the parties. It is not a question of whether the agreed-upon penalties are ones which this Panel would have imposed had the matter come before us for determination at a hearing. It is also not open to us to amend, re-write or alter the terms of the agreement reached between the parties.

10. It is however our fundamental responsibility to be satisfied that the penalties set forth in the agreement are within a reasonable range of appropriateness in the circumstances set forth in the agreed-upon statement of facts.

11. The following excerpts from previously decided cases as recorded in the decision of *Re Ast* (2012 IIROC 38) set forth the parameters of the Hearing Panel's decision making processes when reviewing a Settlement Agreement presented to us by the parties to the dispute:

Standard for Reviewing a Settlement Agreement

13. The standard for reviewing a Settlement Agreement was well-stated in a recent Pacific

District hearing, *Re Johnson* (2012 IIROC 19), where the panel stated:

'The test applicable to a decision whether to accept or reject a settlement is well-known. Simply put, a panel should accept such an agreement unless it considers the penalty provided for clearly to fall outside a reasonable range of appropriateness.'

14. There are many similar statements. See, for example, *Re Jiwa and Hoffar* (2012 IIROC 9),

which adopted an earlier IDA decision, stating: 'It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.'

Another recent example is *Re Trapeze Capital* (2012 IIROC 25), where the panel states:

‘It is clear from jurisprudence emanating from the courts and from Hearing Panels of IIROC, Investment Dealers Association and the Mutual Fund Dealers Association, that our task is not to decide whether, in this case, we would have arrived at the same decision as that reached by the parties. Rather, our duty is to determine whether the penalty is a reasonable one and that it meets the objectives of the disciplinary process which are to maintain the integrity of the investment industry.’

15. And, finally, see the statement in *Re Rotstein and Zachheim* (2012 IIROC 27):

‘Based upon this material it is our responsibility to review the agreement in order to satisfy ourselves that it falls within a reasonable range of appropriateness to the offence and circumstances recorded in the agreement and that there is nothing in the agreement which would be contrary to the public interest or bring the administration of the Rules of IIROC into public disrepute. If we are satisfied that the Settlement Agreement does not offend these principles then it should be accepted.’

(See also *Re Johnson* (2012 IIROC 19); *Re Portfolio Strategies Securities* (2012 IIROC 36); *Re Milewski* [1999] I.B.A.C.D. No. 17).

¶ 12 This Hearing Panel accepts and endorses this standard of review but thinks it is important to understand that we have also given full consideration to all of the other decisions referred to by Enforcement Counsel which have enunciated various perspectives on how a Hearing Panel is to approach a review of a settlement of this nature. For example, in the oft quoted decision of *Re Milewski* [1999] I.B.A.C.D. No. 17, the Panel framed the standard of review as follows:

Although a Settlement Agreement must be accepted by a District Council before it can become effective, the standards for acceptance are not identical to those applied by a District Council when making a penalty determination after a contested hearing. In a contested hearing, the District Council attempts to determine the correct penalty. A District Council considering a settlement agreement will tend not to alter a penalty that it considers to be within a reasonable range, taking into account the settlement process and the fact that the parties have agreed. It will not reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements.

¶ 13 In the case of *Re Donnelly* (2016 IIROC 23), the Hearing Panel commented as follows on its view of the settlement process and the role of the Panel in relation thereto:

Issues considered by the panel

5 The panel determined that it had to be satisfied regarding three considerations before it could accept the settlement agreement. First, the agreed penalties had to be within an acceptable range taking into account similar cases. Secondly, the agreed penalties had to be fair and reasonable (i.e. proportional to the seriousness of the contravention and taking into consideration other relevant circumstances) and should appear to be so to members of the public and industry. Thirdly, the agreed penalties should serve as a deterrent to the respondent and to industry. To be satisfied on these three considerations required an understanding of the particular facts of the case, the circumstances of the respondent, and the impact on him of the agreed penalties.

Importance of the settlement process

7 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 litigation, and there is less congestion in the dispute settling system when matters are taken out of the system through settlements. Finally, where both parties agree, the result is often more palatable to the parties and society than in a contested hearing where the winner takes all.

8 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 both 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 of the dispute that is agreeable to them.

Role of the panel

9 A panel considering whether to accept a settlement agreement and its agreed penalties is in a different position than a panel determining an appropriate penalty in a contested hearing.

10 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 Respondent.

11 However, unlike a panel in a contested hearing that must set the actual penalties 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 panel agrees that the 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.

12 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. However, the parties can always be invited by the panel to provide additional information that the panel believes it needs in order to come to a favourable decision; and the parties may choose to provide it. Or indeed, the parties may agree to changes in 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.

13 In the final analysis, a panel will accept a settlement agreement where it is in the public interest to do so, as will almost always be the case where the panel is satisfied regarding the three considerations mentioned above under “*Issues considered by the panel*”.

...

Fair and Reasonable

29 What is fair and reasonable will depend to a large degree on the particular facts and circumstances of a matter. Where both parties to a settlement agreement are represented by counsel, and have the means to undergo a contested hearing, but have reached a settlement, it is unlikely that a panel would ever conclude that the settlement was unfair and not reasonable.

¶ 14 Finally, this panel also had particular regard to the comments of the Supreme Court of Canada in the case of *R. v. Anthony-Cook*, [2016] S.C.J. No. 43 where the court commented as follows on the role of a trial judge in reviewing and considering the joint submission on sentence in exchange for a plea of guilty. In commenting on the tests to be applied to this review, the court provided as follows in connection with what it described as the “public interest test”:

32 Under the public interest test, a trial judge should not depart from a joint submission on sentence unless the proposed sentence would bring the administration of justice into

disrepute or is otherwise contrary to the public interest. But, what does this threshold mean? Two decisions from the Newfoundland and Labrador Court of Appeal are helpful in this regard.

