Re Heakes

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

William Alan Heakes

2019 IIROC 09

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

Settlement Hearing: March 20, 2019 in Toronto, Ontario
Decision: April 2, 2019

Hearing Panel:
Martin L. Friedland, C.C., Q.C. (Chair), William Donegan, Ron Smith
Appearance:
Natalija Popovic, Senior Enforcement Counsel for IIROC
Michael Byers, Counsel for the Respondent

REASONS FOR ACCEPTANCE OF SETTLEMENT AGREEMENT

Background

¶ 1 On March 5, 2019, a Notice of Application for a Settlement Hearing was issued by the Investment Industry Regulatory Organization of Canada ("IIROC"), stating that a hearing would be held on March 20, 2019 to consider whether to accept a Settlement Agreement entered into on March 1, 2019 between Staff of IIROC ("Staff") and William Alan Heakes (the "Respondent") pursuant to Section 8428 of the Consolidated Enforcement, Examination and Approval Rules of IIROC. A copy of the Settlement Agreement is attached to these reasons.

¶ 2 The Settlement Agreement addressed allegations that the Respondent violated IIROC Rule 1300.1(q) by making unsuitable recommendations in respect of three client accounts. Section 1300.1(q) provides:

> "Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such client based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level."

¶ 3 The Respondent was a Registered Representative at Mackie Research Capital Corporation in Mississauga Ontario from 2000 until he took a leave of absence in July 2015. The Respondent is currently not

an IIROC registrant.

¶ 4 At the conclusion of the hearing on March 20, 2019, the Panel accepted the Settlement Agreement. These are our reasons for accepting the Settlement Agreement.

The Settlement Agreement

¶ 5 The Respondent admitted in paragraph 28 of the Settlement Agreement that: "Between January 2011 and July 2015, [he] failed to ensure that recommendations made for certain clients were suitable, contrary to Dealer Member Rule 1300.1(q)."

¶ 6 In paragraph 29 of the Settlement Agreement, the Respondent agreed to the following sanctions and costs:

a) a fine of $20,000;

b) suspension of approval in any capacity for two years from the date of the Settlement Agreement;

c) a requirement to re-write and pass the Conduct and Practices Handbook course within three months of re-registration; and

d) costs of $2,500.

Facts

¶ 7 The facts are set out in some detail in paragraphs 6 to 20 of the Settlement Agreement. Three client accounts were involved. They consisted of the joint account of clients WC and RC, a married couple in their early 60s during the relevant time, both retired; the account of CH, in her early 60s; and the estate of CH's late father, JP. The estate account was for the benefit of, and to provide income for, CH's sibling who lives with a disability.

¶ 8 The clients' profiles for all three accounts, the Respondent admits in the Settlement Agreement, "reflect predominantly low risk tolerances." Nevertheless, about 80% of all three accounts were concentrated in a small number (three or four) specific securities, none of which could be considered low risk. As a result, during the relevant period, the clients sustained substantial losses in total of more than $800,000. By July 2015, the clients' approximate dollar and percentage loss relative to their January 2011 account value were: WC and RC – $238,000 (59%); CH – $295,000 (59%); and Estate of JP – $269,000 (52%). In contrast, during the relevant period, the TSX Compositive Index declined less than 2%.

¶ 9 In July 2015, the clients collectively filed a complaint with the firm in respect of their accounts.

Acceptance of Settlement Agreement

¶ 10 The conduct is serious and would normally have warranted a significantly larger fine than $20,000. IIROC Staff have, however, taken into account the fact that during the relevant time the Respondent was experiencing challenging personal circumstances due to a family illness. Moreover, the Respondent presented evidence of his present financial circumstances and health concerns, which were also taken into account by IIROC Staff. The Respondent acknowledges that but for these present health and financial circumstances the fine agreed to by Staff would have been higher. The IIROC Sanction Guidelines specifically provide that inability to pay is a relevant consideration in determining the appropriate financial sanction to be imposed on a respondent.

¶ 11 The Respondent has no discipline history and there is no evidence that the misconduct was intentional, willfully blind, or reckless with respect to regulatory requirements.

¶ 12 The respondent also cooperated with Staff and accepted responsibility for his conduct by entering into the Settlement Agreement. This also reduced the time, effort, and cost that otherwise would have been expended by IIROC if the allegations had been contested.

¶ 13 It should also be noted that the Respondent's firm compensated the clients in excess of one half of their losses.

¶ 14 The Settlement Agreement easily meets the test consistently used for acceptance of settlement agreements by hearing panels for IIROC, the Mutual Fund Dealers Association and the Ontario Securities Commission. That test is whether the penalty falls 'within a reasonable range of appropriateness."

¶ 15 These decisions stem from the leading decision of *Re Milewski* [1999] IDACD. No. 17, which stated:

> "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."

