Re Byron Capital Markets & Becher

IN THE MATTER OF:

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

and

Byron Capital Markets Ltd and Robert Campbell Becher

2014 IIROC 22

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

Heard: May 29. 2014
Decision: June 2, 2014

Hearing Panel:
Martin L. Friedland, C.C., Q.C. (Chair), D.W. ("Sandy") Grant, Peter J. Gribbin
Appearances:
Kathryn Andrews, IIROC Senior Enforcement Counsel
Robert Campbell Becher, president, and Joe Ladeira, chief compliance officer, Byron Capital Markets Ltd

DECISION AND REASONS

INTRODUCTION

¶ 1 The staff of the Investment Industry Regulatory Organization of Canada ("IIROC") and the Respondents, Byron Capital Markets Ltd ("Byron") and Robert Campbell Becher ("Becher"), entered into the attached Settlement Agreement, dated April 8, 2014. 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 May 29, 2014.

¶ 3 In the Settlement Agreement the Respondents admit to the following contraventions of IIROC Rules, Guidelines, Regulations or Policies:

1. Between March and August 2010, Robert Campbell Becher failed to adequately supervise the activities of research analyst JH, contrary to IIROC Dealer Member Rule 38.1.
2. From September 2010 to January 2011, Byron Capital Markets Ltd failed to ensure that adequate disclosure was made in various research reports published by the firm, contrary to IIROC Dealer Member Rule 3400

¶ 4 Staff and the Respondents agreed to the following terms of settlement:

a) Payment of a fine by Becher for count 1 in the amount of $24,000, and

b) Payment of a fine by Byron for count 2 in the amount of $24,000.

¶ 5 The Respondent Byron also agreed to pay costs to IIROC in the sum of $1,000 and Respondent Becher agreed to pay costs to IIROC in the sum of $1,000.

¶ 6 At the end of the hearing, the Panel approved the Settlement Agreement. These are our reasons for doing

so.

FACTUAL BACKGROUND

¶ 7 Byron is a small IIROC Dealer Member firm with an office located in Toronto, Ontario. It primarily carries on institutional trading and corporate finance work.

¶ 8 Becher is the chief executive officer and president of Byron. In 2010 he was a Supervisor and the head of the investment banking department at Byron. One of his responsibilities was to supervise the activities of JH, a research analyst employed by Byron, who specialized in the rare earths sector. JH is not an IIROC registrant.

¶ 9 The Settlement Agreement sets out JH`s involvement with XYZ, a junior mining and exploration company that was seeking financing by way of an investment of over $10,000,000 or purchase of the company.

¶ 10 JH was privy to non-public confidential information regarding XYZ from March of 2010 onwards. Various discussions and exchanges of emails relating to this confidential information took place between JN, Becher, and the president of XYZ during this period, as outlined in paragraphs 17-20 of the Settlement Agreement.

¶ 11 Becher admits that he failed to ensure that JH`s confidential investment banking information concerning XYZ was properly contained, as required by Ontario Securities Commission Policy 33-601.

¶ 12 This constituted a breach of IIROC Rule 38, relating to compliance and supervision. Section 38.1 requires, in part, that "A Dealer Member must establish and maintain a system to supervise the activities of each...employee...of the Dealer Member that is reasonably designed to achieve compliance" with IIROC Rules and other laws, regulations and policies applicable to the Dealer Member's business.

NECESSITY OF CONTAINING INSIDER INFORMATION

¶ 13 Ontario Securities Commission Policy 33-601, "Guidelines for Policies and Procedures Concerning Inside Information," came into force in 1998. It sets out, in the words of the policy, "guidelines related to the policies and procedures which a registrant should consider to contain inside information, to restrict transactions when in receipt of inside information and to ensure compliance with insider trading restrictions." The guidelines were introduced, the Notice of Policy states, to ensure that registrants "develop, implement, maintain and enforce reasonable policies, procedures and organizational arrangements to safeguard inside information and ensure that there is no improper buying, selling or informing."

