

Re Birkeland

IN THE MATTER OF:

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

and

Sheldon Don Birkeland

2015 IIROC 14

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

Heard: May 7, 2015 in Calgary, Alberta
Decision: May 7, 2015
Reasons: May 9, 2015

Hearing Panel:

Ms. Shelley Miller, Q.C. (Chair), David Johnson and James Ross

Appearances:

Tayen Godfrey, Enforcement Counsel for IIROC

Craig Leggatt, Counsel for Sheldon Don Birkeland

REASONS FOR DECISION

¶ 1 As a result of a Settlement Agreement entered into between IIROC and the Respondent, a hearing was conducted on May 7, 2015 in Calgary pursuant to the IIROC Dealer Member Rules. The Hearing Panel received a Settlement Hearing Book submitted on behalf of counsel for IIROC and the Respondent containing the proposed Settlement Agreement, relevant IIROC rules, Disciplinary Sanction Guidelines and certain decisions of previous hearing panels.

¶ 2 The Hearing Panel also heard oral submissions from both counsel.

¶ 3 The Settlement Agreement provided that the Respondent would pay a fine of \$45,000.00, would be required to successfully rewrite the Conduct and Practices Handbook exam, submit to a period of 6 months of close supervision, with all supervision reports to be filed with IIROC's Registration Department, and would pay costs to IIROC of \$5000.00.

¶ 4 After reviewing the written and oral submissions of both counsel, and conducting its own deliberations, the Hearing Panel decided it would approve and sign the Settlement Agreement with written reasons to follow. Those reasons are set out below, with a copy of the Settlement Agreement appended at the end of the reasons and incorporated hereto.

¶ 5 The contraventions alleged by IIROC and admitted by the Respondent are set out in the Settlement Agreement as follows:

- (a) Between January 2007 and January 2011, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to MM, contrary to Dealer Member Rule 1300.1(a) (Investment Dealer Association by-law 1300.1(a) prior to June 1, 2008); and
- (b) Between January 2007 and January 2011, the Respondent made unsuitable recommendations

for the account of MM, contrary to Dealer Member Rule 1300.1(q)(Investment Dealer Association by-law Regulation 1300.1(q) prior to June 1, 2008).

FACTS

¶ 6 The facts described in the Settlement Agreement are briefly summarized below.

- (a) The Respondent had been a Registered Representative (“RR”) and employed by Union Securities Ltd. (“US”) between January 2001 and March 2011.
- (b) MM was a client of the Respondent at US between 1999 and January of 2011.
- (c) Between January 1, 2007 to January 31, 2011 when he oversaw her account, (the “Material Time”) the Respondent failed to perform the necessary due diligence to know the essential facts relative to MM.
- (d) MM’s relevant personal and financial circumstances include the following facts:
 - (i) MM was born in 1923, married and spent much of her life as a farmer;
 - (ii) MM withdrew approximately \$17,000.00 from her account during the Material Time and accordingly, did not rely on her investments entirely for income.
 - (iii) MM was not a sophisticated investor, and had very little investment knowledge. She did not understand the nature of, nor the risks associated with many of the transactions that occurred in her account, some particulars of which include:
 - (A) the purchasing and selling of leveraged Exchange Traded Funds (“ETFs”);
 - (B) short sales; and
 - (C) trades using margin;
- (e) In 2006, MM’s New Client Account Form (“NCAF”) identified the following assets:
 - (i) liquid assets worth \$150,000.00;
 - (ii) fixed assets worth \$150,000.00; and
 - (iii) an annual income of approximately \$25,000.00 comprised of Canada Pension Plan and Old Age Security payments
- (f) MM’s NCAF contained the following inaccuracies:
 - (i) it overstated her investment knowledge by identifying it as “good”
 - (ii) it recorded overly risky investment objectives with financial objectives of
 - (A) 70% short term trading; and
 - (B) 30% venture/speculativeand overly risky risk tolerances of
 - (A) 30% medium risk; and
 - (B) 70% high risk.
- (g) MM trusted and relied on the Respondent’s advice and placed her confidence in him. She routinely followed all the trades in her account that the Respondent recommended.
- (h) Respondent made numerous unsuitable trade recommendations that resulted in an inappropriate level of risk in MM’s account holdings.
- (i) Over the Material Time, the average risk level of securities held in her account was:
 - (i) 23.1% low risk securities;

- (ii) 50.8% medium risk securities; and
 - (iii) 26.1% high-risk securities.
- (j) The Respondent made the following unsuitable recommendations during the Material Time:
- (i) significant purchases of Horizons Beta Pro Leveraged ETFs that amounted to \$300,543.00 or 78% of all purchases in the account for this period. The average value of the equity in the account at this time was about \$36,000.00
 - (ii) three short sales producing proceeds of \$48,551.00; and
 - (iii) a number of trades made on margin when the average annual margin balance in the account was about \$58,615.00 whereas the average value of the equity in the account was only \$42,439.00.
- (k) while the value of MM's account rose over its lifetime, during the Material Time, MM's account incurred a loss of about \$21,271.00 that represented a 33% loss of average net equity. During this interval, the S& P/TSX Composite Total Return Index rose 18.0% and the DEX Long-Term Bond Index rose 21.7%.
- (l) MM's account produced about \$15,923.00 in commissions during the Material Time, which represents about 9% of the average value of the equity held in MM's account. The leveraged ETF trades produced \$5,611.00 of those commissions.
- (m) The Respondent agreed with the facts set out in Section III of the Settlement Agreement.

