

# Re Ast

IN THE MATTER OF:

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

**and**

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

**and**

**Michael Reid Ast**

2012 IIROC 38

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

Heard: July 4, 2012  
Decision: July 5, 2012

**Hearing Panel:**

Martin L. Friedland, C.C., Q.C. (Chair), C. Stuart Livingston, Charles Macfarlane

**Appearances:**

Milton Chan, IIROC Counsel

Laura Paglia, for the Respondent

---

## Decision and Reasons

---

### INTRODUCTION

¶ 1 The staff of the Investment Industry Regulatory Organization of Canada (“IIROC”) and the Respondent, Michael Reid Ast, entered into the attached Settlement Agreement, dated the 25<sup>th</sup> of May, 2012. The settlement was 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.

¶ 2 The Settlement agreement was presented to the Hearing Panel for acceptance on July 4, 2012.

### FACTUAL BACKGROUND

¶ 3 The Respondent became a registrant with the IDA in April 1985 when he commenced his employment with CIBC World Markets Inc., where he continues to be registered. In 2008, he became an IIROC registrant.

¶ 4 For almost two decades, the Respondent engaged in discretionary trading in certain client accounts with the clients’ consent, but without obtaining the necessary prior written authorization from the clients and his firm. The Respondent had general discussions with the clients prior to the transactions, but failed to confirm the details of the trades with the clients. The attached Settlement Agreement describes the factual background more fully.

### CONTRAVENTION OF IIROC AND IDA RULES AND REGULATIONS

¶ 5 Such discretionary trading is contrary to IIROC and IDA Rules and Regulations. The IIROC and IDA

Rules are similar. IIROC Dealer Member Rule 1300.4 states:

1300.4. A Registered Representative may not exercise discretionary authority over a customer account unless:

- (a) the Dealer Member has designated a Supervisor or supervisors to be responsible for discretionary accounts;
- (b) the customer has given prior written authorization in compliance with Rule 1300.5;
- (c) a Supervisor designated under subsection (a) has approved the account as a discretionary account and recorded that approval;
- (d) the Registered Representative authorized to effect discretionary trades for the account has actively dealt in, advised on or performed analysis for a period of two years with respect to all types of products which are to be traded on a discretionary basis; and
- (e) the account is maintained at the Dealer Member of the Registered Representative.

¶ 6 Rule 1300.5 sets out requirements for the prior written authorization, including a provision that the authorization should normally be for no more than twelve months. Rule 1300.6 provides for review of the financial performance of each discretionary account by a Designated Supervisor at least monthly. (There are also rules relating to managed accounts, which are managed by portfolio managers. This case does not involve managed accounts. The Respondent was not qualified to be a portfolio manager.)

¶ 7 The above requirements are to protect the client. IIROC's Dealer Member Disciplinary Sanction Guidelines (March, 2009) states (section 3.6):

“Obtaining proper approval to designate an account as discretionary or managed is not automatic. The process of approval is required to ensure that only properly qualified registrants trade in the accounts. These designated accounts are also subject to greater supervision. Discretionary trading without the proper authorization is therefore not subject to the safeguards that form part of the approval process, and puts the clients' accounts at greater risk.”

¶ 8 In *Re Shamseer* (2011 IIROC 5), a case involving discretionary trading, the Panel stated:

“In *Re Wenzel* [2005] A.S.C.D No. 153, the Alberta Securities Commission stated that ‘when a person effects a securities transaction for a client without obtaining from the client, in advance, specifics as to four elements of the transaction – quantity, security, price and timing – that person is exercising ‘discretion’.

Whenever registrants exercise discretion in clients' accounts, they are making decisions on behalf of clients. These decisions could, and often do, have a profound impact on these accounts. These decisions may, and often do, give rise to conflicts of interest between the clients and the registrants.

The purpose of IDA Regulation 1300.4, and the current IIROC Dealer Member Rule 1300.4, is to protect the interest of the clients by imposing a regime of a heightened level of scrutiny and supervision.”

## **TERMS OF SETTLEMENT**

¶ 9 IIROC Staff and the Respondent jointly recommend that the Hearing Panel accept the Settlement Agreement.