¶ 14 Insider trading legislation was introduced in Ontario in the 1960s following the 1965 Kimber Report on Securities Legislation. Insider trading continues to be a major problem in Canada, as it is internationally. It is difficult to detect and, if detected, hard to obtain a conviction.

¶ 15 Insider trading harms the capital markets. An IIROC panel in 2012, *Re Bortolin* (2012 IIROC 13) dealt with one of the very few disciplinary cases that discusses insider trading. The panel stated (paragraphs 61 and 62):

> "The capital markets are damaged by insider trading because its existence encourages a belief by many potential investors that they cannot get a fair deal in the capital markets and that it is insiders only who profit through their special access to information. It then becomes harder for entrepreneurs and others to raise capital, creating an obstacle to economic growth. The practice also financially harms the persons on the other side of trades by insiders who do not have the knowledge that the insider has. In almost all cases innocent persons never find out that they have been financially harmed in their purchases or sales of stocks.
>
> Insider trading [is] particularly difficult to detect, mainly because individuals are not aware that they have been hurt. When money is stolen, someone usually complains. But with insider trading...no-one is there to blow the whistle. It is therefore incumbent on securities dealers and other gatekeepers to be vigilant not to facilitate those activities."

¶ 16 Policy 33-601 deals with how dealers should take steps to control the use of insider information. One of

the techniques suggested is “containment of inside information.” (2.1(1)(b)). This involves implementing what is known as a “grey list”. This is a list of issuers and persons who are privy to confidential knowledge. The information should be kept behind what is called a “Chinese Wall”.

¶ 17 There is a good discussion of the issue in a Securities Exchange Commission document from 1990, “Broker-Dealer Policies and Procedures Designed to Segment the Flow and Prevent the Misuse of Material Nonpublic Information” (available online: www.sec.gov/divisions/marketreg/brokerdealerpolicies.pdf). Chinese Walls are described as follows (pages 2-3): “Broker-dealer Chinese Walls have evolved to include policies and physical apparatus designed to prevent the improper or unintended dissemination of market sensitive information from one division of a multi-service firm to another (i.e. from the mergers and acquisitions area to proprietary or retail trading), and trading procedures and reviews designed to prevent and detect illegal trading.”

¶ 18 Byron’s Corporate Finance Procedural Memorandum, dated March 2010, provides that “securities of an issuer are to be placed on the grey list when Byron Securities Ltd has been invited to, or offered to, participate in an offering of securities by an issuer or to act concerning a possible take-over, merger or acquisition or other corporate assignment, even though Byron Securities Ltd has not been formally engaged by the issuer.”

¶ 19 Byron's stated practice was to add individuals to the grey list as well as reporting issuers. From March 2010 to August 2010, JH possessed inside information concerning XYZ. He was not added to the firm’s grey list until August 20, 2010, even though XYZ was added to the list on June 7, 2010, some two months earlier.

¶ 20 The Respondents agree in the Settlement Agreement (paragraph 24) that “Becher should have ensured that JH’s name was placed on the grey list in a timely manner.”

CONFLICT OF INTEREST

¶ 21 During the fall of 2010 and early 2011, Byron admits in the Settlement Agreement that it failed to ensure that proper disclosure was made in twelve of its research reports regarding five issuers (paragraph 25). In particular Byron failed to disclose that it had received investment banking revenue from these issuers. These research reports, primarily delivered to institutional clients on request, were all written by JH.

¶ 22 This is a clear violation of IIROC Rule 3400 dealing with “Research Restrictions and Disclosure Requirements.” The Rule “establishes requirements that analysts must follow when publishing research reports or making recommendations...to minimize potential conflicts of interest.”

¶ 23 The Rule states, in part: “Each Dealer Member shall prominently disclose in any research report...any information regarding its, or its analyst’s business with or relationship with any issuer which is the subject of the report which might reasonably be expected to indicate a potential conflict of interest on the part of the Dealer Member or the analyst in making a recommendation with regard to the issuer.” Byron admits that none of the twelve reports disclosed the fact that Byron had received investment banking revenue from each of the five issuers at the time of issuance of each of the reports.

