

# Re Hayes

IN THE MATTER OF:

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

**and**

**The By-Laws of the Investment Dealers Association of Canada (IDA)**

**and**

**David Hayes**

2014 IIROC 31

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

Heard: June 17, 2014 in Toronto, Ontario

Decision: June 25, 2014

**Hearing Panel:**

Patrick T. Galligan, Q.C., Chair, Peter Bailey and Ted Norris

**Appearances:**

Kathryn Andrews, Enforcement Counsel

Laura Paglia, Counsel for the Respondent

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## REASONS FOR DECISION

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¶ 1 The Staff of Investment Industry Regulatory Organization of Canada (“IIROC”) and the Respondent entered into a Settlement Agreement which they had negotiated pursuant to Rule 20.35 of IIROC Dealer Member Rules. They submitted the Settlement Agreement to this Hearing Panel pursuant to Rule 15 of the Rules of Practice for approval or rejection. After considering the material filed and the submissions made by counsel, we issued an order accepting the Settlement Agreement. These are our reasons for making that order.

### THE CONTRAVENTIONS

¶ 2 The Respondent admits to the following contraventions of IIROC Dealer Member Rules, Guidelines, IDA By-Laws, Regulations or Policies:

Count 1: From 2003 to November 2010, the Respondent failed to know his client EM, contrary to IIROC Dealer Member Rule 1300.1(a) (IDA Regulation 1300.1(a) prior to June 1, 2008.)

Count 2: From February 2003 to November 2010, the Respondent accepted trading instructions from client PM for client EM’s RRSP account, without obtaining authorization from EM to do so, contrary to IIROC Dealer Member Rule 200.1(i)3 (IDA Regulation 200.1(i)3 prior to June 1, 2008.)

### TERMS OF SETTLEMENT

¶ 3 Staff and the Respondent agree to the following terms of settlement:

- a) Payment of a fine by Hayes in the amount of \$20,000 for count 1;
- b) Payment of a fine by Hayes in the amount of \$5,000 for count 2 and;

- c) To re-write the CPH examination within 12 months of the date of acceptance of this Settlement Agreement.

¶ 4 The Respondent agrees to pay costs to IIROC in the sum of \$3,000.

### **THE CIRCUMSTANCES**

¶ 5 The circumstances are set out, in detail, in the Statement of Facts contained in the Settlement Agreement. It is attached as Appendix “A” to these reasons for decision. The following is a brief summary of them.

¶ 6 Failure to know client: From 2003 until November 2010 the Respondent never met or talked with his client EM. All discussions respecting the operation of the account were held with PM (also a client) who was the husband of EM.

¶ 7 Trading instructions: PM provided trading instructions on EM’s account to the Respondent. The Respondent did not have a written trading authorization from EM permitting her husband to give trading instructions. Nor did he speak to EM to ascertain whether she did authorize her husband to give trading instructions on her behalf.

### **SERIOUSNESS OF THE CONTRAVENTIONS**

¶ 8 A registrant owes a high duty to his/her client to ensure that the client knows what is being done in the client’s account. It is easy to assume that one spouse speaks with the authority of the other. It is a dangerous assumption to make because it is not always a correct one. A registrant stands as a gatekeeper to protect a client from unauthorized use of his/her financial assets. The failure of the Respondent to ascertain from his client that she authorized her husband’s dealing with her account is serious and must be recognized as such.

### **CIRCUMSTANCES OF MITIGATION**

¶ 9 In the determination of an appropriate penalty, it is always necessary to consider circumstances of mitigation. The circumstances of mitigation which we take into account in this case are:

- (1) The Respondent has no disciplinary history;
- (2) The Respondent cooperated fully with Staff during its investigation. That demonstrates that he has acknowledged his contraventions, accepted his responsibilities and has shown remorse;
- (3) The Respondent has been reprimanded and fined by his employer.