¶ 16 The Ontario Securities Commission recently stated in Re Cheng 2018 LNONOSC 314 at paragraph 8:

> "The Commission is only to deny approval of a settlement agreement in exceptional circumstances. This deference is explained, in part, by the high desirability of encouraging settlement agreements between Staff and respondents, and promoting certainty in the industry. Of course, the Commission is fully entitled to reject a settlement agreement which falls outside the range of reasonable outcomes available in the circumstances and thus, is contrary to the public interest. The Commission is to consider the terms of the settlement agreement in their totality, rather than considering each term in isolation."

¶ 17 Settlements can be important and useful in achieving outcomes which further the goals of the securities regulatory context. The British Columbia Court of Appeal stated with respect to a settlement by the B.C. Securities Commission in *B.C. Securities Commission v. Seifert* [2007] B.C.J. No. 2186 at paragraph 49 (B.C.C.A.):

> "Settlements assist the Commission to ensure that its overriding objective, the protection of the public, is met. Settlements proscribe activities that are harmful to the public. In so doing, they are effective in accomplishing the purposes of the statute. They provide means of reaching a flexible remedy that is tailored to address the interests of both the Commission and the person under investigation."

¶ 18 Hearing Panels should respect settlements worked out by the parties. A Panel does not know what led to a settlement, what was given up by one party or the other in the course of the negotiations, and what interest each party has in agreeing to resolve the matter. The Panel cannot go beyond the Settlement Agreement. There are often facts that play a role in the settlement which are not set out in the Settlement Agreement or brought to the attention of the Panel. Respecting settlements is particularly desirable in cases, such as this one, where experienced counsel were involved and where, we were told, there were "extensive negotiations."

¶ 19 Although the monetary penalty in the present case might be lower than usual, the two-year suspension from the date of the acceptance of the Settlement Agreement appears to be significantly higher than normal in the circumstances. The combination of the fine, suspension period, and requirement to re-write and pass the Conduct and Practices Handbook course provides a significant measure of deterrence of the improper conduct to the Respondent and others in the industry.

¶ 20 The penalties and costs in the present case are not out-of-line with those in comparable cases involving

Rule 1300.1(q), cited to the Panel by Counsel. See *Re Husebye* 2016 LNIIROC 05 and 21; *Re Chiu* 2013 IIROC 55; *Re Carinci* 2013 IIROC 49; *Re Birkeland* 2015 IIROC 14; and *Re Kilgannon* 2013 IIROC 32.

¶ 21 The penalty and the costs agreed to in this case clearly fall within "a reasonable range of appropriateness."

¶ 22 For the above reasons, the Panel accepted the Settlement Agreement.

Dated at Toronto this 2nd day of April, 2019.

Martin L. Friedland, C.C., Q.C., Chair

William Donegan, Panel Member

Ron Smith, Panel Member

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 William Alan Heakes ("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. Between January 2011 and July 2015 ("the Relevant Period"), the Respondent made unsuitable recommendations in respect of three client accounts.

Registration History

5. The Respondent was a Registered Representative ("RR") at Mackie Research Capital Corporation from 2000 until he took a leave of absence in July 2015. The Respondent is currently not an IIROC registrant.

Clients' Profiles Reflect Predominantly Low Risk Tolerances

(i) WC & RC

6. In October 2010, the Respondent opened a joint account for his clients WC & RC, a married couple, when they were 62 and 59 years of age respectively and both retired.

7. The Respondent had provided these clients with an initial investment plan that reflected a

diversified conservative portfolio with predominantly low risk investments, consistent with their objective of preserving capital.

8. WC and RC's New Client Application Form ("NCAF") for their joint account reflected riskier investment objectives and higher risk tolerances than they initially discussed with the Respondent.

(ii) CH

9. CH was 58 when she opened an account with the Respondent in July 2008. Prior to opening the account, the Respondent had provided CH with a conservative sample portfolio plan that called for no high-risk investments. This was consistent with her objectives and appropriate for her at that time, as reflected on her 2008 NCAF.

10. In 2011 and again in 2012 when she was 61-62 years of age, the Respondent recommended purchases of a higher risk security, Sea Dragon Energy ("Sea Dragon") to CH.

11. In order to accommodate an investment in Sea Dragon, CH's NCAF was updated in July 2012 at the Respondent's recommendation after the purchases were made, to reflect riskier investment objectives and increased risk tolerances. The investment objectives on this NCAF erroneously totaled 150%.

(iii) Estate of JP

12. In May 2008, the Respondent opened an account for the Estate of JP. His client CH is JP's daughter and one of two co-trustees for the account. This estate account was for the benefit of, and to provide income for, CH's sibling who lives with a disability.

