

Re Chrabalowski

IN THE MATTER OF:

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

and

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

and

Radoslaw Andrzej Chrabalowski

2011 IIROC 49

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

Hearing: July 27, 2011
Decision: August 12, 2011
(18 paras.)

Hearing Panel:

Mr. Terrance Sweeney (Chair), Mr. Leo Ciccone (Industry Member), Ms. Colleen Wright (Industry Member)

Appearances:

Mr. Milton Chan, Enforcement Counsel, IIROC
Ms. Denise Carson, IIROC Staff
Mr. Michael Lacy, Counsel for the Respondent
Mr. Victor O'Brien, Student at Law, for the Respondent
Mr. Radoslaw Andrzej Chrabalowski, the Respondent

DECISION

BACKGROUND - SUBMISSIONS

¶ 1 We were constituted as a Hearing Panel of the Ontario District Council of the Investment Industry Regulatory Organization of Canada ("IIROC") to consider, pursuant to IIROC Transitional Rule No. 1, Schedule C.1, Part C, a Settlement Agreement, attached as Schedule "A" and dated the 28th day of June 2011, jointly recommended by counsel for IIROC and counsel for the Respondent.

REASONS, DECISION AND ORDER

¶ 2 The Hearing Panel was convened and heard the submissions of counsel for both parties. The Members of the Hearing Panel read and considered carefully the Settlement Agreement and other evidence presented.

¶ 3 After due deliberation and based on all of the evidence, the Hearing Panel accepted the Settlement Agreement and executed it.

¶ 4 These are the reasons for that decision.

Facts:

¶ 5 In order to set our Reasons in the proper context, the Hearing Panel notes the following facts which were agreed by the parties:

1. The complainant and her husband were born in the 1920s. They had only primary school education. The husband died in 2008.
2. The complainant and her husband had limited investment knowledge. Prior to 2007, the complainant and her husband invested in a Guaranteed Investment Certificate.
3. The complainant and her husband's combined taxable income were derived from Canada Pension Plan and Old Age Security. The Respondent acknowledged he did not know the breakdown of their income.
4. On December 17, 2007 the Respondent purchased a Bank of Montreal Dynamic Retirement-Edge Income Portfolio, Current Pay Notes, Series 4, a principal-protected note issued by Bank of Montreal (BMO) ("the investment"). The investment represented a substantial portion of their liquid assets.
5. The investment has a 15 year term and generates no interest payments during its term. The Information Statement for the investment reads, in part, as follows: "... not suitable investments for investors requiring or expecting certainty of yield and are not prepared to assume risks associated with a long term investment."
6. The Respondent acknowledged that he did not discuss investment objectives with the complainant and her husband.
7. On December 1, 2008, BMO declared a "Capital Preservation Event" for the investment which meant that the complainant and her husband would only receive their principal back, without interest, at the expiry of the 15-year term.
8. During May 2009 the Member Firm reached a settlement with the widowed complainant to liquidate the investment for \$47,319.30. This amount, in addition to the monthly return of capital, effectively reimbursed her for the entire invested amount.

¶ 6 The Hearing Panel learned during the hearing that the Member Firm has held back commissions owed to the Respondent. He, in turn, sued his Member Firm for, among other things, the return of his commissions. The trial of those issues has yet to take place.

Submissions:

¶ 7 Counsel for IIROC addressed the Hearing Panel on the merits of the Settlement Agreement. He stressed that the Respondent had failed to exercise due diligence to ensure that the investment was suitable for these clients and, thus, the Respondent breached IDA Regulation 1300.1(q).

¶ 8 Counsel for IIROC also stated these clients were vulnerable and the loss was substantial to them. However, he drew to the attention of the Hearing Panel the following mitigating factors:

- (1) The factual situation represented an isolated incident impacting only these clients.
- (2) The Respondent did not misrepresent the situation and he cooperated fully with IIROC Staff and, thus, saved IIROC significant enforcement resources.
- (3) The Respondent has no prior disciplinary record.
- (4) The Respondent has been under strict supervision at his present Member Firm. The period of such supervision is already longer than IIROC would have demanded.