33 In *Druken*, at para. 29, the court held that a joint submission will bring the administration of justice into disrepute or be contrary to the public interest if, despite the public interest considerations that support imposing it, it is so “markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a break down in the proper functioning of the criminal justice system”. And, as stated by the same court in *R. v. B.O.2*, 2010 NLCA 19 (CanLII), at para. 56, when assessing a joint submission, trial judges should “avoid rendering a decision that causes an informed and reasonable public to lose confidence in the institution of the courts”.

34 In my view, these powerful statements capture the essence of the public interest test developed by the Martin Committee. They emphasize that a joint submission should not be rejected lightly, a conclusion with which I agree. Rejection denotes a submission so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down. This is an undeniably high threshold – and for good reason, as I shall explain.

...

40 In addition to the many benefits that joint submissions offer to participants in the criminal justice system, they play a vital role in contributing to the administration of justice at large. The prospect of a joint submission that carries with it a high degree of certainty encourages accused persons to enter a plea of guilty. And guilty pleas save the justice system precious time, resources and expenses, which can be channeled into other matters. This is no small benefit. To the extent that they avoid trials, joint submissions on sentence permit our justice system to function more efficiently. Indeed, I would argue that they permit it to function. Without them, our justice system would be brought to its knees, and eventually collapse under its own weight.

41 But as I have said, for joint submissions to be possible, the parties must have a high degree of confidence that they will be accepted. Too much doubt and the parties may choose instead to accept the risks of a trial or a contested sentencing hearing. The accused in particular will be reluctant to forgo a trial with its attendant safeguards, including the crucial ability to test the strength of the Crown’s case, if joint submissions come to be seen as an insufficiently certain alternative.

42 Hence, 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. A lower threshold than this would cast the efficacy of resolution agreements into too great a degree of uncertainty. The public interest test ensures that these resolution agreements are afforded a high degree of certainty.

43 At the same time, this test also recognizes that certainty of outcome is not “the ultimate goal of the sentencing process. Certainty must yield where the harm caused by accepting the joint submission is beyond the value gained by promoting certainty of result” (*R. v. DeSousa*, 2012 ONCA 254, 109 O.R. (3d) 792, per Doherty J.A., at para. 22).

¶ 15 The Supreme Court also outlined the scope of the information which must be placed before the court in order that it can make an informed decision as to whether or not the joint submission should be accepted. The court accordingly stated as follows:

54 Counsel should, of course, provide the court with a full account of the circumstances of the offender, the offence, and the joint submission without waiting for a specific request from the trial judge. As trial judges are obliged to depart only rarely from joint submissions, there is a “corollary obligation upon counsel” to ensure that they “amply justify their position on the facts of the case as presented in open court” (Martin Committee Report, at p. 329). Sentencing – including sentencing based on a joint submission – cannot be done in the dark. The Crown and the defence must “provide the trial judge not only with the proposed sentence, but with a full description of the facts relevant to the offender and the offence”, in order to give the judge “a proper basis upon which to determine whether [the joint submission] should be accepted” (*DeSousa*, at para. 15; see also *Sinclair*, at para. 14).

55 This is not to say that counsel must inform the trial judge of “their negotiating positions or the substance of their discussions leading to the agreement” (*R v. Tkachuk*, 2001 ABCA 243, 293 A.R. 171, at para. 34). But counsel must be able to inform the trial judge why the proposed sentence would not bring the administration of justice into disrepute or otherwise be contrary to the public interest. If they do not, they run the risk that the trial judge will reject the joint submission.

¶ 16 It is against the backdrop of the various pronouncements of courts and other Hearing Panels that this Hearing Panel has undertaken its review of the Settlement Agreement placed before us on October 20, 2017.

CONTRAVENTIONS

¶ 17 The terms of the Settlement Agreement placed before this Hearing Panel contained an admission on the part of the Respondent, Mr. Kirkland, that he had contravened the following requirement of IIROC’s Rules:

57 By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC’s Rules:

- a) From January 2013 to February 2015 the Respondent failed to consider and to address a potential material conflict of interest between himself and his clients that resulted from his recommendations and purchases of securities in new issues that were offered for sale by his Dealer Member contrary to Dealer Member Rule 42.1 and 42.2.
- b) In April 2015 the Respondent failed to escalate a client’s written complaint to his Dealer Member, contrary to Dealer Member Rule 3100.

¶ 18 The provisions of the Rules which the parties are agreed Mr. Kirkland has contravened are as follows:

42.1 Responsibility to identify conflicts of interest

- (1) Each Dealer Member and, where applicable, Approved Person shall take reasonable steps to identify existing and potential material conflicts of interest between the interests of the Dealer Member or Approved Person and the interests of the client.
- (2) Where an Approved Person becomes aware of an existing or potential material conflict of interest, the existing or potential conflict shall be reported immediately to the Dealer Member.

42.2 Approved Person responsibility to address conflicts of interest

- (1) The Approved Person must consider the implications of an existing or potential material conflicts of interest between the Approved Person and the client.
- (2) The Approved Person must address all existing or potential material conflicts of

interest between the Approved Person and the client in a fair, equitable and transparent manner, and consistent with the best interests of the client or clients.

- (3) Any existing or potential material conflict of interest between the Approved Person and the client that cannot be addressed in a fair, equitable and transparent manner, and consistent with the best interests of the client or clients, must be avoided.

