

Re Silicz

IN THE MATTER OF:

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

and

Walter Silicz

2017 IIROC 02

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

Heard: December 5, 2016 in Winnipeg, Manitoba

Decision: December 5, 2016

Written Reasons: January 12, 2017

Hearing Panel:

Frederick H. Webber, Chair, Donald Lawson and Stuart Livingston

Appearances:

Tayen Godfrey, Enforcement Counsel

SETTLEMENT HEARING DECISION

A. PRE-HEARING PROCEDURES

¶ 1 This matter was commenced by a Notice of Hearing dated June 17, 2016 (“NOH”). The Respondent replied to the NOH with a Response to Notice of Hearing, dated July 7, 2016 (“Response”), and with an Amended Response to Notice of Hearing, dated October 7, 2016 (“Amended Response”).

¶ 2 The Amended Response added a procedural defence based on certain limitation periods which need not be outlined in these reasons since the case was settled before the Panel decided whether the limitations defence applied.

¶ 3 The said limitations defence, together with the Respondent’s proposal to call two expert witnesses gave rise to a Notice of Motion by IIROC, dated October 27, 2016, (“NOM”), requesting rulings from the Panel that the Respondent’s limitations period defence be struck from the Amended Response and the proposed expert testimony be excluded.

¶ 4 The Respondent issued a Notice of Cross-Motion dated November 7, 2016, effectively opposing the NOM.

¶ 5 The Panel heard IIROC’s motion and the Respondent’s cross-motion on November 14, 2016 in Winnipeg. After an off-the-record discussion among the Panel and both counsel, it was agreed that the Respondent’s expert witness, Henderson, would be allowed to testify at the hearing on the merits which was scheduled for December 5-9, 2016. It was also agreed that IIROC would have until the end of the week to advise the Respondent when it might have a report in response to the Respondent’s expert accounting report by Demers Beaulne, and thus whether the hearing could commence on December 5. Subsequently, the Panel was advised by the IIROC National Hearing Coordinator (“NHC”) that the parties had agreed that the hearing would commence on December 5.

¶ 6 On the limitations defence raised by the Respondent, the Panel reviewed written submissions and heard oral arguments from both counsel. At the end of the motion hearing, the Respondent's counsel stated that he had additional cases that he had not yet made available to IIROC counsel or to the Panel, but which he wished to refer to in support of his position. After discussing the issue with both counsel, it was agreed that the Respondent's counsel would make the cases available to IIROC counsel and to the Panel before the end of the week and the hearing of the IIROC motion to strike the limitations defence from the Amended Response would recommence at the start of the hearing on the merits.

¶ 7 Late on the afternoon of Friday December 2, 2016, the Panel were advised by the NHC that the parties had reached a settlement agreement and that the hearing scheduled to commence on December 5, 2016, would proceed as a settlement hearing.

¶ 8 Consequently, the issues raised and argued pursuant to the NOM, became moot, and the hearing commenced on December 5, 2016 as a settlement hearing.

B. SETTLEMENT HEARING

¶ 9 At the commencement of the settlement hearing, the Panel members were given written materials including the settlement agreement dated December 2, 2016 ("the SA") and documents in support of the settlement. After a brief adjournment to allow the Panel to read the materials, the hearing reconvened and the Panel heard oral submissions from both counsel supporting acceptance of the SA. A copy of the SA is attached hereto; the facts upon which the settlement is based are set forth therein and will not be repeated herein. Pursuant to IIROC Rule 15.3, they are the only facts upon which the Panel's decision is based.

¶ 10 Under the SA, the Respondent admitted the following contraventions of IIROC Rules, Guidelines, Regulations or Policies:

Between December 2005 and October 2008, the Respondent as Branch Manager failed to adequately supervise eighteen client accounts at his branch, contrary to IIROC Dealer Member Rules 1300.2 and 2500 (Investment Dealer Association by-law 1300.2 and Policy No. 2 prior to June 1, 2008).

¶ 11 IIROC and the Respondent agreed to the following terms of settlement:

- (a) A fine in the amount of \$30,000; and
- (b) A two year suspension from acting in a supervisory capacity.

