

# Re Bugden

IN THE MATTER OF:

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

**and**

**David Claude Bugden**

2017 IIROC 30

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

Heard: April 18, 2017  
Decision: April 18, 2017  
Written Reasons: May 8, 2017

**Hearing Panel:**

R. Scott Peacock, Chair, Ken Wheelans and Bruce Walker

**Appearances:**

Elissa Sinha, Enforcement Counsel

David DiPaolo, Counsel for the Respondent

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## DECISION IN RESPECT TO A SETTLEMENT AGREEMENT

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¶ 1 A Notice of Application for a Settlement Hearing was issued by the National Hearing Coordinator on the 27<sup>th</sup> day of March 2017. The Notice was for a hearing to consider whether to accept a Settlement Agreement entered into between staff of IIROC (“Staff”) and the Respondent David Claude Bugden (“Respondent”) pursuant to Section 8428 of the Consolidated Enforcement, Examination and Approval Rules of IIROC. The panel convened and the matter was heard in Halifax on the 18<sup>th</sup> day of April 2017.

¶ 2 The matter for the panel’s determination was whether or not the proffered Settlement Agreement was in a reasonable range for the misconduct set forth in the agreement and whether or not the acceptance of the agreement was in the public interest.

¶ 3 The Panel having heard from IIROC staff counsel, counsel for the Respondent, having considered the facts set forth in the Agreement and the precedents provided by counsel to the Panel in the Settlement Book concluded that the Settlement Agreement would be accepted.

¶ 4 The Respondent acknowledged the contraventions set out in Part IV of the Settlement Agreement, a copy of which is appended to this decision as Appendix “A”, more particularly that:

- a) Between January 2012 and December 2014, the Respondent made recommendations and purchases of securities that were not suitable and were not within the bounds of good business practice, contrary to IIROC Rules 1300.1 (o) and (r).
- b) In January 2010, May 2011 and June 2012, the Respondent approved account documentation without using due diligence to learn the essential facts relative to two clients, contrary to IIROC Dealer Member Rule 1300.1(a)

¶ 5 Count (a) is in respect to a widow (“Client A”) born in 1939 whose KYC reflected low investment

knowledge with an income of \$51,000 to \$ 74,000 per year with a net worth of \$ 700,000. The client had fee based accounts for her RRIF and Cash Account. The Respondent traded the accounts actively particularly in new issues and or initial public offerings of securities. Notwithstanding that the Respondent's strategy was profitable for the client's account; the Respondent acknowledged that the strategy was higher risk.

¶ 6 Count (b) is in respect to clients of the Respondent's partner with whom he had a Teaming and Gross Commission Sharing Agreement ("Clients B and C"). The Respondent modified forms to reflect higher risk tolerances for the clients that were not consistent with their personal circumstances, investment knowledge, and risk tolerances. The Respondent acknowledges that he did not take steps to satisfy himself as to whether or not the forms were accurate and suitable. The Respondent claimed to have skimmed the KYC documents prepared by his partner and had relied on his partner for the correctness of the underlying KYC documentation.

¶ 7 The Settlement Agreement provided for the sanctions and costs:

- a) For Count (a), a fine of \$ 25,000 inclusive of disgorgement of commissions obtained in the amount of approximately \$ 12,000;
- b) For count (b), a fine of \$ 15,000;
- c) Close supervision for 1 year;
- d) Successful re-write of the Conduct and Practices Handbook within six months; and
- e) Costs of \$ 5,000.

The panel's mandate is focused on whether or not to accept the joint recommendation of the IIROC Staff counsel and the Respondents counsel.

¶ 8 In the course of its deliberation the role of the panel is not to consider and determine whether or not the agreement provides for the penalties the panel would deem appropriate, but rather, does the agreement provide for a reasonable disposition in all of the circumstances and is it in the public interest. Counsel referred the panel to the case of *Milewski*<sup>1</sup> where the panel 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. Put another way, the District Council will reflect the public interest benefits of the settlement process in its consideration of specific settlements."

The efficacy of the settlement process is a cornerstone of effective and efficient regulatory process. Parties who have engaged in good faith negotiations to reach an agreement that is appropriate in the circumstances and is reasonable in its application of the principles of general and specific deterrence, remedial intent and public interest are entitled to expect the agreement to receive appropriate consideration by a panel. If in its due consideration the panel determines the agreement falls within the governing parameters it should be accepted; if not the agreement should be rejected. The parties would then be free to enter into a subsequent agreement or proceed to a hearing on the merits.

¶ 9 IIROC staff counsel referred the panel to the IIROC Sanction Guidelines and several cases for consideration. In the matter of *Re Higgs*<sup>2</sup> the panel cited *Milewski* and wrote:

"4 There are two broad related principles that apply in connection with a decision to accept or reject a settlement.

5 The first is succinctly stated in the following passage from the decision in *Re Milewski*:

A District Council considering a settlement agreement will tend not to alter a penalty that it considers to

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<sup>1</sup> [1999] I.D.A.C.D. No. 17 at page 10

<sup>2</sup> 2010 LNIROC 3 at page 2

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.

