

Re Niding

IN THE MATTER OF:

THE RULES OF THE
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

THE BY-LAWS OF THE
INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

ANDRÉ NIDING

2009 IIROC 10

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

Heard: December 12, 2008
Decision: February 12, 2009
(21 paras.)

Hearing Panel:

Me Alain Arsenault, Chair
Me Danielle LeMay, Panel Member
Mr. Gilles Archambault, Panel Member

DECISION ON SETTLEMENT AGREEMENT

UNOFFICIAL ENGLISH TRANSLATION

1. On or about February 8, 2007, Staff of the Investment Dealers Association of Canada (IDA) launched an investigation, for the 1998-1999 period, into the conduct of the Respondent, who was employed as a registered representative with Midland Walwyn Capital Inc., which has since become Merrill Lynch Canada Inc.;
2. On June 1, 2008, the Respondent became a registrant of IIROC, owing to the merger of the IDA with IIROC;
3. On December 3 and 4, 2008, the parties signed a Settlement Agreement (Exhibit P-1) in accordance with Rules 20.35 to 20.40 of the IIROC Dealer Member Rules, and Rule 15 of the Rules of Practice and Procedure;
4. In this Agreement, the Respondent admits to the following misconduct:
 - 1- Between July 1998 and August 1999, while he was a Registered Representative with Midland Walwyn Capital Inc. (which became Merrill Lynch Canada Inc. in the same period), a Member firm of the IDA, and was working as a team with Registered Representative "B", the Respondent engaged in business conduct which was unbecoming

and detrimental to the public interest, failed to observe high standards of ethics and conduct and failed in his duty to protect the public, contrary to By-law 29.1 of the Association, when he learned that, unbeknownst to the firm and in return for a receipt, “C” had remitted cash for investment purposes, in an amount equal to or greater than \$23,750.00, although he knew or should have known that this was contrary to written internal company policy and to the provisions of the Proceeds of Crime (Money Laundering) legislation in force, the requirements of which were set forth in Interpretation Bulletin C-55 published by the Association on March 4, 1993;

2- Between July 1998 and August 1999, while he was a Registered Representative with Midland Walwyn Capital Inc. (which became Merrill Lynch Canada Inc. in the same period), a Member firm of the IDA, and was working as a team with Registered Representative “B”, the Respondent engaged in business conduct which was unbecoming and detrimental to the public interest and failed to observe high standards of ethics and conduct, contrary to IDA By-law 29.1, by allowing “C” to invest monies remitted in cash by means of a third-party account, being a Canadian account in the name of “D”, reference no. 158, although he knew that “C” was the actual beneficiary of the account and knew or should have known that such procedure could be construed as a tax evasion scheme;

5. The Settlement Agreement (Exhibit P-1) provides for the following penalties:

- a) An aggregate fine in the amount of \$25,000, apportioned as follows:
 - i) \$15,000 for count 1;
 - ii) \$10,000 for count 2;
- b) A six(6)-month period of strict supervision, with monthly Supervision Reports to be submitted by the firm;
- c) Repayment of the commissions generated on the trading that was done, an amount of \$2,250;
- d) Successful completion of the Conduct and Practices Handbook examination within six (6) months from the effective date of this Settlement Agreement;

As well as payment of \$10,000 in investigation costs to IIROC;

6. This Settlement Agreement (Exhibit P-1) is complemented by a second agreement regarding the terms of payment of the monetary penalties (Exhibit P-2), also signed on December 3 and 4, 2008;
7. On December 12, 2008, the parties appeared before our Hearing Panel seeking our approval for the suggested penalties;
8. IIROC Member Rule 20.36 limits the powers of the Hearing Panel over a Settlement Agreement;
9. Its authority is limited to either accepting the Settlement Agreement or rejecting it; the Hearing Panel may not substitute a penalty that it deems more appropriate;
10. Upon acceptance by the Hearing Panel, the Settlement Agreement becomes binding upon the parties; if rejected, the parties may negotiate a new settlement agreement. Should the parties fail to negotiate a new settlement agreement, another Hearing Panel shall be constituted for a disciplinary hearing on the same or related charges;
11. The Settlement Agreement (Exhibit P-1) appended to this decision offers a very clear account of the events that led to the Respondent’s alleged misconduct;
12. More specifically, the plaintiff, a client of the Respondent, had remitted large amounts of cash to the Respondent, for which receipts were given, which amounts were traded to a tax haven and then returned

to the Midland Walwyn Capital Inc. office, to an account opened in the name of a person other than the Plaintiff;