RULE 3100

REPORTING REQUIREMENTS

A. Reporting Requirements to Member

1. Each registrant shall report to the Dealer Member, within two business days, whenever:

...

- (c) he or she is the subject of any customer complaint in writing;

...

AGREED FACTS

Material Conflicts of Interest Between Mr. Kirkland and His Client

¶ 19 Based upon the facts set forth in the Settlement Agreement, the parties are agreed that the Respondent made numerous recommendations to several of his clients to purchase new issues and initial public offerings of securities (collectively referred to as “New Issues”) as a result of which he earned (in addition to his normal fees), a portion of the commissions paid to his Dealer Member, BMO Nesbitt Burns Inc. (“BMO”), by the issuers of the securities during 2014 and part of 2015 which resulted in a substantial increase in his earnings. Over the same period there was relatively no change in the volume of his book of business but the number of trades in New Issues escalated considerably from their level in 2013.

¶ 20 The New Issues would generally come to the attention of the Respondent through “New Issue updates” email alerts which were sent to him by BMO’s syndication department. Importantly, the Respondent acknowledges and admits that aside from the research he himself performed on the securities, the fact that he would also receive additional commissions paid to him by BMO over and above his normal earnings (which were mostly derived from fee-based accounts with his clients) had, in part, an influence on his decision to recommend these New Issues to his clients.

¶ 21 During 2014-2015, the Respondent accordingly recommended and purchased “numerous” New Issues in several clients’ accounts which of course resulted in him receiving additional remuneration from BMO which would be part of the distribution syndicate for all of the New Issues purchased by him.

¶ 22 The facts also disclose that the Respondent in a number of cases recommended that his clients sell the New Issues in a relatively short period of time even though there may not have been any profit or gain for his clients. The Respondent would then in a number of cases recommend that the client use the proceeds to purchase additional securities (including, in particular, New Issues). In summary, while it was not a universal practice of his, the Respondent was often recommending short term trading in New Issues and then revolving the money received from these dispositions into both New Issues and existing securities.

¶ 23 During 2014, New Issues accounted for approximately one-half of the purchases across his book of business and in some cases the short term trading in these securities was undertaken when no gain or profit had accrued to the client and the proceeds were subsequently plowed back into other purchases, a significant number of which were other New Issues.

¶ 24 In the result, this investment strategy undertaken by Mr. Kirkland resulted in a high turnover in his clients’ accounts and a trading routine which was much above the average number of trades in relation to a

similar book of business.

¶ 25 In support of these facts, the parties have recited the case history of two clients (SA and PM), a married couple who had opened six new fee-based accounts with the Respondent in March and April 2014. Prior to opening these accounts with the Respondent, the clients had only invested in guaranteed investment certificates and mutual funds and their new client application form indicated their investment time horizon was long term (in excess of 10 years).

¶ 26 While no New Issues were purchased in three of the accounts, the Respondent did recommend that the clients purchase a number of New Issues for the three RRSP accounts which, during the 11 month period that the Respondent was advising the clients, resulted in the acquisition of New Issues which represented one-half of Mr. Kirkland's recommended purchases to them and approximately three-quarters of the dollar value of all purchases in the three accounts. It is also of some note that over this period of time, the longest period of time that a New Issue was held in the accounts was for approximately 5 months.

¶ 27 During the 11 month period that this relationship prevailed, the value of the purchases made by Mr. Kirkland was some \$430,000 (approximately twice the overall value of the opening balance of the RRSP accounts) of which approximately \$302,900 involved purchases of New Issues. BMO received \$15,810 in fees and commissions from the New Issue purchases of which \$3,180 was net additional commissions remitted to the Respondent.

¶ 28 By the end of February 2015, the accounts had sustained a loss in value of approximately \$32,900 (or 15% of the value of the accounts) of which \$23,000 had been generated by New Issues. It is to be noted however that approximately \$15,000 of these losses resulted from declines in the Energy Leaders Plus Income Fund, a New Issue which suffered a significant decline due to the dramatic decrease in oil prices in 2014.

¶ 29 It is also of some interest to note that when, in February 2015, the clients did complain to BMO and discontinued their relationship, the three accounts in which there was no trading of New Issues had increased in value by approximately \$3,800 (6%).

¶ 30 In the result, the Respondent, from a global perspective, earned a total of approximately \$477,000 in net commissions in 2013 and 2014 as a result of New Issues purchased. BMO earned fees and commissions on the same purchases of approximately \$1,908,900. The parties are agreed that the Respondent almost tripled his net commissions from New Issues purchased in 2014 as compared with 2013.

¶ 31 The facts further indicated that in the case of five specific New Issues purchased between March and December 2014, the Respondent earned net commissions of over \$200,000 and at least half and in some cases up to 98% of these New Issues had been sold by the end of 2014, generally at a value less than the purchase price.

¶ 32 In summary, it is the position of Enforcement Counsel that the strategy of the Respondent to recommend the purchase of New Issues on a significant and escalating basis, (which purchases were often held on a short term basis and some of which were periodically revolved into another New Issue), placed the Respondent in a conflict of interest position vis-à-vis his clients. It is the position of IIROC (which has been agreed to by the Respondent in the Settlement Agreement) that the fact that Mr. Kirkland generated significant additional income by pursuing this strategy mandated him to recognize that he was required to identify the potential material conflict of interest and ensure that it was disclosed to his clients.

¶ 33 IIROC also posits that the fact that the Respondent had more than doubled the dollar value of New Issue purchases as well as the percentage of New Issue purchases relative to his AUM (which did not measurably increase) should have set off sirens that he had placed himself in a material conflict of interest position which he should have identified and addressed with his clients by advising them of the impact of this practice on his net commissions or taking other steps to avoid the conflict of interest. The fact that he roughly tripled his net commissions from New Issues between 2013 and 2014 should have caused him to recognize that this type of resulting increase in his earnings is something that should have been disclosed to the clients as the strategy was implemented.