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

“Between 1991 and 2009 the Respondent engaged in discretionary trading in the accounts of twenty-seven (27) clients without first having the accounts approved and accepted as discretionary accounts, contrary to IIROC Dealer Member Rule 1300.4 (IDA Regulation 1300.4 prior to June 1, 2008).”

- ¶ 11 Staff and the Respondent agree to the following terms of settlement:
- a) A fine to IIROC in the sum of \$20,000; and
  - b) A period of suspension from registration in any category with IIROC for two months.
- ¶ 12 Further, the Respondent “agrees to pay costs to IIROC in the sum of \$5,000.”

### **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 Zackheim* (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.”

### **OUR DECISION**

¶ 16 Using the *Rotstein and Zackheim* test, we are satisfied that that the penalties proposed in the Joint Settlement Agreement is within a reasonable range of appropriateness to the offence and circumstances recorded in the attached 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.

¶ 17 The penalty proposed is consistent with the March 2009 IIROC Dealer Member Disciplinary Guidelines, section 3.6, on Discretionary Trading. It is also consistent with other discretionary trading cases that were brought to our attention. See *Re Biron* (2012 IIROC 4); *Re Shamseer* (2011 IIROC 5); *Re Bardsley* (2010 IIROC 15); *Re Karcz* (2010 IIROC 22); and *Re Osman* ([2007] I.D.A.C.D. No. 3).

¶ 18 The contravention in the present case is particularly serious because it involved a large number of clients over two decades. It is also serious because the Respondent knew that it was contrary to IDA and IIROC rules but deliberately continued the practice.

¶ 19 There are, however, mitigating circumstances. The Respondent has already been disciplined by the CIBC World Markets Disciplinary Committee, which in July 2010 imposed the following sanctions against the Respondent:

- a) formal reprimand;
- b) fine of \$25,000;
- c) requirement to rewrite the Conduct and Practices Handbook course within 90 days;

- d) further requirement that the Respondent's Branch Manager continue to closely monitor all of the Respondent's client activity and maintain regular ongoing contact with his clients.

¶ 20 CIBC subsequently monitored the Respondent's trades over a four month period and confirmed that the Respondent had obtained proper instructions for those trades prior to their execution.

¶ 21 It should also be noted that the Respondent has worked as an investment advisor at CIBC World Markets for 27 years without disciplinary history except as described in the Settlement Agreement. Further, apart for the complaint that led to the investigation (which concerned poor returns, not discretionary trading), none of the 27 clients for whom the Respondent conducted discretionary trades has filed complaints against the Respondent or alleged financial harm by him.

¶ 22 Finally, the Respondent has fully co-operated with IIROC's investigation and admitted his wrongdoing.

¶ 23 The Panel therefore accepts the Settlement Agreement and gives effect thereto as of July 5, 2012.

Dated at Toronto this 5<sup>th</sup> day of July, 2012.

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

C. Stuart Livingston

Charles Macfarlane

## SETTLEMENT AGREEMENT

### I. INTRODUCTION

1. IIROC Enforcement Staff and the Respondent, Micahel Reid Ast, 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 Michael Reid Ast.
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 IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for 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 Rules, Guidelines, IDA By-Laws, Regulations or Policies:

Between 1991 and 2009 the Respondent engaged in discretionary trading in the accounts of twenty-seven (27) clients without first having the accounts approved and accepted as discretionary accounts, contrary to IIROC Dealer Member Rule 1300.4 (IDA Regulation 1300.4 prior to June 1, 2008).

8. Staff and the Respondent agrees to the following terms of settlement:
  - a) A fine to IIROC in the sum of \$20,000; and
  - b) A period of suspension from registration in any category with IIROC for two months.

9. The Respondent agrees to pay costs to IIROC in the sum of \$ 5,000.

### **III. STATEMENT OF FACTS**

#### *(i) Acknowledgment*

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. For over two decades, the Respondent engaged in discretionary trading in certain client accounts with clients' consent but without obtaining the necessary prior written authorization from the clients and his firm. The Respondent had general discussions with the clients prior to the transactions, but failed to confirm the details of the trades with the clients, exercising discretion with respect to either time, price, quantity or type of securities.

##### *The Respondent*

12. The Respondent first became a registrant with the IDA in April 1985 when he commenced his employment with CIBC World Markets Inc. ("CIBC WM"), where he continues to be registered.