DECISION

¶ 7 The issue for the panel was whether to accept or reject the proposed settlement. In his submissions recommending acceptance of the terms of the Settlement Agreement, Enforcement Counsel referred the Hearing Panel to Dealer Member Rule 20.36 which stipulates as follows:

20.36 (1) Upon conclusion of a settlement hearing, the Hearing Panel may either:

- (a) accept the Settlement Agreement; or
- (b) reject the Settlement Agreement.

¶ 8 Enforcement counsel also cited the decision *Re Milewski*, [1999] I.D.A.C.D. No. 17, which contains the following statement:

“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 settlement.

¶ 9 Enforcement Counsel also reviewed the relevant factors set out in the Sanction Guidelines to be taken into consideration by the Hearing Panel, including:

- (a) The purpose of sanctions is to be preventative in nature;
- (b) The sanctions are to address specific deterrence to the Respondent and general deterrence of others that may be like minded;
- (c) Penalties are not to be punitive but to fit the facts of each case; and
- (d) The approach is to be global in nature.

¶ 10 Enforcement Counsel then reviewed the facts which were relevant to the application of the above principles:

- (a) The client was elder and reliant;
- (b) There were two violations spread over a longer period of time;
- (c) The proposed penalty would ensure the Respondent does not benefit from his actions;
- (d) The Respondent has no prior record;
- (e) The conduct does not reveal an intentional, wilful intent to cause harm; and
- (f) By entering into a Settlement Agreement, the Respondent saved costs of hearing and saved burden of MM having to attend and testify at a hearing.

¶ 11 Counsel for the Respondent concurred with the submissions of Enforcement Counsel but added the following:

- (a) The relevant cited case authorities demonstrated that the proposed penalty in this case fell well within the range of penalties previously imposed on similar facts;
- (b) The Respondent had a number of personal and professional circumstances that ensured that in this instance the proposed penalty would have a significant financial effect; and
- (c) The Respondent's conduct throughout the proceedings demonstrated significant remorse.

¶ 12 The Hearing Panel was also provided with cases cited by IIROC including *Re Allan*, 2013 IIROC 56, and *Re Hanna*, 2012 IIROC 71. It was noted that both cases concerned persons in their senior years with limited investment knowledge and assigned investment objectives and risk tolerance parameters that were too risky and not consistent with their financial circumstances.

¶ 13 The Hearing Panel also considered the following purposes which sanctions are designed to serve:

- (a) the "Know Your Client" rule in the Dealer Member Disciplinary Sanction Guidelines requires that all registrants make diligent and business-like efforts to learn and record the essential financial and personal circumstances and the investment objectives of each client.
- (b) knowing your client is a fundamental ongoing obligation that a registrant is required to meet to continue to act in the best interest of his clients.

¶ 14 This Hearing Panel accepts that it must not substitute its own discretion for that exercised by the parties in reaching their Settlement Agreement, nor reject a settlement unless it views the penalty as clearly falling outside a reasonable range of appropriateness.

¶ 15 This Hearing Panel concludes the proposed sanctions are appropriate to the conduct of the Respondent, having regard to the goal of promoting general adherence to industry rules and standards, the prime function of the disciplinary process which is to protect the public and the reputation of the securities industry, as well as all of the personal circumstances referenced by the Respondent's counsel.

¶ 16 Accordingly, the Hearing Panel accepts the terms of the Settlement Agreement and gives effect to it as of May 7, 2015.

DATED as of the 9th day of May, 2015.

Shelley L. Miller, Q.C.,

Chair

David Johnson

James Ross

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff (“Staff”) and the Respondent, Sheldon Don Birkeland, 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 Sheldon Don Birkeland.
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 January 2007 and January 2011, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to MM, contrary to Dealer Member Rule 1300.1(a) (Investment Dealer Association by-law 1300.1(a) prior to June 1, 2008); and
 - b. Between January 2007 and January 2011, the Respondent made unsuitable recommendations for the account of MM, contrary to Dealer Member Rule 1300.1(q) (Investment Dealer Association by-law 1300.1(q) prior to June 1, 2008).
6. Staff and the Respondent agrees to the following terms of settlement:
 - a. A fine in the sum of \$45,000.00;
 - b. A requirement to successfully Rewrite the Conduct and Practices Handbook exam; and
 - c. A period of 6 months of close supervision, with all supervision reports to be filed with IIROC’s Registration Department.
7. The Respondent agrees to pay costs to IIROC in the sum of \$5,000.00.