13. Subsequently, the Respondent learned of the management of these funds by another representative of the same brokerage firm, namely Mr. Marc-Antoine Beauchamp;
14. The Respondent and his associate, Mr. Marc-Antoine Beauchamp, received \$328,000 from the plaintiff, in approximately six (6) instalments;
15. According to the representations made by the parties at the hearing, these facts and actions were contrary to Midland Walwyn Capital Inc. policy in the matter, as well as to the Proceeds of Crime (Money Laundering) legislation enacted by the Government of Canada, because no report was filed with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC);
16. What's more, according to the representations made by the parties at the hearing, Midland Walwyn Capital Inc. was unaware of the Respondent's alleged misconduct, even though the plaintiff had remitted the amount of \$328,000 to the Respondent and his associate at the firm's offices;
17. The parties have jointly detailed the aggravating and mitigating factors to justify their Settlement Agreement;
18. The aggravating factors reported by the parties are:
 - a) his knowledge of his associate's conduct with respect to the plaintiff;
 - b) his silence;
 - c) his attendance at a few meetings;
 - d) the shared commissions;
19. As for the mitigating factors reported by the parties, the following are worth mentioning:
 - a) the absence of any disciplinary record on the Respondent;
 - b) the lack of ties with the client;
 - c) his non-participation in setting up the tax evasion scheme;
 - d) his satisfactory cooperation in the investigation;
20. According to the Hearing Panel, the lack of a disciplinary record on the Respondent and his satisfactory cooperation in IIROC's investigation, notably his admitting to the alleged misconduct, are important points that must be taken into account in evaluating the reasonableness of the penalties that are the subject of the Settlement Agreement presented by the parties;
21. Consequently, due in particular to the fact that the Respondent was not actively involved in this matter, the Hearing Panel considers that the Settlement Agreement is reasonable given all of the existing circumstances.

FOR THESE REASONS, THE HEARING PANEL:

ACCEPTS AND GIVES EFFECT to the Settlement Agreement appended to this decision, as well as to each of the penalties mentioned therein, from the date of service of this decision on the Respondent.

Montréal, this February 12, 2009.

Me Alain Arsenault, Chair
Me Danielle Le May, Panel Member
Mr. Gilles Archambault, Panel Member

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. The Enforcement Department Staff (“Staff”) of the Investment Industry Regulatory Organization of Canada (“IIROC”) has conducted an investigation (the Investigation) into the conduct of André Niding (the Respondent);
2. The Investigation was commenced by Enforcement Department Staff of the Investment Dealers Association of Canada (IDA) prior to May 30, 2008. 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 the IDA and IIROC, which came into force June 1, 2008, the IDA has retained IIROC to provide the necessary services for the IDA to carry out its regulatory functions;
3. The Investigation disclosed matters for which the Respondent may be disciplined by a Hearing Panel appointed pursuant to Part C of Schedule C.1 to Transition Rule No. 1 of IIROC (the Hearing Panel);

II. JOINT SETTLEMENT RECOMMENDATION

4. The Respondent consents to be subject to the jurisdiction of IIROC;
5. Staff and the Respondent consent and agree to the settlement of these matters by way of this settlement agreement (“the Settlement Agreement”) 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;
6. The Settlement Agreement is subject to acceptance by the Hearing Panel;
7. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel;
8. 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;
9. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his/her right, under IIROC Rules and any applicable legislation, to a disciplinary hearing, review or appeal;
10. 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;
11. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel;
12. 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;
13. Staff and the Respondent jointly recommend that the Hearing Panel accept the Settlement Agreement;

III. STATEMENT OF FACTS

(i) Acknowledgment

14. Staff and the Respondent agree with the facts set out in this section and acknowledge that the terms of the settlement contained in this Settlement Agreement are based upon those specific facts;