6 Secondly, in the recent decision of the Saskatchewan Court of Appeal in *Rault v. Law Society of Saskatchewan*, the court cited with approval and applied to an administrative tribunal the principles applicable to joint submissions on sentencing in criminal cases described by the Alberta Court of Appeal in *R. v. G.W.C.*, namely, that there is an obligation on the tribunal to give serious consideration to a joint submission on sentencing agreed upon by counsel unless the sentence is unfit or unreasonable; or contrary to the public interest; and, it should not be departed from unless there are good or cogent reasons for doing so.’

¶ 10 Another factor for the panel’s consideration beyond reasonableness is the proportionality of the proposed penalties to the admitted misconduct and whether the proposed penalties are analogous to misconduct by others in like circumstances. The appearance of fairness requires that the objective observer perceives a consistency in the application of the rules and dispositions in administrative tribunal proceedings. These issues were commented on by the Panel in *Re Donnelly*<sup>3</sup>

“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.”

¶ 11 The Panel has considered the facts set forth in the Settlement Agreement, the absence of any prior disciplinary record, the cooperation of the Respondent with IIROC staff and the joint submission of IIROC staff counsel and Respondent’s counsel. The penalties provided in the Settlement Agreement are appropriate in the circumstances, consistent with the public interest and the maintenance of fair and effective capital markets. It is the unanimous decision of the panel is to accept the Settlement Agreement. Its acceptance is so ordered.

Dated at Halifax, Nova Scotia this 9<sup>th</sup>, day of May, 2017

R. Scott Peacock

Chair

Ken Wheelans

Bruce Walker

## 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 David Bugden (“Respondent”).

### PART II – JOINT SETTLEMENT RECOMMENDATION

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<sup>3</sup> 2016 IIROC 23 at page 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**

- For the purposes of this Settlement Agreement, the Respondent agrees with the facts as set out in Part III of this Settlement Agreement

#### **The Respondent**

- The Respondent has been an IIROC Registrant since 1999 with Scotia Capital Inc. (“Scotia”). Since 2007, the Respondent has been employed in Scotia’s New Glasgow, Nova Scotia branch.
- In 2007, the Respondent entered into a Teaming and Gross Commission Sharing Agreement (the “Agreement”) with another IIROC Registrant, David Chabassol (“Chabassol”). Pursuant to the Agreement, the Respondent and Chabassol shared joint sales code and split commissions equally, subject to a monthly payment by the Respondent to Chabassol because Chabassol had brought a larger share of assets into the Team.

#### **Unsuitable Recommendations that were Not Within the Bounds of Good Business Practice**

- Client A became a client of the Respondent in 2008. She holds two accounts with him, a Registered Retirement Income Fund (“RRIF”) and a Cash Account. The Know Your Client (“KYC”) form completed for Client A when she opened her account reflected that she was born in 1939, retired, widowed, and had “low” investment knowledge. Her income was in the range of \$51,000-\$74,000 per year and her entire net worth was \$700,000, all of which was liquid and invested with the Respondent.
- From 2012 to 2014, Client A’s risk tolerance and objectives were as follows:

<b>Account</b>	<b>KYC Update</b>	<b>Risk Tolerance (low/med/high)</b>	<b>Objectives (income/LTCA/STCA)<sup>1</sup></b>
<b>Cash Account</b>			
	March 2010	25/40/35	0/50/50
	August 2014	20/45/35	0/50/50
<b>RRIF</b>			
	Oct 2010	30/60/10	30/60/10
	June 2013	25/40/35	10/45/45
	July 2014	10/55/35	20/55/35

- Both of Client A’s accounts were fee-based and she was not charged commissions when she bought and sold individual securities.
- Between 2012 and 2014, the Respondent’s trading in the accounts of Client A was active, particularly in new issues and/or initial public offerings of securities (“New Issues”). The Respondent’s strategy was to take advantage of the price differential between the New Issue price and the price available on the secondary market for securities in the same issuer. Pursuant to the strategy, the Respondent purchased and sold New Issues relatively quickly in Client A’s account for a profit. The Respondent acknowledged to Staff that this strategy was “higher risk”.
- Between 2012 and 2014, the Respondent purchased a total of 62 New Issues in the RRIF and 35 New Issues in the Cash Account. In 2012, the value of the New Issues purchased in both accounts was more

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<sup>1</sup> STCA stands for Short Term Capital Appreciation. LTCA stands for Long Term Capital Appreciation.

than double the account holdings. Frequently the New Issues were sold within several days or weeks of purchase and other New Issues were purchased.

