Re Mackenzie

IN THE MATTER OF:

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

and

The Universal Market Integrity Rules

and

Donald Dean Mackenzie

2011 IIROC 40

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

Heard: April 26, 2011 at Calgary, Alberta
Decision: June 13, 2011
(15 paras.)

Hearing Panel:
Alan V.M. Beattie, Q.C. – Chair, Kathleen Jost, Martin Davies
Appearance:
Andrew Werbowski, Senior Enforcement Counsel, for the Association
Scott A. Harling (represented at the Hearing by Nikki van Mulligen by conference call), for the Respondent

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HEARING PANEL REASONS FOR DECISION (SETTLEMENT AGREEMENT)

Introduction

¶ 1 An Offer of Settlement presented by the Investment Industry Regulatory Organization of Canada ("IIROC") dated the 4th day of April, 2011 was accepted by the Respondent (and witnessed by his Counsel) dated April 8, 2011. The document therefore became a Settlement Agreement.

¶ 2 In the Settlement Agreement the Respondent admits to a Statement of Allegations, admits to contraventions and agrees to the disposition of the contraventions by prescribed sanctions (all below).

¶ 3 A Settlement Book was provided in advance of the Hearing by IIROC to the Respondent, his Counsel and members of the Hearing Panel.

OFFER OF SETTLEMENT

INTRODUCTION

1. In March 2009, the Enforcement Department Staff ("Staff") of the Investment Industry Regulatory Organization of Canada ("IIROC") began an investigation (the "Investigation") into the conduct of Donald Dean Mackenzie (the "Respondent").

2. The Investigation has disclosed matters for which IIROC seeks certain sanctions against the Respondent pursuant to Rule 10.5 of the Universal Market Integrity Rules ("UMIR").

3. If this Offer of Settlement is accepted by the Respondent, the resulting settlement agreement (the "Settlement Agreement") which has been negotiated in accordance with Part 3 of UMIR Policy 10.8, is conditional upon approval by a hearing panel appointed pursuant to IIROC Transitional Rule No. 1, Schedule C.1 (the "Hearing Panel").

4. The Respondent agrees to waive all rights under UMIR to a hearing or to an appeal or review if the Settlement Agreement is approved by the Hearing Panel.

5. The Respondent consents to be subject to the jurisdiction of IIROC and its relevant disciplinary process and rules in relation to this matter.

6. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.

AGREEMENT AS TO REQUIREMENTS CONTRAVENED

7. The Respondent agrees that:

   (i) Between September 2007 and June 2008 he entered orders on the Toronto Stock Exchange ("TSX") that he knew or ought reasonably to have known would create or could reasonably be expected to create an artificial bid price contrary to UMIR 2.2(2)(b) and UMIR Policy 2.2 for which he is liable under UMIR 10.4(1).

ADMITTED FACTS

8. For the purposes of this Settlement Agreement, Staff and the Respondent agree with and rely upon the admitted facts and conclusions which are set out in the Statement of Allegations attached as Appendix A to this Settlement Agreement.

DISPOSITION

9. For the contraventions in paragraph 7(i) above, Staff and the Respondent have agreed upon disposition as follows:

   (i) Payment by the Respondent of a fine in the amount of $20,000;

   (ii) a prohibition on the Respondent seeking re-registration approval with any Dealer Member of IIROC for a period of 3 months from the effective date of approval of this Settlement Agreement; and

   (iii) payment by the Respondent of costs in the amount of $5,000.

10. In agreeing to this disposition, Staff is specifically acknowledging that the Respondent was internally disciplined by his former employer and that he has:

   (i) Paid a fine in the sum of $20,000;

   (ii) Re-written the CPH (completed on August 26, 2008); and

   (iii) Completed a branch presentation summarizing the IA Compliance Manual section on trading.

PROCEDURES FOR ACCEPTANCE OF OFFER OF SETTLEMENT AND APPROVAL OF SETTLEMENT AGREEMENT

11. The Respondent shall have until the close of business on April 6, 2011 to sign this Settlement Agreement and serve an executed copy thereof on Staff.