(ii) Factual Background

15. Staff of the IDA conducted an investigation into the conduct of the Respondent during the period of 1998-1999, when the Respondent was employed as a registered representative with Midland Walwyn Capital Inc., which became Merrill Lynch Canada Inc. in the same period (the firm), regarding a complaint filed with the IDA on November 17, 2006;
16. The plaintiff, "C", alleged having lost over \$200,000 as a result of investments that he made via client account "E" with the firm;
17. Staff of the IDA launched its investigation on or about February 8, 2007;
18. At the material time, the Respondent was registered with the IDA;
19. On June 1, 2008, the Respondent became a registrant of IIROC;
20. The Respondent's employment profile is the following:

| From | To | Firm |
|---------------|---------------|------------------------------------|
| February 2005 | The present | Richardson Financial Partners Ltd. |
| December 2001 | January 2005 | CIBC World Markets Inc.. |
| August 1998 | December 2001 | Merrill Lynch Canada Inc. |
| April 1998 | August 1998 | Midland Walwyn Capital Inc. |
| August 1979 | April 1998 | RBC Dominion Securities Ltd. |
| November 1977 | August 1979 | Molson Rousseau |

21. At the material time, the Respondent was working as a team with "B", who was also a registered representative of the firm;
22. At the material time, the Respondent was a registered representative with about twenty years' experience in the industry; he therefore had the seniority of experience over his associate "B";
23. The Respondent, and his associate "B", were put in touch with the plaintiff, who wanted to open an overseas account for investment purposes;
24. The Respondent acted in cooperation with his associate "B", and with "A", also a registered representative of the same firm, to set up the overseas structure through "D";
25. To the Respondent's knowledge, "A" was the person within the firm with the expertise in opening accounts with client "D";

26. The Respondent and his associate "B" introduced the plaintiff to "A";
27. To the Respondent's knowledge, "A" opened a Canadian account with the firm in the name of client "D" for investments to be made by the plaintiff; this was account "E";
28. In his interview with the IDA investigator on April 30, 2007 (the Interview), the Respondent admitted having been present, with his associate "B", when "A" opened this account;
29. More specifically, account "E", reference number 158, was opened in the name of client "D";
30. The Respondent and his associate "B" knew that the plaintiff was the actual beneficiary of this account, and this point was acknowledged by the Respondent during the Interview with the IDA investigator;
31. At all material times, the Respondent and his associate "B" were the designated representatives on the statements of Canadian account "E", linked to the plaintiff;
32. As the designated representative on the account and a member of the "B"/Respondent team, the Respondent could make trades in the account and had access to all of the information regarding this account;
33. To the Respondent's knowledge, during the years 1998 and 1999, the plaintiff remitted a cash amount to "B" for investment purposes, in exchange for a receipt;
34. In his interview with the IDA investigator on April 30, 2007, the Respondent acknowledged having been present when the plaintiff remitted cash to his associate "B", in exchange for a receipt, in an amount equal to or greater than \$25,000;
35. In fact, over the course of 1998 and 1999, the following cash amounts were remitted directly to "B", in exchange for a receipt, on the following dates:
 - a) receipt signed by Respondent and dated July 30, 1998, for the sum of \$23,750;
 - b) receipt signed by Respondent and dated September 2, 1998, for the sum of \$23,750;
 - c) receipt signed by Respondent and dated June 29, 1999 for the sum of \$100,000;
 - d) receipt signed by Respondent and dated August 13, 1999 for the sum of \$47,500;
36. "B" therefore received a total of \$195,000 in cash from the plaintiff, most of the time in the presence of "A", and in the presence of the Respondent on at least one occasion;
37. By the Respondent's own admission during his interview with the IDA investigator regarding his presence when the cash amounts were remitted to "B", and given the amounts for which the receipts were issued, the Respondent apparently witnessed the remittance of a cash amount that was at least equal to \$23,750;
38. The facts of the Investigation show that "A" also signed receipts for cash amounts received from the plaintiff, to "B"'s knowledge, for a total amount of \$233,000;
39. Of this \$233,000, "A" and "B" respectively signed two receipts bearing the same date of June 29, 1999 and for an amount of \$100,000;
40. In light of all of the facts revealed by the Investigation, the IDA investigator concluded that it was the same \$100,000 amount;