¶ 34 The parties are accordingly agreed that this practice resulted in a dereliction in his responsibility to identify existing and potential material conflicts of interest between Mr. Kirkland and his clients and to take the appropriate steps to address those conflicts in accordance with the provisions of Rule 42.1 and 42.2.

¶ 35 Of some importance however is the fact that in January 2015 an internal enquiry arose through BMO's compliance staff with respect to why the Respondent's commissions had doubled in relatively short order. BMO determined that the increase was as a result of the New Issue commissions but took no steps to advise the Respondent of this enquiry or the results of their investigation. In fact, it was the policy of BMO that disclosure of commissions on New Issues was not required by their financial advisors inasmuch as the prospectuses disclosed the amount of the gross commissions paid to the Dealer Member.

¶ 36 It was, however, the personal practice of the Respondent to disclose the commissions on New Issues to clients who asked about the issue.

Failure to Escalate Client LG's Written Complaints

¶ 37 The agreed upon facts also indicate that Mr. Kirkland opened several accounts for his client LG in 2012. In April 2015, the client who was approximately 67 years of age and retired, indicated in a written complaint to the Respondent that he was requesting an urgent review of his account and that he was concerned about "the dismal performance of his accounts" which had declined considerably and were causing him "considerable alarm".

¶ 38 LG requested a meeting with the Respondent in order to get his side of the story and make a plan to stop the slide of his investments. He also suggested that he should receive a second opinion of the suitability of his holdings by the investment supervisor.

¶ 39 Upon receipt of this written complaint, the Respondent failed to escalate it to his supervisor or anyone else at BMO. Instead, he called LG and discussed the quality of the holdings and the fact that the client should not focus exclusively on the account value. The Respondent believed that he had addressed the client's concerns and accordingly did not escalate the complaint to anyone else at BMO.

¶ 40 The matter remained dormant until June 2017 when LG wrote a second complaint to the compliance staff at BMO.

¶ 41 The Respondent acknowledges that this conduct resulted in a contravention of his duty to report written customer complaints to the Dealer Member as required by Rule 3200.

THE PENALTY SOUGHT

¶ 42 Both Enforcement Staff and the Respondent urge this Hearing Panel to accept their joint recommendation that the following sanctions and costs set forth in the Settlement Agreement be accepted by this Hearing Panel:

- A. A global fine of \$90,000 inclusive of disgorgement;
- B. Costs of \$10,000 payable to IIROC.

¶ 43 The Settlement Agreement also discloses that the Respondent made a payment of some \$26,400 to compensate client SA and PM as a result of the settlement of their complaint to the Ombudsman.

¶ 44 It was also indicated that staff have been provided with information relative to certain financial circumstances which, but for their existence, would have resulted in staff requiring a higher penalty in order to resolve this matter.

DECISION

¶ 45 After a long and careful review of the Settlement Agreement and the submissions of counsel, the Panel has unanimously determined that it is prepared to accept this Settlement Agreement for the reasons set out below

FAILURE TO ESCALATE WRITTEN COMPLAINT

¶ 46 The Panel has no difficulty in accepting the portion of the Settlement Agreement which dealt with this issue and which conclusively established that the Respondent had contravened the provisions of Rule 3100 which require a registrant to report any written complaints to his Dealer Member within two business days when the registrant is the subject of any customer complaint in writing.

¶ 47 The provisions of the Settlement Agreement clearly catalogue the facts which establish this contravention as well as the Respondent's acknowledgement that he had committed the contravention.

RULE 42.1 AND 42.2 (CONFLICTS OF INTEREST)

¶ 48 As Enforcement Counsel for IIROC indicated in the course of her presentation and submissions to the Hearing Panel, this is a unique case and in many ways a case of first instance with respect to the alleged contravention of Rule 42 (conflicts of interest) of IIROC's Rules. There is no specific previous authority which either counsel could provide to the Hearing Panel which would provide observations or commentary about the meaning and/or interpretation to be applied to sections 42.1 and 42.2 of the Rules.

¶ 49 The fundamental difficulty that this Hearing Panel had in accepting this Settlement Agreement is that we were not persuaded on the facts and submissions placed before us in the Settlement Agreement that the Respondent had actually committed the contravention to which he has agreed, at least in the manner that it was primarily presented to the Panel in the course of the written and oral submissions at the hearing of this matter.

¶ 50 The facts as presented to us established that the Respondent engaged in the legitimate business of recommending the purchase of New Issues by a number of his clients after performing his own independent research on the individual securities he was recommending and which had been presented to him by his Dealer Member through a New Issues Update email alert which had been forwarded to him by BMO's syndication department.

¶ 51 The Settlement Agreement also reveals that the Respondent would often recommend to his clients that the New Issues should be sold after a relatively short period of time. Once the proceeds had been realized from these sales, the Respondent would recommend that the client purchase additional securities including New Issues and non-New Issues. The agreement describes these facts as engaging in the practice of "short term trading".

¶ 52 In our view, none of these events could be considered as "prohibited conduct" in and of themselves.

¶ 53 The Settlement Agreement also establishes that when New Issues are sold by a registrant, both the registrant and the Dealer Member who is part of the syndication will make additional fees as a result of monies being remitted to the Dealer Member by the issuer of the securities for the sale of such securities.

¶ 54 Once again, there is no suggestion that the receipt of such fees is anything other than an industry norm.