The Respondent also agreed to pay costs to IIROC in the sum of \$10,000.

¶ 12 Under IIROC Rule 20.36, the Panel must either accept or reject the SA. The principle upon which that decision should be based is set forth in the well-known case of *Re Milewski* [1999] I.D.A.C.D. No. 17 and has been confirmed in numerous subsequent cases, viz:

"A [panel] 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 [panel] will reflect the public interest benefits of the settlement process in its consideration of specific settlements."

This Panel agrees with, and has followed that principle in reaching its decision in this case.

¶ 13 IIROC counsel reviewed with the Panel, the IIROC Sanction Guidelines (the "Guidelines") as applicable to this case. Although the Guidelines are not binding on the Panel, they have been adopted by IIROC, it is reasonable to treat them as indicative of industry expectations and this Panel feels that they can be of assistance in determining whether to accept the SA.

¶ 14 IIROC counsel briefly reviewed the Sanction Principles set forth in the Guidelines, in particular those relating to whether a suspension or a permanent bar should be considered. The Panel agrees with the submissions of both counsel that the matters set out in the Sanctions Principles indicate that a 2 year suspension from acting in a supervisory capacity is appropriate in this case.

¶ 15 The Guidelines also list Key Factors in Determining Sanctions. The following are applicable in this case:

1. The number of violations

There were 18 instances of failure to supervise to which the Respondent admitted. However, they were largely a repeat of the same conduct arising out of the same plan, and therefore should not be penalized as if they were separate violations. In addition, the 18 instances of failure to supervise were out of a total of 80 accounts being supervised, a relatively small number.

2. Personal Benefit / Intentional Conduct

There was no direct personal benefit to the Respondent as a result of the violations and the misconduct was not intentional, willfully blind or reckless with respect to regulatory requirements.

3. Cooperation and Responsibility of Respondent

Although this case has taken some time for a resolution, by agreeing to the settlement, the Respondent has saved IIROC the time and cost of a full hearing and has taken responsibility for his actions.

4. Harm to Clients

Many of the clients profited from their investments, but a number of them would have been better off had they not followed the investment plan underlying the misconduct in this case.

5. Client Vulnerability

The clients involved were somewhat vulnerable, being retired or close to it.

These factors support the Panel's decision to accept the SA.

¶ 16 IIROC counsel referred the Panel to several cases in support of his submission that the SA should be accepted by the Panel. While the facts in all of the cases were different than in this case, there were sufficient similarities that the cases provided useful guidance to the Panel in coming to its decision to accept the SA.

C. DECISION

¶ 17 It is the decision of this Panel to accept the SA and the members signed an order to that effect at the hearing.

Dated as of January 12th, 2017.

Frederick H. Webber- Chair

Donald Lawson- Member

Stuart Livingston- Member

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff ("Staff") and the Respondent, Walter Nick Silicz, consent and agree to the settlement of this matter by way of this agreement (the "Settlement Agreement").
2. The Enforcement Department of IIROC has conducted an investigation ("the Investigation") in the conduct of Walter Nick Silicz, and had previously conducted an investigation into the conduct of Donald Earl Phillips ("Phillips"), a Registered Representative between 2000 and 2011.
3. 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

4. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
5. The Respondent admits to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:
 - a) Between December 2005 and October 2008, the Respondent as Branch Manager failed to adequately supervise eighteen client accounts at his branch, contrary to IIROC Dealer Member Rules 1300.2 and 2500 (Investment Dealer Association by-law 1300.2 and Policy No. 2 prior to June 1, 2008).
6. Staff and the Respondent agree to the following terms of settlement:
 - a) A fine in the amount of \$30,000.00; and
 - b) A two year suspension from acting in a supervisory capacity.
7. The Respondent agrees to pay costs to IIROC costs in the sum of \$10,000.00.

III. STATEMENT OF FACTS

(i) Acknowledgment

8. For the purposes of this Settlement Agreement, the Respondent agrees with the facts set out in this Section III and acknowledges that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts.

(ii) Factual Background

Overview

9. This matter stems from the Respondent's supervision of eighteen client accounts which were investing in Flow-Through Limited Partnership Units, which are high risk securities. The Respondent failed to adequately supervise the opening of these 18 client accounts or the trading that took place in these 18 client accounts, or both.