41. The plaintiff therefore had "A" and "B" issue receipts for a total cash amount of \$328,000;
42. The Respondent never reported any of this to his firm, at least as regards the remittance of cash amounts, which he witnessed and which occurred in his presence;
43. In fact, according to the facts revealed by the IDA Investigation, it appears that the cash remittances were made without the knowledge of the firm, and contrary to the firm's policy in the matter and to the regulations in force at the time;
44. By the Respondent's own admission, during his interview with the IDA investigator, the Respondent knew that this was not proper procedure;
45. Regarding the matter of receiving cash, he furthermore acknowledged having encountered a similar situation many years before, in 1980 and 1981, and the firm for which he worked at the time had taken him to task and asked him not to do that;
46. What's more, at the material time, the Respondent had to have been aware of his own firm's internal policy in the matter, as well as the regulations in force at the time;
47. Indeed, the Respondent admitted to the IDA investigator that receiving cash was not allowed by the firm;
48. Consequently, the Respondent knew or should have known that this was contrary to written internal company policy and to the provisions of the Proceeds of Crime (Money Laundering) legislation in force, the requirements of which were clearly stated in Interpretation Bulletin C-55 published by the Association on March 4, 1993;
49. Yet, in spite of his twenty some years of experience in the industry, the Respondent did not inform the firm of what was going on in connection with the plaintiff and the cash remittances;
50. What's more, the Respondent reported to the IDA investigator that the cash remitted by the plaintiff was placed in a desk drawer at the firm before being turned over to "A"; the Respondent stated the following regarding this event: [translation] *"The money was, went into the drawer and, the next morning, I took it out and gave it to "A", that's it, that's all!"*;
51. The Respondent never disclosed this fact to the firm and the Respondent admitted to the investigator that the branch manager was unaware of the situation;
52. Neither the Respondent, nor "B", ever reported to the firm that the cash amounts had been received for investment purposes;
53. More specifically, the facts contained in the following paragraphs were uncovered during the investigation into the opening of accounts and the movement of funds in connection with the plaintiff;
54. The plaintiff opened an overseas account with "D";
55. Some of the above-mentioned sums received in cash were deposited in this overseas account held by the plaintiff;
56. Moreover, as already mentioned, a Canadian account "E", reference number 158, was opened with the firm in the name of client "D";

57. This Canadian account was under the joint code for the representatives "B"/Respondent;
58. The funds deposited overseas were redirected to the Canadian account "E";
59. The IDA's investigation brought to light the following sequence of fund transfers:
 - a) on or about July 22, 1998, the plaintiff remitted a sum of \$133,000 in cash to "A";
 - b) on or about July 29, 1998, an amount of \$133,000 was received in the plaintiff's overseas account;
 - c) the same day, an amount of \$131,500 was transferred to the Canadian account "E" held with the firm;
 - d) on July 29, 1998, an amount of \$131,500 was credited to this Canadian account;
 - e) on or about July 30, 1998, the plaintiff remitted an amount of \$23,750 in cash to "B";
 - f) on the same date, an amount of \$23,750 was credited to Canadian account "E" held with the firm, which amount came from the Canadian account of "F" with the firm;
 - g) on or about September 2, 1998, the plaintiff remitted an amount of \$23,750 in cash to "A";
 - h) on or about September 4, 1998, an amount of \$23,750 was credited to Canadian account "E" with the firm, which amount also came from the Canadian account of "F" with the firm;
 - i) on or about June 29, 1999, the plaintiff remitted an amount of \$100,000 in cash to "A" and to "B";
 - j) on or about July 13, 1999, with effect on July 9, 1999, an amount of \$100,000 was received in the plaintiff's overseas account with "D";
 - k) on or about July 14, 1999, an amount of \$100,000 was debited from this overseas account and transferred to client account "E" held with the firm;
 - l) on or about July 14, 1999, an amount of \$100,000 was credited to Canadian account "E" held with the firm;
 - m) on or about August 13, 1999, the plaintiff remitted an amount of \$47,500 in cash to "B";
 - n) on or about August 26, 1999, with effect on August 19, 1999, an amount of \$47,025 was received in the plaintiff's overseas account with "D";
 - o) on or about August 26, 1999, an equivalent amount was transferred to Canadian account "E" held with the firm;
 - p) on or about August 26, 1999, an amount of \$47,025 was credited to Canadian account "E" held with the firm;
60. As the designated representative on the statements of account "E", and a member of the "B"/Respondent team, and according to a commission-sharing agreement, the Respondent and "B" benefited, on a 50-50 basis, from 50% of the commissions generated on the trading that was done in this account;
61. More specifically, commissions for an approximate amount in the order of \$9,000 resulted from the trades thus made in Canadian account "E";
62. Considering the foregoing, the Respondent tacitly allowed the plaintiff to invest cash amounts by means of a third-party account, namely Canadian account "E" opened in the name of "D", when he knew that the plaintiff was the actual beneficiary of this account;
63. By his actions, his lack of questioning, or his inaction, and notably the fact that the Respondent was designated the representative for account "E", he enabled the plaintiff to invest cash amounts under cover of a third-party account, when he knew or should have known that such procedure could be construed as a tax evasion scheme.