¶ 55 The Settlement Agreement and the submissions of counsel also assert however, that as the Respondent significantly increased the number of New Issues purchased and the occasions of short trading in relation to those securities on behalf of his clients (particularly in 2014) without any significant alteration in the size of the book of his business, he should have recognized by reason of this pattern of activity that he had an actual or potential material conflict of interest between his own interests of obtaining additional fees and the interests of the client. It is the position of Enforcement Counsel that at that point he should have taken the initiative and disclosed the conflict to his Dealer Member and the clients in an open and transparent manner and taken appropriate steps to address it in accordance with the provisions of Rule 42. The fact that he did not do so resulted, in the opinion of Enforcement Counsel, in a contravention of Rules 42.1 and 42.2.

¶ 56 The Settlement Agreement, however, also indicates that his Dealer Member identified and reviewed the activities in his book and the escalated purchase of New Issues and never identified to the registrant there was any issue or difficulty with his purchase recommendations or trading practices. In point of fact, it was the practice of the registrant if a client enquired, to advise his clients of the additional commissions he would receive on the purchase of New Issues notwithstanding that it was the policy of BMO that such disclosure was not required (since the prospectuses for the New Issues disclosed commissions paid to the Dealer Member).

¶ 57 In summary, the agreed facts set forth in the Settlement Agreement relate that the Respondent engaged in the legitimate business practices of recommending the purchase of New Issues to his clients and disposing of them on a relatively short term basis. There is no suggestion in the Settlement Agreement that the rationale for recommending the “sale” of these securities was based on anything other than the registrant’s legitimate assessment of the appropriateness of maintaining the New Issues for the clients’ portfolio.

¶ 58 While it is true that the registrant’s activities in recommending the acquisition of New Issues to his clients increased significantly in 2014 (which resulted in a corresponding increase in his commissions earned during that period), such activity was identified and reviewed by his Dealer Member, who found nothing wrong with his business practices to the extent that they never even raised the fact that they had reviewed his trading record during this period.

¶ 59 In her submissions, Enforcement counsel described this situation as a matter of “proportionality”. In her view, while there may have been no obligation on the registrant to do anything when his trades in New Issues were at a moderate level in relation to his AUM, once the volume increased significantly with no corresponding increase in his book, he should have recognized he was now involved in a material conflict of interest. He should then have taken appropriate steps to address it such as cutting back on or ceasing his trading in this area or advising his clients of the additional fees he would earn on these transactions or whatever else was necessary to remove the conflict of interest.

¶ 60 The problem with this position is that it was the policy of his Dealer Member that such disclosure of commissions on New Issues was not required so that if the Respondent had raised this issue with the Dealer Member as his sales of New Issues increased in 2014, he would have been instructed as to what the policy of BMO was. It should be noted, however, that the Respondent did in fact advise his clients of the particulars of his fees on the purchase of New Issues if they enquired.

¶ 61 In response to various questions by members of this panel in connection with this branch of Enforcement Counsel’s submissions to this Hearing Panel, counsel for IIROC was quite forthright in her responses that the conflict of interest only arose once the Respondent’s engagement in the purchase of New Issues (and fees earned by him) escalated to the level that it achieved during the year 2014. Enforcement Counsel candidly conceded that had his activities in this respect remained at a modest level, IIROC would not have intervened on the basis of the level of activity only. Counsel submitted that while there was no bright line test to be applied to this situation so that the registrant would be aware that the line had been crossed and that it was now time to advise his Dealer Member and the clients and make the required disclosure. In this case, however, the registrant should, in the view of Enforcement Counsel, have known that the line was there and had been crossed because of the registrant’s significant expansion of his New Issue purchases and short term trading during the year 2014.

¶ 62 This panel has struggled mightily with the position being advanced by Enforcement Counsel in support of the panel accepting the Settlement Agreement on the basis of this position as we are not persuaded that such a contravention has been made out under the terms of the Settlement Agreement, even though the Respondent has agreed that the contravention occurred.

¶ 63 In our view, in the context of the facts of this situation, there was nothing obvious or reasonably apparent to the registrant which would have triggered him to recognize that a conflict of interest had then arisen which required him to commence altering his Dealer Member’s policy on the purchase of New Issues and advise his clients that he was earning a commission from the Dealer Member’s remittance from the issuer on the purchase of the securities which in all other circumstances would not have been required. There simply is no Ouija Board available for a registrant in these circumstances to consult in order to determine when or if there is an appropriate time to deviate from the policies of his Dealer Member in this respect. The facts placed before us only lead to the reasonable conclusion that had he in these circumstances asked his Dealer Member for guidance, he would have been advised what the standing policy of BMO was, i.e., there was no requirement to disclose the commissions earned by him from the fees remitted to the Dealer Member by the issuer as the gross amount was disclosed in the prospectuses.

¶ 64 It is accordingly our view that on the facts of this case, the concept of proportionality (see para. 59 supra) which would require the Respondent to identify that a material conflict of interest had arisen which he was required to address in accordance with Rules 42.1 and 42.2 does not apply and does not give rise to a contravention of these Rules.

¶ 65 We have accordingly determined that we could not accept this Settlement Agreement on this basis alone.

RECOMMENDATIONS TO CLIENTS

¶ 66 The Settlement Agreement does however also contain an acknowledgement by the Respondent that the purchase of New Issues was influenced, in part, by the fact that he would receive a percentage of the commissions paid to BMO by the issuer. The facts also indicate that he performed independent research on the New Issues, the purchase of which he was recommending but this cannot insulate the Respondent from the consequences of making decisions and preferred recommendations to his clients to acquire securities based even in part on considerations of personal gain for the benefit of the registrant.