¶ 9 Mr. Lacy, counsel for the Respondent, also addressed the Hearing Panel. He acknowledged the public interest in the Respondent's behaviour and the deterrent goal of enforcement proceedings. He argued that the Respondent believed, in good faith, the investment at the time was appropriate for these clients. He further suggested the Respondent's behaviour was in the "low range of breaches", and that both the Member Firm and IIROC's investigation of the Respondent's conduct were wide-ranging. He also pointed out the situation represented an isolated incident over a period of 20 years the Respondent has spent in the investment industry.

¶ 10 Both counsel urged the Hearing Panel to accept the Settlement Agreement as reasonable.

REASONS

¶ 11 The powers of the Hearing Panel are limited by Dealer Member Rule 20.36. We may accept or reject the Settlement Agreement. The Hearing Panel is well aware of the proper tests to use in evaluating a settlement agreement. The Hearing Panel respects the settlement process and will not lightly interfere with a negotiated settlement.

¶ 12 Winkler J., as he then was, set out the principles to be applied in considering a negotiated settlement.¹

There is a presumption of fairness when a...settlement negotiated at arm's length...is presented to the court for approval. A court will only reject a proposed settlement when it finds that the settlement does not fall within a range of reasonableness.

The test to be applied is whether the settlement is fair and reasonable.... This allows for a range of possible results and there is no perfect settlement. Settlement is a product of compromise, which by definition necessitates give and take....

¶ 13 Similar phraseology has been used by a prior Hearing Panel.²

... 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.

¶ 14 IIROC's "Dealer Member Disciplinary Sanction Guidelines", in particular the recommended sanctions for "unsuitable recommendations", set out considerations for what constitutes a range of reasonableness for a settlement agreement in this particular fact situation and the submissions made by IIROC and Respondent's counsel.

DECISION

¶ 15 The Hearing Panel has carefully considered the case law cited by counsel for IIROC, the IIROC Dealer Member Disciplinary Sanction Guidelines, all of the evidence and the submissions of counsel.

¶ 16 The Hearing Panel unanimously rules that the Settlement Agreement and the penalty and costs agreed fall squarely within the range of reasonableness.

ORDER

¶ 17 The Respondent shall pay:

(i) a fine of \$ 20,000.00;

(ii) costs of \$ 2,500.00.

¶ 18 He shall, moreover, disgorge the commission earned on the impugned investment in the amount of \$522.00

¹ *Gilbert v. Canadian Imperial Bank of Commerce*, [2004] O.J. 4260

² *Re Milewski*, [1999] I.D.A.C.D. No. 17 (decided on July 18, 1999 at p. 9)

Dated at Toronto, Ontario, this 12th day of August 2011.

Mr. Terrance Sweeney, Chair

Mr. Leo Ciccone, Industry Member

Ms. Colleen Wright, Industry Member

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff and the Respondent, Radoslaw Andrzej Chrabalowski, consent and agree to the settlement of this matter by way of this settlement agreement (“the Settlement Agreement”).
2. The Enforcement Department of IIROC has conducted an investigation (“the Investigation”) into the conduct of Radoslaw Andrzej Chrabalowski.
3. On June 1, 2008, IIROC consolidated the regulatory and enforcement functions of the Investment Dealers Association of Canada and Market Regulation Services Inc. Pursuant to the Administrative and Regulatory Services Agreement between IDA and IIROC, effective June 1, 2008, the IDA has retained IIROC to provide services for IDA to carry out its regulatory functions.
4. The Respondent consents to be subject to the jurisdiction of IIROC.
5. The Investigation discloses matters for which the Respondent may be disciplined by a hearing panel appointed pursuant to IIROC Transitional Rule No.1, Schedule C.1, Part C (“the Hearing Panel”).