### **DUTY OF A HEARING PANEL UPON A SETTLEMENT HEARING**

¶ 10 We adopt what was said by the Hearing Panel in *re Portfolio Strategies Securities*, 2012 IIROC 36:

9. 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. We cite from the recent decision of the Hearing Panel in *Re CIBC World Markets Inc.*, [2011] IIROC No. 38:

13 Finally, hearing panels will not lightly interfere with a negotiated settlement. As was said in *Re Milewski*, [1999] IDACD No. 17,

... 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.

14 Or, as put by Winkler J. (albeit in another context) in *Gilbert v. CIBC*, [2004] O.J. 4260:

There is a presumption of fairness when a proposed class settlement negotiated at arms length ... is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

The test to be applied is whether the settlement is fair and reasonable ... This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition, necessitates give and take.

15 In our view, the settlement, negotiated as it was by the parties assisted by capable counsel, does not clearly fall “outside a range of appropriateness” and it should therefore be, and was, accepted by the panel.

¶ 11 We share the opinion expressed by the hearing panel in *Re Vorstadt*, [2012] IIROC that the settlement process is an important one which should be “encouraged and supported”.

### **GUIDELINES AND OTHER DECISIONS**

¶ 12 In determining whether a settlement is a reasonable one, a hearing panel is entitled to look at regulatory guidelines and decisions in other cases. Guidelines are not binding upon a hearing panel and cannot derogate from its responsibility to decide what may be an appropriate penalty in a given case. However, they are useful in that they show what penalties members of the industry think are generally appropriate. In this case the agreed upon fines fall well within the Guidelines for Failure to Know Your Client and Unauthorized Third Party Instructions.

¶ 13 Decisions in other cases can often be of some assistance by helping to indicate what might be a reasonable range of monetary penalties. Counsel have referred us to a number of cases, the facts of which bear some resemblance to this case. They are: *Re Ast*, 2012 IIROC 38; *Re Kasten-Brown*, 2011 IIROC 73; *Re Bereskin*, 2010 IIROC 37; *Re Milewski*, [1999] IDACD No. 17; *Re Teng*, 2012 IIROC 51; *Re Campbell*, [1998] IDACD No. 23. Because no two cases are ever exactly the same we have decided not to examine any of these helpful cases in detail. When considered as a whole, however, they demonstrate clearly that the settlement, reached by the parties in this case, falls within a reasonable range when compared with penalties imposed in other not dissimilar cases.

### **IMPACT OF THE PENALTY**

¶ 14 Monetary penalties are necessary to act as specific and general deterrence. The penalty, composed of fines of \$20,000 and \$5,000, and costs of \$3,000, is a significant penalty to the Respondent. The penalty is sufficient to act as a specific deterrent to this Respondent and should be sufficient to alert all Members that failure to know one’s client and failure to ensure that third party instructions are authorized by the client will attract significant consequences.

### **DECISION**

¶ 15 After the hearing, we considered the circumstances of this case and reached the conclusion that the settlement was a reasonable one. Therefore, we accepted it.

**DATED** this 25th day of June 2014.

Patrick T. Galligan, Chair

Peter A. Bailey, Industry Representative

Ted P.E. Norris, Industry representative

## APPENDIX 'A'

### III. STATEMENT OF FACTS

#### (i) Acknowledgement

10. Staff and the Respondent 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

11. EM and her husband PM became clients of CIBC World Markets Inc. ("CIBC WM") in 1995. In early 2003 the Respondent became the primary advisor for EM's RRSP account and for PM's RRSP account as well. The Respondent did not speak to EM until she complained for the first time in August 2010 and did not meet EM until November 2010.
12. The Respondent dealt solely with PM regarding EM's RRSP account, however, the Respondent did not obtain written or verbal authorization from EM to accept trading instructions from PM for her RRSP account. The Respondent did not note the lack of written trading authorization for PM on file.
13. At PM's request, the Respondent arranged for an update to EM's RRSP account in June 2009 yet he did not discuss this update with EM. EM stated that she learned of the update in the summer of 2010 at the same time that she found out that the Respondent had become her advisor.
14. Thirty nine withdrawals totaling approximately \$342,000 gross were made from EM's RRSP account between June 2008 and August 2010. The Respondent did not ask EM any questions about the withdrawals. The Respondent received Letters of Authorization ("LOAs") for the withdrawals, which appeared to be signed by EM.
15. EM stated that her husband had informed her about one withdrawal which was made in March 2010, but that she was not aware of the other withdrawals until the summer of 2010. EM stated that she discovered in the summer of 2010 that her signature had been signed by someone else on the LOAs.