64. On April 15, 2008, Staff of the IDA filed a report with the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC);
65. A settlement agreement has also been reached between "B" and the Staff of IIROC concerning the events related in this agreement;

IV. CONTRAVENTIONS

66. The Respondent admits to the following contraventions of IIROC Rules and Guidance, and IDA By-Laws, Regulations or Policies:
 1. **Between July 1998 and August 1999, while he was a Registered Representative with Midland Walwyn Capital Inc. (which became Merrill Lynch Canada Inc. in the same period), a Member firm of the IDA, and was working as a team with Registered Representative "B", the Respondent engaged in business conduct or practice which was unbecoming and detrimental to the public interest, failed to observe high standards of ethics and conduct, and failed in his duty to protect the public, contrary to By-law 29.1 of the Association, when he learned that, unbeknownst to the firm and in return for a receipt, "C" had remitted cash in an amount equal to or greater than \$23,750.00 for investment purposes, although he knew or should have known that this was contrary to written internal company policy and to the provisions of the Proceeds of Crime (Money Laundering) legislation in force, the requirements of which were set forth in Interpretation Bulletin C-55 published by the Association on March 4, 1993;**
 2. **Between July 1998 and September 1999, while he was a Registered Representative with Midland Walwyn Capital Inc. (which became Merrill Lynch Canada Inc. in the same period), a Member firm of the IDA, and was working as a team with Registered Representative "B", the Respondent engaged in business conduct or practice which was unbecoming and detrimental to the public interest and failed to observe high standards of ethics and conduct, contrary to By-law 29.1 of the Association, by allowing "C" to invest monies remitted in cash by means of a third-party account, being a Canadian account in the name of "D", reference no. 158, although he knew that "C" was the actual beneficiary of the account, and he knew or should have known that such procedure could be construed as a tax evasion scheme.**

V. TERMS OF SETTLEMENT

67. The Respondent agrees to the following terms of settlement:
 - a) An aggregate fine in the amount of \$25,000, apportioned as follows:
 - i) \$15,000 for count 1;
 - ii) \$10,000 for count 2;
 - b) A six(6)-month period of strict supervision, with monthly Supervision Reports to be submitted by the firm;
 - c) Repayment of the commissions generated on the trading that was done, an amount of \$2,250;
 - d) Successful completion of the Conduct and Practices Handbook examination within six (6) months from the effective date of this Settlement Agreement;

68. The Respondent agrees to pay IIROC costs in the amount of \$10,000;
69. By mutual agreement of the parties, appended as Schedule 1 hereto, any monetary penalties and costs imposed upon the Respondent are due and payable in full within thirty (30) days from the effective date of this Settlement Agreement;
70. Unless otherwise stated, suspensions, bars, expulsions, restrictions and other conditions or terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondent, at the City of Montréal, in the Province of Québec, this 3rd Day of December, 2008.

« Témoin »

Witness

« André Niding »

André Niding

Respondent

AGREED TO by Staff, at the City of Montréal, in the Province of Québec, this 4th Day of December 2008.

« Linda Vachet »

Witness

« Diane Bouchard »

Diane Bouchard

Enforcement Counsel

ACCEPTED by the Hearing Panel at the City of Montréal, in the Province of Québec, this 12th Day of February 2009.

« Alain Arsenault »

Panel Chair

« Danielle Le May »

Panel Member

« Gilles Archambault »

Panel Member

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