III. STATEMENT OF FACTS

(i) Acknowledgment

8. 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

9. This matter stems from the Respondent’s handling of the account of MM. MM is an elderly woman who was born in 1923. She has little investment knowledge and was entirely reliant on the Respondent for investment advice. The Respondent failed to know this client and recommended sophisticated, high risk investments that were unsuitable for MM.

Registration History

10. The Respondent is currently employed with Mackie Research Capital Corporation, where he has been a Registered Representative since in 2011. His previous registration history includes:

Firm	From	To	Type
Union Securities Ltd.	January 2001	March 2011	Registered Representative (Securities Options Retail)
Merrill Lynch Canada	June 1998	January 2001	Investment Advisor (Securities Options)

Midland Walwyn	April 1998	June 1998	Investment Advisor
RBC Dominion Securities	October 1996	April 1998	Investment Advisor

Failure to Know Client

11. MM was a client of the Respondent at Union Securities Ltd. between 1999 and March of 2011. However, during the last 4 years that he oversaw her account, namely from January 1st of 2007 to January 31st of 2011 (the “Material Time”), the Respondent failed to perform the necessary due diligence to know the essential facts relative to MM.
12. MM’s relevant personal and financial circumstances include:
 - a. MM was born in 1923 and has spent much of her life as a Farmer;
 - b. MM was married and did not rely on her investments entirely for income. She withdrew approximately \$17,000.00 from her account during the Material Time;
 - c. MM was not a sophisticated investor, and had very little investment knowledge. She did not understand the nature of many of the transactions that occurred in her account, nor the risks associated with them. This includes:
 - i. the purchasing and selling of leveraged Exchange Traded Funds (“ETFs”);
 - ii. short sales; and
 - iii. trades using margin;
 - d. In 2006, MM’s New Client Account Form (“NCAF”) identified the following assets:
 - i. liquid assets worth \$150,000.00;
 - ii. fixed assets worth \$150,000.00; and
 - iii. an annual income of approximately \$25,000.00, comprised of Canada Pension Plan and Old Age Security payments.
13. MM’s NCAF was inaccurate in a number of respects. The NCAF:
 - a. overstated her investment knowledge by identifying it as “good”;
 - b. recorded investment objectives and risk tolerances that were overly risky. Her financial objectives were identified as:
 - i. 70% short term trading; and
 - ii. 30% Venture/Speculative;
 - c. and her risk tolerance was identified as:
 - i. 30% medium risk; and
 - ii. 70% high risk.

Suitability

14. MM had placed her trust and confidence in the Respondent and was reliant on his advice. The Respondent recommended all of the trades in her account, and MM routinely followed his trade recommendations. Numerous unsuitable recommendations made by the Respondent resulted in an inappropriate level of risk in MM’s account holdings.
15. Over the Material Period the average risk level of the securities held in MM’s account was as follows:

- a. 23.1% low risk securities;
 - b. 50.8% medium risk securities; and
 - c. 26.1% high risk securities.
16. Unsuitable recommendations made by the Respondent during the Material Period included:
- a. significant purchases of Horizons Beta Pro Leveraged ETFs. These trades amounted to approximately \$300,543.00 or 78% of all purchases in the account for this period. The average value of the equity in the account over this period was approximately \$36,000.00.
 - b. three short sales which produced proceeds of \$48,551.00; and
 - c. a number of trades made on margin. The average annual margin balance in the account was approximately \$58,615.00. During that same time period the average value of the equity in the account was only \$42,439.00.

Losses

17. While the value of MM's account rose over its lifetime, during the Material Period, MM's account incurred a loss of approximately \$21,271.00. This represented 33% loss of average net equity. During the same time, the S&P/TSX Composite Total Return Index rose 18.0% and the DEX Long-Term Bond Index rose 21.7%.

Commissions

18. MM's account produced approximately \$15,923.00 in commissions over the Material Period. This represents approximately 9% of the average value of the equity held in MM's account. \$5,611.00 of those commissions was produced by the leveraged ETF trades.

IV. TERMS OF SETTLEMENT

19. 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.
20. The Settlement Agreement is subject to acceptance by the Hearing Panel.
21. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
22. 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.
23. 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.
24. 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.
25. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
26. 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.
27. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement.

28. 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 Calgary in the Province of Alberta, this 25th day of March, 2015.

“Craig Leggatt”

Craig Leggatt Solicitor for

Sheldon Birkeland

“Witness”

Witness

“Sheldon Birkeland”

Sheldon Birkeland

AGREED TO by Staff at the City of Calgary in the Province of Alberta, this 7 day of May, 2015.

“Witness”

Witness

“Tayen Godfrey”

Tayen Godfrey

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

ACCEPTED at the City of Calgary in the Province of Alberta, this 7 day of May, 2015, by the following Hearing Panel:

Per: “Shelley Miller”

Panel Chair

Per: “David Johnson”

Panel Member

Per: “James Ross”

Panel Member

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