12. This Settlement Agreement shall be presented to the Hearing Panel at a hearing (the "Approval Hearing") held for the purpose of approving the Settlement Agreement, in accordance with the

procedures described in UMIR Policy 10.8 in addition to any other procedures as may be agreed upon between the parties. The Respondent acknowledges that IIROC shall notify the public and media of the Approval Hearing in such manner and by such media as IIROC sees fit.

13. Pursuant to Part 3.4 of UMIR Policy 10.8, the Hearing Panel may accept or reject this Settlement Agreement.

14. In the event the Settlement Agreement is accepted by a Hearing Panel, the matter becomes final, there can be no appeal or review of the matter, the disposition of the matter agreed upon in this Settlement Agreement will be included in the permanent record of IIROC in respect of the Respondent and IIROC will publish a summary of the Requirements contravened, the facts, and the disposition agreed upon in the Settlement Agreement.

15. In the event the Hearing Panel rejects the Settlement Agreement, IIROC may proceed with a hearing on the matter before a differently constituted Hearing Panel pursuant to Part 3.7 of UMIR Policy 10.8 and this Settlement Agreement may not be referred to without the consent of both parties.

16. The Respondent agrees that, in the event he fails to comply with any of the terms of the Settlement Agreement, IIROC may enforce this settlement in any manner it deems appropriate.

17. The Respondent agrees that neither he nor anyone on his behalf will make a public statement inconsistent with this Settlement Agreement.

APPENDIX "A"

INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

ON BEHALF OF

MARKET REGULATION SERVICES INC.

STATEMENT OF ALLEGATIONS

I. REQUIREMENTS CONTRAVENED

1. Between September 2007 and June 2008 Donald Dean Mackenzie, a registered representative employed by RBC Dominion Securities Inc. ("RBCDS"), entered orders on the Toronto Stock Exchange ("TSX") that he knew or ought reasonably to have known would create or could reasonably be expected to create an artificial bid price contrary to UMIR 2.2(2)(b) and UMIR Policy 2.2 for which he is liable under UMIR 10.4(1).

2. The text of the relevant UMIR Requirements is set out in Schedule "A" hereto.

II. RELEVANT FACTS AND CONCLUSIONS

OVERVIEW

3. During the relevant period, the Respondent entered orders to purchase securities of Far West Mining Ltd. ("FWM") without any intention that the orders would be executed and for no *bona fide* purpose.

4. The Respondent entered the orders in various non-arm's length client accounts with the intention of establishing a high closing bid price to narrow the spread between the closing bid and ask prices because he felt the assigned market maker was not discharging his Market Maker Obligations and maintaining a fair and orderly market for the security.

5. The high closing bid prices were artificial in that they were not justified by any real demand for the securities. The high closing bid prices misrepresented the performance and actual demand for the securities to the market and to other market participants.

6. RBCDS conducted an internal investigation when they noted the pattern of late day bids entered by the Respondent and imposed internal disciplinary sanctions upon the conclusion of the internal investigation.

THE RESPONDENT

7. The Respondent was registered in the securities industry for approximately forty years and was employed by RBCDS as a Registered Representative (Options) since September 1084. He retired in March 2009 and is no longer registered in the industry.

FAR WEST MINING LTD.

8. FWM is an international mining exploration company with headquarters in Vancouver, British Columbia. It is primarily involved in exploration-related activities in Chile and Australia.

9. As of December 22, 2008, there were 53,689,000 shares of FWM issued and outstanding.

10. The following chart shows the historical volumes and prices for FWM during the time period between September 2007 and June 2008.