¶ 67 In our view, conduct of this nature imperils the fundamental trust which lies at the root of the relationship between a registrant and his client. The Respondent has been entrusted with the privilege and responsibility to provide objective and unimpaired advice and guidance to his/her clients and if that advice and judgment is tainted or in any way influenced by the advisor factoring the prospect of his/her own personal gain into the recommendations or decisions for clients then he/she contravenes a number of the basic Rules of IIROC including Rules 42.1 and 42.2.

THE PENALTY

¶ 68 The parties presented this Hearing Panel with an agreed upon sanction of \$90,000 which was set forth as a global figure without any demarcation with respect to which amount of this penalty was to be ascribed to each contravention. This Hearing Panel has accepted the Settlement Agreement which established that the Respondent has contravened the provisions of Rule 3100 – failure to report a written complaint from a customer to his Dealer Member (see paragraphs 46-47 supra) and Rules 42.1 and 42.2 – conflicts of interest (see paragraphs 66-67 supra).

¶ 69 On the basis of the decisions submitted to this Hearing Panel, it would appear that the general range for a contravention of Rule 3100 on facts similar to this one would lead to a fine of between \$5,000 and \$10,000. One can anticipate therefore that the remainder of the fine (\$80,000) would be ascribed to the alleged contravention of Rule 42 and an unspecified amount for disgorgement of some of the additional commissions obtained by the Respondent relating to the contravention.

¶ 70 In considering the appropriateness of the agreed upon penalty in relation to the facts and the nature of the contraventions of the Rules, we have reviewed and considered the IIROC Sanction Guidelines and the prior IIROC decisions brought forward by Enforcement Counsel (although because of the unique nature of this situation, there were no direct comparators).

¶ 71 While it is not often Panels of this nature encounter situations where a registrant acknowledges and admits his motivations were influenced in this manner, we are faced with such a situation in this case. The response to it must be configured with a view towards the significance of the misconduct and the necessity to deter both the Respondent and others who may be inclined to engage in similar practices.

¶ 72 On the facts of this case, the impugned motivation of the Respondent to engage in these practices occurred over a significant period of time and there were accordingly many occasions where his advice and recommendations to clients were coloured and affected by the prospect of personal gain.

¶ 73 The Hearing Panel considered that the Respondent has been in the industry for some 16 years and has no prior disciplinary record. He had also made a significant financial contribution (\$26,400) to resolve the complaints of clients SA and PM. The Settlement Agreement also made reference to “certain financial circumstances” the evidence of which had been provided to staff. Particulars of these circumstances were not

provided to the Hearing Panel but we accept the comments at face value and note that the Agreement indicates that but for these factors, Enforcement Staff would have insisted upon higher fines to resolve this matter.

¶ 74 It is also to be noted that in February 2017 the Respondent became registered with another IIROC Dealer Member and has been working under close supervision as a term of his registration for approximately ten months as a result of the initiation of this proceeding so that the parties are agreed that no further period of close supervision is required.

¶ 75 Like the Hearing Panel in *Re King*, 2013 IIROC 11, this Panel had some difficulty in assessing the appropriateness of a penalty which has been stated in global terms and which encompassed two contraventions of different Rules and an unspecified amount for disgorgement. This made it difficult to apply the traditional comparative analysis of the appropriateness of the penalty to the contraventions in this case.

¶ 76 After considering all of the circumstances of this case however, it is our view that the penalties agreed to do send a strong message that conduct of this nature, if proven, will result in significant consequences to the registrant.

¶ 77 Bearing in mind the parameters within which this Hearing Panel is to review a Settlement Agreement of this nature and while there were no cases presented to us as comparable for the amount of the penalty agreed to, in light of the fact that the penalties are sufficient to respond to the nature of the contravention and were agreed to by the parties after full consideration by experienced and well-regarded counsel for both parties, this Hearing Panel has determined to accept the sanctions and costs set forth in the terms of settlement as being within a reasonable range of appropriateness for the contraventions.

CONCLUSION

¶ 78 For all of the above reasons, this Hearing Panel has determined that in the particular circumstances of this case, it is prepared to accept the Settlement Agreement.

¶ 79 This was a case of first instance and in many respects a difficult one for this panel bearing in mind the role of a Hearing Panel and the applicable standard of review in a settlement hearing. We wish to thank both Counsel for their professional and comprehensive presentations in this matter as well as their considered responses to various questions raised by the panel members during the hearings.

DATED at Toronto this 4th day of January, 2018.

Edward T. McDermott

Deborah Archer

Ron Smith

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada (“IIROC”) will issue a Notice of Motion to announce that it will hold a settlement hearing to consider whether, pursuant to Section 8215 of the Consolidated Enforcement, Examination and Approval Rules of IIROC, a hearing panel (“Hearing Panel”) should accept the settlement agreement (“Settlement Agreement”) entered into between the staff of IIROC (“Staff”) and Graeme Robert Kirkland (“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.

A. Overview

4. The Respondent made numerous recommendations to several of his clients to purchase new issues and/or initial public offerings of securities (collectively “New Issues”).

5. When the Respondent purchased New Issues for his clients he earned a percentage of commissions paid to BMO Nesbitt Burns Inc. (“BMO” or the “Dealer Member”) by the issuers of the securities that roughly doubled his earnings and thereby resulted in a significant additional financial benefit to him.

6. The commissions paid to him by BMO influenced his decision, at least in part, to recommend New Issues to his clients. He was also influenced by his own research. The New Issues were brought to the Respondent’s attention via “New Issue Updates” email alerts sent to him by BMO’s Syndication Department.