##### Background

16. At all material times the Respondent was a Registered Representative ("RR") at a CIBC WM branch in Mississauga, Ontario.

##### EM's RRSP account

17. EM and her husband PM originally opened their own individual RRSP accounts with CIBC Wood Gundy in early 1995 with a different advisor. The Respondent became involved with their accounts in 1998 and took over operation of both EM and PM's RRSP accounts in early 2003 as the primary advisor. At this point the Respondent had never met EM nor had he ever spoken to her. All of the Respondent's dealings for both RRSP accounts were with PM.
18. EM's new account application form ("NAAF") dated April 30, 1995 for her RRSP account indicates that her investment objectives were 100% long term and that her risk tolerance was 100% medium.
19. The Respondent did not notice that there was no trading authorization on file until EM first complained in August 2010.
20. At no point, either before or after taking over the operation of the account, did the Respondent adequately review EM's RRSP account with her, until he met with her in November 2010.
21. The Respondent did not obtain a written trading authorization for EM's RRSP account. Nor did he obtain verbal consent from EM to speak to her husband to obtain instructions for the transactions in her RRSP account. PM provided trading instructions for EM's RRSP account from the time the Respondent took over the account.

## **June 2009 update**

22. PM wanted EM's NAAF for her RRSP account to be updated in early 2009 so that some short term trading could be carried out on PM's instructions. The Respondent says that he discussed the changes with PM. No effort was made by the Respondent to discuss the changes with EM. The updated NAAF (the "June 2009 update") indicated that EM's investment objectives were now 75% long term and 25% short term. Her risk objectives were updated to indicate 90% medium risk and 10% high risk.
23. The Respondent received the June 2009 update which appeared signed by EM by mail at that time. EM stated that she was not aware of the June 2009 update until approximately one year later. EM stated that it was not her signature on the June 2009 update.

## **Withdrawals**

24. From June 2008 to August 2010, there were 39 withdrawals made from EM's RRSP account. These withdrawals totaled approximately \$342,000 gross. Most of the withdrawals were in the amount of \$5,000 gross per withdrawal. Seven withdrawals were made from February 1, 2010 until May 31, 2010 which ranged from amounts of \$15,000 to \$30,000 gross per withdrawal. The total amount withdrawn during this time period was approximately \$172,000 gross.
25. The Respondent received signed LOAs to effect the withdrawals but did not ask EM any questions about any of the withdrawals from her RRSP account.
26. Five thousand dollars was withdrawn by cheque from EM's RRSP account on June 26, 2008 and fifteen thousand dollars was withdrawn by cheque on February 9, 2010 from EM's RRSP account. The Respondent received a letter dated February 9, 2010 signed by PM and which appeared to be signed by EM, advising that their son was authorized to pick up cheques from the redemption of their RRSP accounts. Thirty seven of the withdrawals were wired into PM and EM's joint bank accounts.
27. EM stated that she only discovered the full extent and nature of the withdrawals in the summer of 2010. She stated that other than one withdrawal in March 2010 which she was aware of from an earlier discussion with her husband, she was not aware of the other withdrawals nor did she sign the LOAs.
28. The value of EM's RRSP account declined from \$416,000 in June 2008 to \$62,934 as of August 31, 2010. There were 39 withdrawals totaling \$342,000 during this time frame as described in paragraph 26 above.
29. PM also withdrew sums of money from his RRSP account, in the amount of \$383,300 from June 2008 to September 2010.
30. The Respondent and PM knew that PM and EM's family automotive business was in financial difficulty prior to June 2008. EM stated that in 2008 her husband made her aware of financial difficulties but told her not to worry as things were fine. Prior to that she had advised him to downsize. According to the Respondent, PM wanted to use funds from his own RRSP account and EM's RRSP account to help their family's business. EM was a 50% shareholder in the family's business and was also a President, a Director and Secretary. EM stated that she has not been actively involved in the family business for some time.
31. CIBC WM sent trade confirmations and monthly statements to EM at her home address. CIBC WM also sent T4 RSP's to EM at her home address for the years in question. EM stated that it was her husband's practice to collect the mail. She stated she did not review every statement as she left the investments to her husband as long as he was discussing them with her.
32. EM's RRSP account was conducted in a manner in keeping with the stated investment objectives and risk tolerances for the account.