Month	# of Trading Days	Volume	Average Daily Volume	Low Price	High Price	Average Daily Closing Price	Average Daily # of Trades
Sept 2007	19	820,503	43,184	$3.62	$4.60	$4.205	33
Oct 2007	22	3,697,075	168,049	$4.40	$5.29	$4.866	48
Nov 2007	22	532,302	24,196	$3.81	$5.10	$4.695	23
Dec 2007	19	568,249	29,908	$3.64	$4.20	$3.924	17
Jan 2008	22	700,144	31,825	$3.40	$4.20	$3.799	20
Feb 2008	20	464,971	23,249	$3.40	$4.00	$3.655	24
Mar 2008	20	567,022	28,351	$3.10	$3.72	$3.463	15
April 2008	22	632,167	28,735	$3.25	$4.00	$3.590	19
May 2008	21	1,342,913	63,948	$3.10	$3.65	$3.343	24
June 2008	21	707,352	33,683	$3.00	$3.55	$3.279	13

THE RESPONDENT'S BOOK OF BUSINESS

11. The Respondent's book of business in the relevant period included approximately 177 clients with an approximate market value of $18,800,000 as of September 2007 and $17,900,000 as of June 2008.

12. Of the 177 clients, 87 clients held shares of FWM. The market value of those holdings was approximately $6,200,000 as of September 2007 and $4,300,000 as of June 2008.

13. The Respondent maintained personal and non-arm's length accounts at RBCDS in which he had beneficial interest. The following chart indicates the number of FWM shares, the market value of FWM shares and the overall market value of these accounts which held FWM shares:

Client	Account	FWM shares		FWM value		Market value	
		Sep 07	Jun 08	Sep 07	June 08	Sep 07	Jun 08

DM	Margin a/c 711-99003	25,500	26,900	$117,045	$91,460	$193,364	$145,165
DM	RRSP 496-97311	2,000	2,000	$9,180	$6,800	$12,987	$10,716
JM	Cash a/c 712-99033	28,000	24,500	$128,520	$83,300	$213,858	$160,959
JM	RRSP 496-97313	28,500	33,000	$130,815	$112,200	$228,973	$196,337

THE RESPONDENT'S LATE DAY BIDS IN FWM

14. Between September 2007 and June 2008, the Respondent entered numerous late bid orders for FWM in the accounts identified in paragraph 13. The vast majority of the late bid orders were entered in JM's cash account.

15. The review of the Respondent's order entry activity indicates the following:

- 99 orders were entered in the last ten minutes of trading during the relevant period.
- Of these 99 orders:
    - 1 was entered in the last ten minutes of trading;
    - 2 were entered in the last 3 minutes of trading;
    - 2 were entered in the last 2 minutes of trading; and
    - the remaining 94 orders were entered in the last minute of trading.
- Of these 99 orders, 77 caused an up-tick to the last bid price.
- Of these 99 orders 22 caused an up-tick to the last traded price.

16. The chard appended as schedule "B" represents all orders entered in the last ten minutes of the trading day throughout the relevant period by the Respondent.

[*Hearing Panel's note: This extensive chart is not reproduced here because it is summarized by months in the first chart above (para. 10).*]

17. The Respondent acknowledges that his motive in entering the late day bids was to up-tick the final bid as he believed the market maker was doing a poor job in maintaining the spread between the bid and the ask for FWM shares.

ARTIFICIAL PRICING

18. The Respondent followed the trading activity for FWM carefully and knew that it was an illiquid security.

19. Given FWM's lack of liquidity, and the length of time the orders were open, the Respondent's bid orders had little prospect of being filled. The Respondent knew or ought to have known that his late day orders would not be filled and the orders would artificially narrow the spread between the bid price and the ask price.

RBCDS: INTERNAL DISCIPLINE

20. Upon detecting the pattern of late bid orders, RBCDS internally disciplined the Respondent. He was:

- Fined $20,000
- Required to re-write the CPH; and
- Required to complete a branch presentation summarizing the IA Compliance manual

  Section on trading.

III. SUMMARY

21. The purpose of UMIR 2.2(2)(b) and Policy 2.2 is to protect the marketplace from artificial pricing, which undermines the integrity of the marketplace and erodes investor confidence.

22. The Respondent knew or ought to have known that his order entry activity would create or could reasonably be expected to create an artificial bid price. The closing bid orders had no *bona fide* purpose. The Respondent entered the orders to establish a high closing bid price in order to narrow the spread between the bid price and the ask price. In so doing, he misrepresented the performance and actual demand for FWM to the market and to other market participants.