Registration History

10. The Respondent has worked in the financial industry since 1978. The conduct in question occurred while the Respondent was the Branch Manager at Wellington West Capital Inc.'s ("WWC") Winnipeg branch, where he has worked since 1993. The Respondent is currently working as a Registered Representative in a non-supervisory position with National Bank, which acquired WWC in July of 2011. His positions in the investment industry included the following:
 - a) September 30, 1993 to October 21, 2008 - Branch Manager and Supervisor with WWC;
 - b) January, 1996 to September 30, 1997 - Branch Manager and Ultimate Designated Person ("UDP") with WWC;
 - c) 1992 to 1993 - Investment Advisor with Midland Walwyn;
 - d) 1984 to 1992 - Branch Manager with Midland Doherty (later Midland Walwyn);
 - e) 1980 to 1984 - Investment Advisor with Midland Doherty; and
 - f) 1978 to 1980 - Investment Advisor with F.H. Deacon Hodgson.
11. In 2000 the Respondent was disciplined in relation to his role with WWC. He admitted that between October, 1993 and March, 1997, he, together with the Chief Compliance Officer, failed to design, establish, oversee and implement a compliance program that complied with IDA requirements. There was no evidence that clients were harmed. The IDA was satisfied that WWC had taken adequate measures to remedy deficiencies. The Respondent received a \$10,000.00 fine, and was required to rewrite the Partners, Directors and Officers Examination. There has been no other disciplinary history.

Background

12. The Respondent was the Branch Manager at WWC in Winnipeg responsible for supervising the activities of Registered Representative Donald Earl Phillips during the relevant period (December 2005 and October 2008). Phillips had worked as a Registered Registrant since 2000 and previous to that he had been a mutual fund salesman.
13. Phillips had participated in the promotion of a financial strategy devised by KM, a Mutual Fund Dealers Association (“MFDA”) registrant with Wellington West Financial Inc. (“WWF”), in that Phillips, on three occasions, participated in presentations made by KM to groups of railway workers by presenting a slideshow explaining Flow-Through Units. The strategy was targeted at, and marketed to, railway workers and their pension funds. Part of the strategy involved the railway workers purchasing, through Phillips, Flow-Through Limited Partnership Units (“Flow-Through Units”), which are high risk securities.
14. KM had been advising railway workers about the possible benefits of a tax free rollover of their pension funds. The railway workers could roll an eligible portion of their pension funds into a tax free Locked-in Retirement Account, or Life Income Fund Account, at any time before they turned 55 years old. Any remaining pension money above the eligible amount was paid to the clients and subject to taxation.
15. KM suggested that these clients invest a portion of their pension proceeds in Flow-Through Units in order to reduce this tax burden, as they could potentially receive a 100% tax deduction for the amount invested.
16. KM could not sell Flow-Through Units as a MFDA registrant. Therefore, after the clients elected to commute their pension plans they were referred by KM (at WWF) to Phillips (at WWC), pursuant to a fee sharing referral agreement (the “Referral Agreement”) between WWC and WWF.
17. Once referred, Phillips would open accounts for the railway workers and use a portion of the non-eligible funds to purchase various Flow-Through Units for them. Between 2005 and 2010 ninety-four new accounts were opened at WWC pursuant to the Referral Agreement. Not all of these accounts were for railway workers.
18. On February 5, 2015 a Hearing Panel for IIROC accepted a Settlement Agreement between IIROC staff and Phillips (the “Phillips’ Settlement Agreement”) regarding eleven railway worker clients. In it, Phillips admitted to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:
 - a) Between April, 2006 and August, 2008, Phillips failed to use due diligence to learn and remain informed of the essential facts relative to 11 of his clients, contrary to Dealer Member Rule 1300.1(a) (IDA By-law 1300.1(a) prior to June 1, 2008); and
 - b) Between May, 2006 and November, 2008, Phillips made unsuitable recommendations for the accounts of 11 clients, contrary to Dealer Member Rule 1300.1(q) (IDA By-law 1300.1(q) prior to June 1, 2008).
19. The contraventions identified above in paragraphs 18 (a) and (b) are admitted by Phillips in his Settlement Agreement, but are not the admissions of the Respondent.