## **November 2010 NAAF update**

33. EM called the Respondent in August 2010 to complain about the large number of withdrawals which she

stated that she had just discovered. In November 2010, the Respondent went to EM's house and met her for the first time. He reviewed and completed a NAAF update with her where EM confirmed that her investment objectives were 100% long term and that her risk tolerance was 100% medium risk. EM signed the November 8, 2010 NAAF update.

### **Mitigating Factors**

34. The Respondent was reprimanded by CIBC WM and paid a fine of \$10,000 to his Member firm.
35. The Respondent has no previous disciplinary history with IIROC.
36. The Respondent co-operated with the investigation and prosecution of this matter.

## **SETTLEMENT AGREEMENT**

### **I. INTRODUCTION**

1. IIROC Enforcement Staff and the Respondent Mr. David Hayes ("Hayes" or the "Respondent"), 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 Hayes.
3. On June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment Dealers Association of Canada 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 Respondent consents to be subject to the jurisdiction of IIROC.
5. The Investigation discloses matters for which the Respondent 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 Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
7. The Respondent admits to the following contraventions of IIROC Dealer Member Rules, Guidelines, IDA By-Laws, Regulations or Policies:

Count 1: From 2003 to November 2010, the Respondent failed to know his client EM, contrary to IIROC Dealer Member Rule 1300.1 (a) (IDA Regulation 1300.1(a) prior to June 1, 2008.)

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8. Staff and the Respondent agree to the following terms of settlement:
  - a) payment of a fine by Hayes in the amount of \$20,000 for count 1,
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  - c) to re-write the CPH examination within 12 months of the date of acceptance of this Settlement Agreement.
9. The Respondent agrees to pay costs to IIROC in the sum of \$3,000.

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### **November 2010 NAAF update**

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### **Mitigating Factors**

34. The Respondent was reprimanded by CIBC WM and paid a fine of \$10,000 to his Member firm.

35. The Respondent has no previous disciplinary history with IIROC.
36. The Respondent co-operated with the investigation and prosecution of this matter.

#### **IV. TERMS OF SETTLEMENT**

37. 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.
38. The Settlement Agreement is subject to acceptance by the Hearing Panel.
39. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
40. 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.
41. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
42. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.
43. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
44. Staff and the Respondent 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.
45. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
46. 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.

**AGREED TO** by the Respondent at the City of Toronto, in the Province of Ontario this 28th day of April, 2014.

**"WITNESS"**

**"DAVID HAYES"**

**AGREED TO** by Staff at the City of Toronto in the Province of Ontario, this 7th day of May, 2014.

**"WITNESS"**

**"KATHRYN ANDREWS"**

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

**ACCEPTED** at the City of Toronto in the Province of Ontario, this 17th day of June, 2014, by the following  
Hearing Panel:

Per: "Patrick Galligan"

Panel Chair

Per: "Ted Norris"

Panel Member

Per: "Peter Bailey"

Panel Member