¶ 24 Failure to disclose such a conflict of interest prevents readers of the report from making fully informed decisions on whether to act on the report.

TERMS OF SETTLEMENT

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

¶ 26 As stated above, Staff and the Respondents agree to the following terms of settlement:

a) Payment of a fine by Becher for count 1 in the amount of $24,000, and

b) Payment of a fine by Byron for count 2 in the amount of $24,000.

The Respondent Byron also agreed to pay costs to IIROC in the sum of $1,000 and Respondent Becher agreed to pay costs to IIROC in the sum of $1,000.

STANDARD FOR REVIEWING A SETTLEMENT AGREEMENT

¶ 27 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."

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."

See also *Re Portfolio Strategies Securities* (2012 IIROC 36) which also note "that the settlement process is an important one which should be encouraged and supported." 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

¶ 28 We are satisfied, to use the language in the *Rotstein and Zackheim* case, that the penalties proposed in the Joint Settlement Agreement are 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.

¶ 29 The penalties proposed are reasonably consistent with the suggested penalties in the March 2009 IIROC Dealer Member Disciplinary Guidelines. The penalty relating to count 2 (disclosure in research reports) is consistent with a very recent case, *Re Toll Cross Securities* (2014 IIROC 19), the only reported case relating to Member Rule 3400.

¶ 30 The Settlement Agreement does not outline any specific harm that arose because of the above breaches by the Respondents. There was, however, risk of harm.

¶ 31 It should also be kept in mind that we are dealing here with a small company and the penalty imposed is understandably less than for a large organization. (See *Re Magna Partners Ltd* 2011, 34 OSCB 8697, a decision of the Ontario Securities Commission concerning an IIROC penalty.). The OSC Panel stated (paragraph 58) that Magna, which had been fined $100,000, "had been in early warning...In our view, a penalty of $100,000 is not proportionate to the size of the firm and its regulatory capital. A penalty of that size would be considered a minor deterrence to a large member of its industry, but could cause the failure of a much smaller member firm." The size of the firm, the panel stated, should be "a very significant factor". The Respondent Byron is at present in Early Warning (Settlement Agreement, paragraph 31).

¶ 32 The Settlement Agreement notes (paragraph 30) that "Byron revised its Policies and Procedures Manual in May 2011 to set out more detailed procedures and to remedy the above deficiencies regarding the research reports."

¶ 33 The Settlement Agreement also notes that since the above events, "Byron has made improvements in its compliance and investment banking departments" (paragraph 29). It hired an experienced Chief Compliance Officer in 2011.

¶ 34 Neither of the Respondents have any previous disciplinary history with IIROC.

¶ 35 Finally, the Respondents have co-operated with IIROC's investigation and admit their wrongdoing.

¶ 36 The Panel therefore accepted the Settlement Agreement and gave effect thereto as of May 29, 2014.

Dated at Toronto this 2nd day of June, 2014.

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

Peter J. Gribbin, Industry Representative

D.W. ("Sandy") Grant, Industry Representative

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff ("Staff") and the Respondents Byron Capital Markets Ltd and Robert Campbell Becher ("Byron" or "Becher" or the "Respondents"), 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") into the conduct of Byron and Becher.

3. The Investigation discloses matters for which the Respondents 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 Respondents jointly recommend that the Hearing Panel accept this Settlement Agreement.

5. The Respondents admit to the following contraventions of IIROC Dealer Member Rules, Guidelines, Regulations or Policies:

    1. Between March and August 2010, Robert Campbell Becher failed to adequately supervise the activities of research analyst JH, contrary to IIROC Dealer Member Rule 38.1.

    2. From September 2010 to January 2011, Byron Capital Markets Ltd failed to ensure that adequate disclosure was made in various research reports published by the firm, contrary to IIROC Dealer Member Rule 3400.

6. Staff and the Respondents agree to the following terms of settlement:

    a) Payment of a fine by Becher for count 1 in the amount of $24,000, and

    b) Payment of a fine by Byron for count 2 in the amount of $24,000.