7. In a number of cases, the New Issues did not perform well over a short time frame and the Respondent recommended that these clients subsequently sell the New Issues and there was in some cases no profit or gain for his clients.

8. The Respondent did not take reasonable steps to identify, address, and avoid the potential material conflict of interest that resulted from his recommendations and purchases of New Issues.

9. In 2015 the Respondent failed to escalate a client’s written complaint to his Dealer Member.

B. Registration History

10. From 2001 to 2002 the Respondent was a registrant with Investors Group and then was not registered in the securities industry from 2002 until 2007. According to the Respondent, he was working as a marketing contractor for RBC Dominion Securities advisors during this time. He was registered with Scotia Capital Inc. from 2007 to 2008 and worked for three months at RBC Dominion Securities Inc. from late 2008 to February 2009.

11. He was a Registered Representative with BMO from March 2009 to June 2016. As of February 2017, the Respondent has been registered with another IROC Dealer Member, working under close supervision as a term of his registration due to this proceeding.

C. New Issues Commissions and Short Term Investing

12. The Respondent’s earnings were based, in part, on the use of a fee based structure for most client accounts (“Fee Based Accounts”).

13. In addition the Respondent recommended and purchased numerous New Issues in several clients’ accounts and thereby received an additional financial benefit in the form of commissions on these purchases.

14. BMO was part of the syndicate for all of the New Issues purchased by the Respondent and shared in the financial benefit in the form of fees and commissions received from the issuers.

15. The Respondent admits that the additional commissions influenced his decision, at least in part, to recommend New Issues to his clients. He was also influenced by his own research.

16. However, in a number of cases the Respondent recommended that his clients sell the New Issues on a short term basis, and used the proceeds to purchase additional securities, including New Issues. The Respondent recommended short term trading in non-New Issue securities as well.

17. In 2014 New Issues accounted for approximately half of the purchases across his book of business. In some cases, there was ultimately a limited or no gain for his clients from this trading.

18. The Respondent also acknowledges to Staff that a result of his active investment strategy it meant that

he routinely traded much more than average resulting in a high turnover in his clients' accounts.

D. Clients SA & PM

- 19. Among the clients for whom the Respondent purchased New Issues were SA and PM, a married couple.
- 20. The Respondent opened a total of six Fee Based Accounts for SA and PM in March and April 2014. SA and PM each opened an RRSP account and transferred approximately \$100,000.00 and \$85,000.00 into each respectively; a spousal RRSP account and a TFSA account.
- 21. Prior to opening these accounts with the Respondent, these clients had only invested in Guaranteed Investment Certificates and in mutual funds. SA and PM's new client application forms indicated that their investment time horizon was long term, in excess of 10 years.
- 22. SA and PM made no withdrawals from or additional contributions to any of their six accounts during the 11 month period from March 2014 to February 2015 that they were the Respondent's clients.

TFSA Accounts Were Profitable

- 23. SA and PM indicated to the Respondent that they wanted a "proactive" account management approach in the TFSA Accounts.
- 24. No New Issues were purchased in the TFSA accounts or in SA's spousal RRSP account.
- 25. In February 2015 SA and PM made a complaint to BMO and subsequently moved their accounts, in kind, out of BMO. At the time the accounts were moved out, the TFSA accounts and SA's spousal RRSP account had increased, on paper, in value by approximately \$3,800 or 6%, over the 11 month period.

RRSP Accounts-Purchases of New Issues

- 26. The Respondent did recommend purchases of several New Issues in the RRSP accounts and PM's spousal RRSP account (the "RRSP Accounts").
- 27. Over the 11 month period the longest period of time that a New Issue was held in the RRSP Accounts was for approximately five months.
- 28. The Respondent did not inform SA and PM that he would be receiving additional commissions on purchases of New Issues. BMO's policy was that disclosure of commissions on New Issues was not required. SA and PM received copies of a prospectus for all New Issue purchases. The Prospectuses disclosed commissions paid to his Dealer Member. The Respondent disclosed the commissions on New Issues to clients who asked. SA and PM did not ask.
- 29. During the 11 month period, New Issues represented approximately half of the Respondent's recommended purchases, and approximately three quarters of the dollar value of all purchases, in the RRSP Accounts.
- 30. A summary of the trading activity in the RRSP Accounts is as follows:

Account	Opening Balance	Closing Balance	No. of All Purchases	No. of Purchases of New Issues	Gross Commissions Applied to the Respondent's Grid for New Issues
1	\$85,300	\$79,600	18	12	\$3,700
2	\$100,300	\$84,400	20	10	\$3,500
3	\$31,700	\$20,400	8	2	\$705
Total	\$217,400	\$184,500	46	24	\$7905

					[approximated total net commissions of \$3180 paid by BMO to the Respondent]
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31. By the end of February 2015 the RRSP Accounts had sustained a loss in value of approximately \$32,900, or 15%, of which approximately \$23,000 were realized losses in New Issues. Approximately \$15,000.00 of this \$23,000.00 loss resulted from losses from the Energy Leaders Plus Income Fund, a New Issue, which suffered a significant decline due to the drastic decreases in oil prices in late 2014.
32. Over the same time period BMO earned approximately \$15,810 in total fees and commissions from these New Issue purchases of which \$3180 was net commissions paid to the Respondent.
33. By the end of the 11 month period the value of purchases made by the Respondent was approximately \$430,000 or roughly twice the overall value of the opening balance of the RRSP Accounts. Of these purchases, approximately \$302,900 worth were purchases of New Issues.
34. BMO investigated the complaint made by SA and PM but did not resolve it. SA and PM made a complaint to the Ombudsman and BMO ultimately settled this complaint with SA and PM.
35. The Respondent contributed approximately \$26,400 to compensate these clients as a result of the settlement of the Ombudsman complaint. The Respondent acknowledges that but for this payment the monetary penalty herein would have been higher.