SCHEDULE "A"

EXCERPTS FROM THE UNIVERSAL MARKET INTEGRITY RULES MADE AND ADOPTED AS RULES OF IIROC PURSUANT TO TRANSITION RULE 1.1 SCHEDULE A.1

2.2 Manipulative and Deceptive Activities

…

(2) A Participant of Access Person shall not, directly or indirectly, enter an order or execute a trade on a marketplace if the Participant or Access Person knows or ought reasonably to know that the entry of the order or the execution of the trade will create or could reasonably be expected to create:

(a) a false or misleading appearance of trading activity in or interest in the purchase or sale of the security; or

(b) an artificial ask price, bid price or sale price for the security or a related security.

POLICY 2.2 - MANIPULATIVE AND DECEPTIVE ACTIVITIES

Part 2 - False or Misleading Appearance of Trading Activity or Artificial Price

For the purposes of subsection (2) of Rule 2.2 and without limiting the generality of that subsection, if any of the following activities are undertaken on a marketplace and create or could reasonably be expected to create a false or misleading appearance of trading activity or interest in the purchase or sale of a security or an artificial ask price, bid price or sale price, the entry of the order or the execution of the trade shall constitute a violation of subsection (2) of Rule 2.2:

(a) entering an order or orders for the purchase of a security with the knowledge that an order or orders of substantially the same size, at substantially the same time and at substantially the same price for the sale of that security, has been or will be entered by or for the same or different persons;

(b) entering an order or orders for the sale of a security with the knowledge that an order or orders of substantially the same size, at substantially the same rime and at substantially the same price for the purchase of that security, has been or will be entered;

(c) making purchases of, or offers to purchase, a security at successively higher prices or in a pattern generally of successively higher prices;

(d) making sales of or offers to sell a security at successively lower prices or in a pattern generally of successively lower prices;

(e) entering an order or orders for the purchase or sale of a security to:

(i) establish a predetermined sale price, ask price or bid price,

(ii) effect a high or low closing sale price, ask price or bid price, or

(iii) maintain the sale price, ask price or bid price within a predetermined range;

(f) entering an order or a series of orders for a security that are not intended to be executed;

(g) entering an order for the purchase of a security without, at the time of entering the order, having the ability or the reasonable expectation to make the payment that would be required to settle any trade that would result from the execution of the order;

(h) entering an order for the sale of a security without, at the time of entering the order, having the reasonable expectation of settling any trade that would result from the execution of the order; and

(i) effecting a trade in a security, other than an internal cross, between accounts under the direction or control of the same person.

If persons know or ought reasonably to know that they are engaging or participating in these or similar types of activities those persons will be in breach of subsection (2) of Rule 2.2 irrespective of whether such activity results in a false or misleading appearance of trading activity or interest in the purchase or sale of a security or an artificial ask price, bid price or sale price for a security or a related security.

Part 3 - Artificial Pricing

For the purposes of subsection (2) of Rule 2.2, an ask price, bid price or sale price will be considered artificial if it is not justified by real demand or supply in a security. Whether or not a particular price is "artificial" depends on the particular circumstances.

Some of the relevant considerations in determining whether a price is artificial are:

(a) the prices of the preceding trades and succeeding trades;

(b) the change in the last sale price, best ask price or best bid price that results from the entry of the order on a marketplace;

(c) the recent liquidity of the security;

(d) the time the order is entered and any instructions relevant to the time of entry of the order; and

(e) whether any Participant, Access Person or account involved in the order:

(i) has any motivation to establish an artificial price, or

(ii) represents substantially all of the orders entered or executed for the purchase or sale of the security.

The absence of any one or more of these considerations is not determinative that a price is or is not artificial.

SUBMISSIONS OF IIROC

¶ 4 The foregoing portions of the Settlement Book were reviewed by Mr. Werbowski.

¶ 5 Mr. Werbowski made the following further submissions:

1. IIROS's Universal Market Integrity Rules ("UMIR") include **Disciplinary Sanction Guidelines** adopted April 1, 2009. They are well recognized principles and are designed, among other things, to deter the individual Regulated Person as well as to foster general deterrents. They are also designed so that participants in the market can expect sanctions to be imposed on those who have contravened industry requirements.