7. The Respondent Byron agrees to pay costs to IIROC in the sum of $1,000 and the Respondent Becher agrees to pay costs to IIROC in the sum of $1,000.

III. STATEMENT OF FACTS

(i) **Acknowledgment**

8. Staff and the Respondents 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. Between March and August 2010, while a Supervisor and head of investment banking at Byron, Becher allowed research analyst JH to conduct investment banking business on Byron's behalf. At this time Byron was seeking investment banking business from an issuer XYZ Company ("XYZ").

10. During this time, JH obtained confidential or non public information concerning XYZ. Becher did not ensure that Byron had adequate safeguards to contain this confidential information. In particular, Becher failed to add JH to the firm's grey list in a timely manner.

11. In addition, during the fall of 2010 and early 2011, Byron failed to ensure that proper disclosure was made in twelve of its research reports regarding five issuers. In particular, Byron failed to disclose that it had received investment banking revenue from these issuers. These research reports were all written by JH.

The member firm and its principals

12. Byron is a small IIROC Dealer Member firm with an office located in Toronto, Ontario. It primarily carries on institutional trading and corporate finance work and was formerly known as Byron Securities Limited.

13. Becher has been a Supervisor at Byron since May 19, 2010. Becher was the head of the investment banking department at Byron from March 2009 until November 2010. Since November 2010 Becher has been the CEO, Ultimate Designated Person and President of Byron.

14. At all material times JH was a research analyst employed by Byron. He specialized in the rare earths sector. JH is not an IIROC registrant.

The issuer

15. XYZ is a junior mining and exploration company whose President and CEO was AA. In early 2010, XYZ was seeking financing by way of an investment in the firm of over 10 million dollars and/or was seeking an investor to purchase the company.

Containment of confidential information (count 1)

16. During the spring of 2010, Becher permitted JH to seek out business for Byron from XYZ. Becher then failed to adequately contain the information that JH obtained from XYZ within Byron.

Spring of 2010

17. Various emails were exchanged between March 2010 and the end of May 2010, between Becher, JH and AA. JH obtained confidential or non public information concerning XYZ at this time, via these emails and/or conference calls.

Summer of 2010

18. On June 3, 2010, XYZ announced that a foreign government had granted it the rights to a certain mine. In response to a query about this development from Becher, JH provided information concerning XYZ which had not been publicly announced at this point.

19. On June 11, 2010, JH emailed Becher and advised him regarding the status of XYZ's discussions with a possible investor. In an email dated June 15, 2010, AA provided further information to Becher and JH regarding XYZ's financing needs.

Failure to adequately contain confidential information

20. Various emails to and from JH indicate that JH was privy to non public or confidential information regarding XYZ from March of 2010 onwards. The emails also indicate that Becher knew or ought to have known that JH had had access to confidential or non public information concerning XYZ

throughout this period.

21. Beginning in the spring of 2010, Becher failed to ensure that JH's confidential investment banking information concerning XYZ was contained within "appropriate secure and restricted areas and minds", as it should have been further to both OSC Policy 33-601 and Byron's own policies and procedures**.**

Grey list and Byron procedures

22. Byron's Corporate Finance Procedural Memorandum dated March 2010 provides that "securities of an issuer are to be placed on the grey list when Byron Securities Ltd has been invited to, or offered to, participate in an offering of securities by an issuer or to act concerning a possible take-over, merger or acquisition or other corporate assignment, even though Byron Securities Ltd has not been formally engaged by the issuer."

23. Byron's Chinese Wall Summary Flowchart defines grey list as a confidential list, compiled and maintained by Byron, of the names of reporting issuers about which Byron has inside information ("Inside Information"). Inside Information is defined as material information that has not been generally disclosed. Byron's practice was to add individuals to the grey list as well as reporting issuers. From March 2010 to August 2010, JH possessed Inside Information concerning XYZ within the meaning of this term.

24. JH was not added to the firm's grey list until August 20, 2010, despite the fact that XYZ was added to the firm's grey list some two months earlier on June 7, 2010. Becher should have ensured that JH's name was placed on the grey list in a timely manner.