E. Respondent’s New Issues Purchases 2013 to 2014

36. In addition to SA and PM, from January 2013 to December 2014, the Respondent made several purchases of New Issues for at least 125, or roughly 70%, of his other clients’ accounts.

Commissions Earned from New Issues Purchases

37. The Respondent earned a total of approximately \$477,000 in net commissions in 2013 and 2014 as a result of New Issues purchases alone. BMO earned fees and commissions on these same purchases of approximately \$1,908,900.00.

Increase in New Issues Purchases in 2014

38. Although his AUM remained virtually the same as in 2013, in 2014 the Respondent more than doubled the dollar value of New Issues purchases, as well as the percentage of New Issues purchases, relative to his AUM.
39. The Respondent roughly tripled his net commissions from New Issues purchases in 2014 compared with 2013.
40. For example, in the case of five specific New Issues purchased between March and December 2014, the Respondent had earned net commissions of over \$200,000; over \$90,000 of which was earned on one day in March 2014 when two New Issues settled on the same day.
41. Further, the Respondent had sold at least half and in some cases as much as 98% of these New Issues by the end of 2014. For four of the five New Issues at least 45%, and in the case of one of the New Issues 100% of the clients sold below the purchase price.
42. In January 2015, the firm’s compliance staff raised an internal inquiry as to why the Respondent’s “...commissions [were] double what they should be.” The inquiry was responded to by another compliance staff member, who confirmed that it was as a result of New Issues commissions. This inquiry was not made directly to the Respondent.

F. Conflicts of Interest

43. The Respondent admits he placed himself in a potential material conflict of interest when he engaged in

numerous purchases of New Issues influenced, at least in part, by the fact that he received a percentage of the commissions paid to BMO by the issuer on such purchases.

44. As a result, while the trading in New Issues for PM and SA, and other clients, was generally unprofitable for them, there was a substantial financial benefit to the Respondent.
45. The Respondent however, failed to identify, address, and avoid the potential material conflict of interest throughout the relevant time. Though BMO raised concerns about the Respondent's turn (revenue on assets) and use of New Issues, there is no evidence that the conflict of interest was ever identified by BMO or brought to the Respondent's attention.
46. In late 2015 the Respondent decided to substantially reduce his New Issues usage and reduce the amount of turn in his book of business.

G. Failure to Escalate Client LG's Written Complaint

47. The Respondent opened several accounts for his client LG in 2012 when LG was approximately 67 years of age and retired.
48. In 2015 the Respondent's client LG stated at that time that he was concerned about losses in his account. In April 2015 LG sent a written complaint in an email to the Respondent entitled "Request for an urgent review of my account".
49. In his complaint LG expressed concerns including about the "dismal performance" of his accounts resulting in a decrease in their value, which was causing him "considerable alarm".
50. LG concluded the email with a request to meet with the Respondent and inquired about "I am wondering about setting a new direction and getting a second opinion of the suitability of [his] holdings by the investment supervisor" at the firm; and "I now want your side of the story and I want to make a plan to both stop the slide and to get out of this mess."
51. The Respondent did not escalate the written complaint to his supervisor or anyone else at BMO.
52. Instead the Respondent called LG and discussed the quality of the holdings in his accounts and advised LG that he should not focus on the account value alone. LG did not contact anyone else at BMO at the time.
53. According to the Respondent, he felt that he had addressed the client's concerns. By not escalating LG's written complaint of April 2015 to BMO compliance, no one else at BMO addressed the concerns at that time.
54. This issue came to Staff's attention in June 2017 when LG wrote a second complaint addressed directly to BMO compliance staff, in which he enclosed his April 2015 complaint.
55. The Respondent acknowledges that but for certain financial circumstances, evidence of which has been provided to Staff, the fine agreed to by Staff would have been higher.
56. The Respondent further acknowledges that but for the fact that he has been under close supervision for over seven months at his current Dealer Member, a period of close supervision would have been included as a further sanction.

PART IV – CONTRAVENTIONS

57. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:
 - a) From January 2013 to February 2015 the Respondent failed to consider and to address a potential material conflict of interest between himself and his clients that resulted from his recommendations and purchases of securities in new issues that were offered for sale by his Dealer Member contrary to Dealer Member Rule 42.1 and 42.2.

- b) In April 2015 the Respondent failed to escalate a client's written complaint to his Dealer Member, contrary to Dealer Member Rule 3100.

PART V – TERMS OF SETTLEMENT

58. The Respondent agrees to the following sanctions and costs:
- a) A global fine of \$90,000 inclusive of disgorgement.
59. The Respondent agrees to pay costs to IIROC in the sum of \$10,000.
60. 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

61. 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.
62. 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

63. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
64. 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.
65. 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.
66. 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.
67. 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.
68. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
69. 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.
70. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf, will make a public statement inconsistent with this Settlement Agreement.
71. 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

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

DATED this “18th” day of “October”, 2017.

“Witness”

Witness

“Graeme Robert Kirkland”

Graeme Robert Kirkland

“Eric Mucchi”

Witness

“Natalija Popovic”

Natalija Popovic / Kathryn Andrews

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

The Settlement Agreement is hereby accepted this “4th” day of “January”, 2018 by the following Hearing Panel:

Per: “Edward McDermott”

Panel Chair

Per: “Debbie Archer”

Panel Member

Per: “Ron Smith”

Panel Member

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