11. Although Client A did not pay commissions, the issuers paid a commission to Scotia when the Respondent purchased New Issues for Client A. For the fiscal years ending October 2012 and October 2014, commissions totaling approximately \$47,000 were generated on these transactions, of which Bugden personally received approximately \$12,000.
12. The following is a summary of the trading that the Respondent recommended and executed for Client A from 2012-2014:

<b>Year (as at Oct)</b>	<b>Account value</b>	<b>Value of All Buys in 12 month period</b>	<b>New Issue Buys</b>
<b>Cash Account</b>			
2012	\$207,637	\$486,305	\$486,305
2013	\$159,145	\$137,539	\$105,525
2014	\$110,302	\$132,814	\$91,884
<b>RRIF</b>			
2012	\$452,388	\$831,408	\$831,408
2013	\$456,450	\$529,250	\$482,400
2014	\$445,537	\$326,505	\$274,855

13. The active short-term trading in New Issues increased the risk in Client A's accounts such that the risk tolerance and account objectives that she had agreed to were exceeded in 2012, 2013 and 2014.
14. The New Issue trading strategy used by the Respondent was not suitable for Client A, given her age, investment knowledge, financial circumstances, risk tolerance, and investment objectives.
15. The New Issue trading strategy was inconsistent with good business practice, given the significant commissions generated as compared to the unsuitable risk undertaken for Client A.

### **Approval of Account Documentation**

16. Client B and Client C were clients of the Respondent and his partner, Chabassol. Their dealings were almost exclusively with Chabassol.
17. In January 2010, the Respondent signed two KYC forms for Client B's RRSP and margin accounts. The KYC documents for Client B indicated that she was born in 1971, had "low" investment knowledge, was widowed with 2 dependent children, had liquid assets of \$400,000, fixed assets of \$200,000, and an income of less than \$25,000 per year. Client B's risk tolerance was 100% high and 100% STCA for both accounts. In May 2011, the Respondent signed a KYC for an RESP account for Client B which reflected the same personal circumstances and a risk tolerance of 100% high and 100% STCA.
18. In June 2012, the Respondent signed an Account Agreement Modification Form for Client C. Client C was born in 1919 and was a homemaker with moderate investment knowledge, liquid assets of \$210,000, fixed assets of \$80,000, and annual income in the range of \$25,000-\$50,000. The form that the Respondent signed in 2012 increased Client C's risk tolerance from 100% medium to 70% medium and 30% high, and increased her objectives from 90%LTCA/10%STCA to 70%LTCA/30%STCA.
19. The allocation for high risk and short-term trading for both Client B and Client C did not appear to be consistent with their personal circumstances as stated on the KYC forms. However, the Respondent did not take any steps to satisfy himself as to whether they were accurate and suitable.
20. The Respondent told IIROC Staff that he would "skim" KYC documents prepared by Chabassol and relied on Chabassol to ensure that the KYC documentation was correct.

## **Mitigating Factors**

21. The Respondent has no disciplinary record with IIROC.
22. Client A held a fee-based account with Scotia. Accordingly, she did not pay commission on the purchase of New Issues.
23. Client A's accounts were generally profitable (with the exception of the Cash Account in 2013) and she has never complained to Scotia or IIROC about the activity in her accounts.
24. The Respondent had no actual knowledge of the circumstances, risk tolerance, and investment objectives of Client B and Client C.

## **PART IV – CONTRAVENTIONS**

25. By engaging in the conduct described above, the Respondent committed the following contraventions of IIROC's Rules:
  - a) Between January 2012 and December 2014, the Respondent made recommendations and purchases of securities that were not suitable and were not within the bounds of good business practice, contrary to IIROC Rules 1300.1(o) and (r).
  - b) In January 2010, May 2011 and June 2012, the Respondent approved account documentation without using due diligence to learn the essential facts relative to two clients, contrary to IIROC Dealer Member Rule 1300.1(a).

## **PART V – TERMS OF SETTLEMENT**

26. The Respondent agrees to the following sanctions and costs:
  - a) For count (a), a fine of \$25,000 , inclusive of disgorgement of commissions obtained in the amount of approximately \$12,000;
  - b) For Count (b), a fine of \$15,000;
  - c) Close supervision for 1 year;
  - d) Successful re-write of the Conduct and Practices Handbook within six months; and
  - e) Costs of \$5,000.
27. 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**

28. 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 paragraph 29 below.
29. 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**

30. This Settlement Agreement is conditional on acceptance by the Hearing Panel.
31. 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.
32. 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.

33. 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.
34. 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.
35. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
36. 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.
37. If this Settlement Agreement is accepted, the Respondent agrees that neither [he/she/it] nor anyone on [his/her/its] behalf, will make a public statement inconsistent with this Settlement Agreement.
38. 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**

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

**DATED** this “7<sup>th</sup>” day of March, 2017.

“Witness”

Witness

“Eric Mucchi”

Witness

“David Bugden”

DAVID BUGDEN

“Elissa Sinha”

Elissa Sinha

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

The Settlement Agreement is hereby accepted this “18” day of “April”, 20 “17” by the following Hearing Panel:

Per: “R. Scott Peacock”

Panel Chair

Per: “Ken Wheelans”

Panel Member

Per: “Bruce Walker”

Panel Member