Supervision Failure

20. Eighty of the 94 client accounts subject to the Referral Agreement were opened during the period the Respondent was Branch Manager. The Respondent failed in his supervision of 18 of the 80 client accounts, as follows: DC, CC, GD, RD, DH, WJ, DK, LK, DM, LP, RP, DR, KR, LR, RS, FV, KW and WW (the “Clients”).
21. As Branch Manager, the Respondent was responsible for approving the opening of client accounts, and for supervising the trading activity in those accounts. The Respondent relied on the following factors in relation to the 18 Clients’ accounts:

- a) The Respondent knew Phillips and felt he had no reason to doubt that he was carrying out his responsibilities to the 18 Clients;
- b) The use of the purchase of Flow-Through Units to mitigate a one-time tax liability can be an appropriate tax mitigation strategy, depending upon the circumstances of the investor. The Respondent discussed with Phillips the investment strategy and understood it to be a legitimate strategy for the 18 Clients;
- c) The Respondent understood that the amount of money to be invested by the 18 Clients in Flow-Through Units represented a limited portion of their total assets;
- d) The 18 Clients received a copy of a written statement to WWC's compliance department in which Phillips confirmed that he had complied with his know your client obligations and applicable laws;
- e) While not documented, the Respondent had a number of discussions with Phillips about the financial strategy. He had received assurances from Phillips that he was fulfilling his duties, and that the 18 Clients were aware of the risks of investing in Flow-Through Units;
- f) For each purchase of Flow-Through Units the 18 Clients received a Prospectus or an Offering Memorandum that described the risks associated with the investment, and the 18 Clients executed Subscription Agreements outlining risks;
- g) The Respondent was not aware of any complaints that were made about the purchase of Flow-Through Units during the period in question.

22. However, the Respondent should have been prompted to take further supervisory action in regard to the 18 Clients given their specific personal and financial circumstances, including the following factors:

- a) The amount of money invested. Of particular significance specific to these 18 Clients is that most of them had invested a significant percentage of their stated liquid assets and overall net-worth in Flow-Through Units.
- b) Most of the 18 Clients were approximately 55 years old, were retired, or about to retire, and had indicated 100% higher risk speculative securities and trading strategies, or an aggressive growth target mix; and
- c) Most of the 18 Clients were investing pension money in Flow-Through Units. These are complicated investments which are tax driven and considered high risk, and include the following attributes:
 - (i) They are illiquid in that there was no secondary market through which the Flow-Through Units could be sold;
 - (ii) There are no assurances of a positive, or any, return on an investment in the Flow-Through Units;
 - (iii) Flow-Through Units are more suitable for investors with high marginal tax rates who can afford a loss on their investment; and
 - (iv) Flow-Through Units are more suitable for investors who are aware of the inherent risks associated with resource exploration and development.

23. Had the Respondent taken further supervisory action in regard to these 18 Clients he would have been in a better position to assess whether or not the recommended trading strategy, and the amount of money that was invested in Flow-Through Units, was suitable for them.

Performance & Benefits

24. Many of the 18 Clients profited from their investment, however a number of them would have been in a

better position had they simply paid taxes on the pension monies that they invested in Flow-Through Units.

25. While the Respondent did not personally benefit directly, the 18 Client accounts generated additional revenue for WWC's Winnipeg branch.

IV. TERMS OF SETTLEMENT

- 28. 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.
- 29. The Settlement Agreement is subject to acceptance by the Hearing Panel.
- 30. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
- 31. 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.
- 32. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his/her/its right under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.
- 33. 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.
- 34. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
- 35. 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.
- 36. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.
- 37. 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 Winnipeg in the Province of Manitoba this 2nd day of December, 2016.

(“Witness”) _____

Witness

(“Walter Nick Silicz”) _____

Respondent

AGREED TO by Staff at the City of Winnipeg in the Province of Manitoba, this 4th day of December, 2016

(“Rosa Chan”) _____

Witness

(“Tayen Godfrey”) _____

Tayen Godfrey

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

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