13. The NCAF for this account reflected conservative investment objectives and risk tolerances.

14. A summary of the investment objectives and risk tolerance as reflected on the NCAFs for the above three client accounts is as follows:

Client	**% Investment Objectives**				**% Risk Tolerance**		
	Income	Capital Gains					
		Short Term	Medium Term	Long Term	Low	Medium	High
WC & RC (2010)	60	10	15	15	60	30	10
CH (2008)	70	-	15	15	75	25	-
CH (Update – 2012)*	50	20	40	40	40	40	20
Estate of JP (2008)	70	-	15	15	0	100	-

* Investment objectives erroneously total 150%

Unsuitable Recommendations and Concentration in the Clients' Accounts

15. By the end of June 2012, as summarized below, the above clients had accumulated large positions in a small number of securities and sectors, namely Pengrowth Energy Corp. ("Pengrowth"), Aston

Hill Senior Gold Producers Income Corp. ("Aston"), and Goldcorp Inc. ("Goldcorp."):

Client	**WC & RC**	**CH**	**Estate of JP**
Securities as at June 2012	Pengrowth Aston Goldcorp.	Pengrowth Aston Goldcorp.	Pengrowth Aston
Market Value of Securities	$149,740	$213,800	$183,280
Account Market Value	$326,280	$353,000	$365,950
Percentage of Account Value	45%	60%	50%

16. In addition, between July and December 2012, the Respondent recommended numerous purchases of IBI Group Inc. ("IBI") in each of these client's accounts at prices between $6.00 and $11.00, at cumulative costs as follows:

WC & RC $112,680;

CH $119,700; and

Estate of JP $148,090.

17. By the end of December 2012, as summarized below, these clients' accounts had increased concentration in a small number of securities:

Client	**WC & RC**	**CH**	**Estate of JP**
Securities as at December 2012	Pengrowth Aston Goldcorp. IBI	Pengrowth Aston IBI	Pengrowth Aston IBI
Market Value	$232,883	$211,893	$220,992
Account Market Value	$280,860	$286,650	$275,700
Percentage of Account	83%	74%	80%

18. Notwithstanding the increased purchases and concentration in IBI as of the end of 2012, between 2013 and 2015, the Respondent recommended additional purchases of this security in the accounts of WC & RC, and CH.

19. The above accounts were otherwise relatively inactive between 2013 and 2015. By August 2015, these accounts were left with concentrations in IBI/Pengrowth and Goldcorp; and the price of IBI had fallen to just over $2.00.

20. This level of concentration was not suitable for WC & RC, CH, and the Estate of JP given the following considerations:

    (i) while these securities paid dividends, none could be considered low risk as the invested capital was at risk of loss due to market conditions;

(ii) the risk was amplified as the investments were concentrated in only three sectors;

(iii) the respective ages, investment objectives, and risk tolerance of WC & RC, and CH; and

(iv) the investment objectives and risk tolerance on the NCAF for the Estate of JP and the fact that the purpose of the account was to provide an income for CH's sibling.

Client Harm and Losses

21. The Respondent failed to invest the accounts of WC & RC, CH, and the Estate of JP in a suitable manner, as set out above.

22. As a result, during the Relevant Period, the clients sustained substantial losses of more than $800,000. The clients' approximate dollar and percentage loss relative to their January 2011 account value were:

WC & RC	$238,000 (59%);
CH	$295,000 (59%); and
Estate of JP	$269,000 (52%).

23. In contrast, during the Relevant Period, the TSX Composite Index declined less than 2%.

24. The losses in the account of WC & RC contributed to their decision to sell their residence and move to a more affordable home in 2013 as they were concerned there might be insufficient funds for their retirement.

25. In July 2015, these clients collectively filed a complaint with the firm in respect of their accounts. They were assigned a new RR following the Respondent's leave from the firm. In July 2018 the Respondent's firm compensated these clients in excess of one half of their losses; the Respondent did not contribute to the compensation.

26. The Respondent acknowledges that but for certain health and financial circumstances, evidence of which has been provided to Staff, the fine agreed to by Staff would have been higher.

Other Factors

27. The following factors are noted:

- The Respondent has no disciplinary history;
- During the Relevant Time the Respondent was experiencing challenging personal circumstances due to a family illness; and
- There is no evidence that the misconduct was intentional, willfully blind, or reckless with respect to regulatory requirements.

PART IV – CONTRAVENTION

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

Between January 2011 and July 2015, the Respondent failed to ensure that recommendations made for certain clients were suitable, contrary to Dealer Member Rule 1300.1(q).

PART V – TERMS OF SETTLEMENT

29. The Respondent agrees to the following sanctions and costs:

a) fine of $20,000;

b) suspension of approval in any capacity for two years;

c) re-write and pass the Conduct and Practices Handbook course within three months of re-registration; and

d) costs of $2,500.

30. 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

31. 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.

32. 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

33. This Settlement Agreement is conditional on acceptance by the Hearing Panel.

34. 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.

35. 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.

36. 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.

37. 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.

38. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.

39. 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.

40. 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.

41. 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

42. This Settlement Agreement may be signed in one or more counterparts which together will constitute a binding agreement.

43. A fax or electronic copy of any signature will be treated as an original signature.

DATED this "1" day of "March", 2019

"Witness"

Witness

"William Alan Heakes"

William Alan Heakes

DATED this "1st" day of "March", 2019

"Dan McVicker"

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 "20" day of "March", 2019 by the following Hearing Panel:

Per: "M. L. Friedland"

Panel Chair

Per: "William Donegan"

Panel Member

Per: "Ron Smith"

Panel Member