13. The Respondent is 64 years old.

14. On June 1, 2008, the Respondent became a regulated person of IIROC.

##### *Discretionary Trading*

15. For an extended period of time, the Respondent exercised discretion on behalf of twenty-seven clients. He effected some securities transactions in these client accounts without first confirming the details of the trades with the clients, exercising discretion with respect to either time, price, quantity or type of securities. The clients knew and verbally agreed to the Respondent engaging in discretionary trading for their accounts. With some of the clients, the Respondent had general discussions about investment strategies prior to trades, but did not inform the clients of the specifics of the trades until after the trades were executed. With other clients, the Respondents discussed targeted prices for specific securities and exercised time discretion on the transactions.

16. The vast majority of the Respondent's clients for whom he exercised discretion were high net worth, experienced investors with whom he has had long term professional, personal and at times family relationships.

17. To enable proper supervision by Member firms in regard to discretionary trading, registrants must obtain written authorization from the clients in question and written approval from their firms prior to exercising discretion in client accounts.

18. Despite being cognizant of the prohibition against unapproved discretionary trading, the Respondent determined that operating managed accounts was incompatible with his practice and did not recommend that the clients utilize managed accounts.

19. At no point did the Respondent obtain his clients' written authorization for discretionary trading. The client accounts in question were not designated as discretionary or managed accounts by CIBC WM.

20. The Respondent was not registered to maintain discretionary and/or managed accounts, and further did not have the educational qualification to obtain approval as a portfolio manager.

##### *Internal Review Conducted by CIBC WM*

21. In February, 2009, CIBC WM received a complaint against the Respondent alleging investment losses. The complainant was a high net worth and sophisticated investor who had been the Respondent's client for over 22 years with positive investment returns. During the course CIBC WM's review of the complaint, the Respondent disclosed that he had conducted discretionary trades in the complainant's account with consent. There is no evidence that the complainant suffered financial harm due to discretionary trading. The complainant subsequently initiated civil action against the Respondent, and the matter was resolved by the Respondent compensating the complainant in the sum of \$200,000.
22. As a result of the complaint, CIBC WM conducted an internal review into the Respondent's business practice. While the Respondent initially denied having conducted discretionary trades for clients other than the aforementioned complainant, shortly thereafter he admitted to have conducted discretionary trades for approximately twenty-seven clients with their consent.
23. As a result of its internal investigation, on July 13, 2010, CIBC WM's Disciplinary Committee imposed the following sanctions against the Respondent:
  - a. formal reprimand;
  - b. fine of \$25,000;
  - c. requirement to rewrite the CPH course within 90 days;
  - d. further requirement that the Respondent's Branch Manager continue to closely monitor all of the Respondent's client activity and maintain regular ongoing contact with his clients.
24. The Respondent's branch manager initiated direct contacts with the Respondent's clients who had executed trades between August 1, 2010 and December 1, 2010 and confirmed that the Respondent has obtained proper instructions for those trades prior to their executions. The branch manager also sent out letters to five of the Respondent's active clients confirming that they were aware and approved every trade in their account before it was implemented. All five clients signed and returned copies of the aforementioned letters acknowledging their understanding and agreements with its contents.

#### ***Additional Mitigating Factors***

25. The Respondent has worked as an investment advisor at CIBC WM for 27 years without disciplinary history except as otherwise described herein.
26. Except for the aforementioned complaint, none of the twenty-seven clients for whom the Respondent conducted discretionary trades has filed complaints against the Respondent or alleged financial harm by him.
27. The Respondent has fully co-operated with IIROC's investigation and admitted his wrongdoing.

#### **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 Toronto in the Province of Ontario, this 25<sup>th</sup> day of May, 2012.

“Witness Signature”

“M Reid Ast”

Witness

Michael Reid Ast, Respondent

**AGREED TO** by Staff at the City of Toronto in the Province of Ontario, this 28th day of May, 2012.

“Witness Signature”

Milton Chan

Witness

Milton Chan

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 5th day of July, 2012, by the following Hearing Panel:

Per: Martin L. Friedland, C.C., Q.C.

Panel Chair

Per: C. Stuart Livingston

Panel Member

Per: Charles Macfarlane

Panel Member

*Copyright © 2012 Investment Industry Regulatory Organization of Canada. All Rights Reserved.*