2. Although the Respondent initially took the position that he did not realize that he was violating the rules, he now accepts that he was in contravention and deserves the imposition of sanctions for his artificial bid activity.

3. Consideration has to be given to the fact that there were a large number of transactions over an extended period over 9 or 10 months, affecting a larger number of clients with a significant combined market value in FWM. However, there is no evidence of client losses. It was a report of RBCDS that

brought the matter to the attention of IIROC and not a client complaint.

4. The Respondent has retired and has no intention of returning to the securities industry. He had no prior disciplinary record. He was disciplined internally by RBCDS including a fine of $20,000. He has been very cooperative in the IIROC investigation and for this Hearing.

5. Although the Respondent was not as culpable as some others in the industry who have been disciplined for similar misconduct, the following decisions provide some assistance in determining the reasonable range of penalies:

> ***Fabi*** (2008) IIROC No. 16 (Ontario District Council) - ought to have known that the orders he entered and trades he executed would create or could reasonably be expected to create an artificial sale price for six securities - misbehaviour arose through inadvertence and negligence, which are not excusable, rather than deliberate manipulation - did not personally benefit directly in the trading - cooperated with the Member - $15,000 fine, costs $5,000.
>
> ***Williamson*** (2011) IIROC No. 13 (Ontario District Council) - entered orders on the TSXV that he knew or ought reasonably to have known would create or could reasonably be expected to create an artificial bid price - orders were for no *bona fide* purpose and without any intention that the orders would be executed - intention of establishing a high closing bid price in order to improve the unrealized daily profit and loss position of the shares held in his inventory account and thereby misrepresent the performance of the securities - compensated on commissions - all orders were entered late in the trading day, none were filled and all increased the closing bid price - $40,000 fine, six month suspension, $5,000 costs.
>
> ***Moorhead*** (2008) Market Regulation Services Inc. (Ontario) - entered orders and/or instructed his assistant to enter orders to purchase securities with the intention of assisting a trader at another firm to increase the daily profit or reduce the daily loss position in that trader's inventory account - no *bona fide* purpose - orders misrepresented the performance of the securities and were artificial not being justified by any real demand for the securities - created artificial bid price - $40,000 fine, suspension for three months, $10,000 costs.
>
> ***Milewski*** (1999) IDACA No. 17; Bulletin No. 2605, August 5, 1999 (Ontario District Council) is referenced as establishing that a District Council should not alter a penalty that is within a reasonable range.

¶ 6 Mr. Werbowski submitted that the penalties set out in the Settlement Agreement are within a reasonable range and that this Hearing Panel should accept the Settlement Agreement.

SUBMISSIONS OF THE RESPONDENT

¶ 7 Ms. van Mulligen, on behalf of Mr. Scott Harling, Counsel for the Respondent, agreed with the submissions of IIROC (above).

DECISION

¶ 8 In the Settlement Agreement the Respondent admits to the contraventions of UMIR policy 2.2 ("Manipulative and Deceptive Activities"), set out at pp. 7 - 9 above.

¶ 9 The Hearing Panel accepts that the contraventions have been established.

¶ 10 We accept the submissions of Counsel for IIROC (above) and are guided by the IIROC Universal Market Integrity Rules ("UMIR").

¶ 11 The UMIR "Disciplinary Sancation Guidelines" include:

> **PART 1 - GENERAL PRINCIPLES**
>
> **General Purpose**

1. Disciplinary sanctions are designed to:

   a. encourage Regulated Persons to comply with all applicable securities legislation and requirements;

   b. prevent fraudulent and manipulative acts and practices and deter misconduct both generally and specifically;

   c. promote just and equitable principles of trade for participants and open and fair business practices by access persons; and

   d. improve overall business standards in the securities industry.

   e. promote public confidence in the SRO system.

Range is Guideline Only

2. The guidelines suggest, but do not mandate, how IIROC Staff or Hearing Panels formulate appropriate sanctions. These guidelines are intended to provide a basis upon which decision-makers can exercise their discretion consistently and fairly.

   IIROC Staff/Hearing Panels must always consider these guidelines, the unique facts of each case, the appropriate aggravating and mitigating factors when exercising judgment to formulate the appropriate sanctions.