Inadequate disclosure on research reports (count 2)

25. Byron published twelve research reports written by JH during the fall of 2010 and January 2011, concerning five issuers. The research reports are primarily delivered to institutional clients on request.

26. The twelve research reports in question were:

	Issuer	**Name of Report**	**Date**
1	Lithium Americas Corp	Charging Up	September 23, 2010
2	Orocobre Limited	First out of the gate	September 23, 2010
3	Orocobre Limited	Q4 Year End Update	September 30, 2010
4	Rodinia Lithium Inc.	Slews of Good News	October 6, 2010
5	Great Western Minerals Group Ltd.	Additional Processing Capacity	October 27, 2010
6	Largo Resources Ltd.	Maracas Fully Financed	October 27, 2010*
7	Largo Resources Ltd.	Will Sanity Prevail?	October 28, 2010
8	Lithium Americas Corp	Resource Update	November 9, 2010
9	Rodinia Lithium Inc.	Private Placement details	November 29, 2010*
10	Largo Resources Ltd.	More icing on the cake	December 14, 2010*
11	Rodinia Lithium Inc.	Drill Program	January 17, 2011*
12	Great Western Minerals Group Ltd.	You are going to miss it once it's gone	January 20, 2011*

27. None of the above twelve reports disclosed the fact that Byron had received investment banking revenue from each of these five issuers at the time of issuance of the report.

28. In addition, five of these reports (the ones identified by asterisks above) were not approved in writing by

the compliance department at Byron prior to publication.

Improvements made at Byron

29. Since the above events, Byron has made improvements in its compliance and investment banking departments. It hired JL, an experienced Chief Compliance Officer, in 2011.

30. Byron identified its research report errors prior to April 2011. Byron revised its Policies and Procedures Manual in May 2011 to set out more detailed procedures and to remedy the above deficiencies regarding the research reports.

Byron's financial condition

31. Pursuant to IIROC Rule 30, Byron has been in Early Warning Level 2 since November 30, 2012. Over the past twelve months, Byron has enjoyed some profitable months and suffered operating losses in other months. Risk Adjusted Capital ("RAC") as filed by Byron in its Monthly Financial Reports ("MFRs") for December 31, 2013 and January 31, 2014 showed a very modest positive RAC.

32. Byron is attempting to improve its profitability and financial condition, and has taken several measures to contain costs and to improve its capital position. Examples of this include capital injections, a reduction in the number of employees and moving to new office space. Byron has been keeping IIROC's Financial Operations department informed of new inititatives and measures to improve profitability and to improve RAC.

Mitigating Factors

33. Neither Byron nor Becher have any previous disciplinary history with IIROC.

34. Both Byron and Becher co-operated with Staff's Investigation and this prosecution.

IV. TERMS OF SETTLEMENT

35. 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.

36. The Settlement Agreement is subject to acceptance by the Hearing Panel.

37. The Settlement Agreement shall become effective and binding upon the Respondents and Staff as of the date of its acceptance by the Hearing Panel.

38. 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.

39. If the Hearing Panel accepts the Settlement Agreement, the Respondents waive their rights under IIROC rules and any applicable legislation to a disciplinary hearing, review or appeal.

40. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondents may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the matters disclosed in the Investigation.

41. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.

42. Staff and the Respondents 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.

AGREED TO by the Respondents at the City of Toronto in the Province of Ontario, this "8th" day of "April", 2014.

"WITNESS" **"BYRON CAPITAL MARKETS LTD"**

"WITNESS" **"ROBERT CAMPBELL BECHER"**

AGREED TO by Staff at the City of Toronto in the Province of Ontario, this "10th" day of "April", 2014.

"WITNESS" **"KATHRYN ANDREWS"**

Senior 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 "29th" day of "May", 2014, by the following Hearing Panel:

Per: "Martin Friedland"

Panel Chair

Per: "Peter Gribbin"

Panel Member

Per: "Donald Grant"

Panel Member

Copyright © 2014 Investment Industry Regulatory Organization of Canada. All Rights Reserved.