Precedents

3. The amount of a fine or other sanction depends on the facts of each matter and the value of the sanction in preventing a recurrence. The nature and extent of any sanction cannot be precisely determined by comparison with the sanctions imposed in other similar proceedings.

….

General Factors

5. IIROC Staff/Hearing Panels may consider the following:

   ….

   e. extent of harm to market integrity, reputation of the marketplace, or both;

   ….

   i. number of transactions and securities involved, size of transactions;

   j. timeframe of the misconduct;

   ….

   Aggravating Factors

   6. IIROC Staff/Hearing Panels may consider aggravating factors including:

      ….

      d. the amount of the unjust enrichment/benefit;

      e. whether an individual or firm respondent's misconduct was intentional or willfully blind to regulatory requirements;

      ….

      h. whether an individual respondent was unaware of regulatory requirements;

      ….

   Mitigating Factors

7. IIROC Staff/Hearing Panels may consider mitigating factors including:

   a. whether the individual or firm respondent self-reported the misconduct to IIROC in the absence of a regulatory obligation to do so;

   ….

   c. whether an individual or firm respondent accepted responsibility for and acknowledged the misconduct to his or her employer (in the case of an individual) or a regulator prior to detection and intervention by the firm (in the case of an individual) or a regulator;

   ….

   e. whether any individual respondents have been subject to appropriate internal discipline; and

   f. any other factors that may be appropriate in the circumstances.

Factors in Assessing Harm to the Marketplace

8. IIROC Staff/Hearing Panels may consider the following factors in assessing harm to the marketplace:

   a. number of transactions and securities involved, and size of transaction;

   b. timeframe over which the misconduct took place;

   c. number and type of investors involved;

   d. monetary impact on investors and/or the capital markets;

   e. impact of the misconduct on the public's perception of the capital market; and

   f. any other factors that may be appropriate in the circumstances.

"Considerations in Determining Sanctions" for **"Manipulative and Deceptive Activities"** - UMIR 2.2 (pp. 8, 9 above) reference the "General Principles" (p. 12 above) and include:

> The degree of the manipulation - number of orders, transactions, securities, size of transactions and length of time of the manipulation.

Discussion of **"Suspension of Access or Other Sanctions"** includes:

> In a case involving a limited number of transactions and limited quantifiable harm to the marketplace, consider a suspension or restriction of access of up to 6 months.

¶ 12 Consideration of the general principles set out above: the protection of the investing public, protection of the integrity of the IIROC process, protection of the integrity of the securities market, prevention of a repetition of conduct of the type under consideration, and general deterrence, leads us to the conclusion that the penalties agreed upon between IIROC and the Respondent in the Settlement Agreement are appropriate and should be accepted. We consider the penalties to be within the reasonable range appropriate to cases of this nature. We adopt the reasoning of the Hearing Panel in ***Milewski*** (above), at p. 12:

> …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.

¶ 13 It is difficult to understand how someone registered in the securities industry for 40 years would not know that manipulating artificial pricing is a serious contravention of regulatory requirements. We are inclined to the view that the Respondent was "willfully blind to regulatory requirements" ["aggravating factors", 6(e), above]. On the other hand, we have taken into consideration the factors in favour of the Respondent including

that the clients did not suffer financial harm, that he received no compensation for the transactions, that he was disciplined by RBCDS including a fine of $20,000, and that he has cooperated in the investigation and entering into the Settlement Agreement.

¶ 14 The Hearing Panel advised, at the conclusion of the Hearing, that we accepted, and we signed, the Settlement Agreement. We confirm that decision.

¶ 15 The Respondent, in the Settlement Agreement, agreed to the following terms of settlement, which we have accepted as appropriate:

a) payment by the Respondent of a fine in the amount of $20,000;

b) a prohibition on the Respondent seeking re-registration approval with any Dealer Member of IIROC for a period of 3 months from the effective date of approval of this Settlement Agreement; and

c) payment by the Respondent of costs in the amount of $5,000.

June 13, 2011

Alan V.M. Beattie, Chair

Kathleen Jost

Martin Davies