II. JOINT SETTLEMENT RECOMMENDATION

6. Staff and the Respondent jointly recommend that the Hearing Panel accept this Settlement Agreement.
7. The Respondent admits to the following contraventions of IIROC Rules, Guidelines, IDA By-Laws, Regulations or Policies:
 - i. Between October and December 2007 the Respondent failed to use due diligence to ensure that his investment recommendation to clients SR and BR was suitable for them, contrary to IDA By-law 1300.1 (q).
8. Staff and the Respondent agrees to the following terms of settlement:
 - i) a fine in the amount of \$ 20,000
 - ii) disgorgement of commission in the amount of \$ 522
9. The Respondent agrees to pay costs to IIROC in the sum of 2,500.

III. STATEMENT OF FACTS

(i) Acknowledgment

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

(ii) Factual Background

Overview

11. In late 2007 BR (the complainant) and her husband SR were in their eighties and had Grade 4 education and limited investment knowledge. At that time, they met and sought the Respondent’s help with investing their liquid assets into an investment that would relatively secure their capital while providing them with income. The Respondent recommended a principal-protected note with a lengthy redemption

term. In light of the investment goals of the couple, the product recommended by the Respondent was not appropriate.

The Respondent

12. The Respondent first became a registrant in February 1991. He was employed by Raymond James Ltd. (Raymond James) as a Registered Representative Options (Retail) at its Mississauga branch between April 2006 and November 2008.
13. On June 1, 2008, the Respondent became a regulated person of IIROC.
14. On November 10, 2008, the Respondent resigned from Raymond James in good standing. Between November 2008 and May 2009, the Respondent was employed by Industrial Alliance Securities Inc. (Industrial Alliance) at its Mississauga branch in a non-registered capacity.
15. Since July 31, 2009, the Respondent has been employed by Argosy Securities Inc. as a Registered Representative Options (Retail) at its head office in Markham.

Unsuitable Recommendations

16. The complainant and her husband SR were born in the 1920s. They were immigrants from Poland and had only primary education. SR passed away in late 2008.
17. They had limited investment knowledge. Prior to meeting the Respondent, they invested in a Guaranteed Investment Certificate (GIC).
18. In October, 2007, their GIC matured. They opened an account with the Respondent and invested \$52,000, the proceeds from the matured GIC. According to the Respondent, they agreed to temporarily park the proceeds in a money-market mutual fund until a new series of the agreed upon long-term investment was available. The Respondent received no commission for this transaction. The amount represented a substantial portion of their liquid assets. According to the Respondent, this investment was a temporary measure until the anticipated availability of a different investment product that he recommended and they accepted.
19. The complainant and SR had a combined annual taxable income of approximately \$19,000 from Canada Pension Plan and Old Age Security. They also received the Guaranteed Income Supplement (GIS). The Respondent acknowledged that he did not know the breakdown of the couple's income. The couple's objective was to invest their liquid assets in a relatively secure investment product that would provide them with monthly cash flow to supplement the income they received from the government. The Respondent acknowledged that he did not discuss investment objectives with the couple, believing that because of their lack of previous investment experience it would not be informative to them.
20. On December 17, 2007, the Respondent redeemed the complainant's and SR's investment in the money market mutual fund and purchased Bank of Montreal Dynamic RetirementEdge Income Portfolio, Current Pay Notes, Series 4 (BMO-PPN), a principal-protected note issued by the Bank of Montreal.
21. BMO-PPN has a fifteen-year term and generates no interest payments during its term. If there is any return, it is only paid out at the end of the fifteen-year term. It may produce no return at maturity and its investor may not receive anything aside from the monthly repayment of the principal. Its Information Statement states that BMO-PPN is "not suitable investments for investors requiring or expecting certainty of yield and are not prepared to assume risks associated with a long-term investment".
22. The couple received no monthly income from BMO-PPN. Instead, they only received a portion of the principal each month.
23. According to the Respondent, he recommended BMO-PPN because he determined that that the couple should only receive monthly cash flows that were not considered taxable income. In December 2007, the annual income threshold of GIS was \$20,111. He determined that the couple's annual income was close to the stated income threshold of GIS and any taxable income would "cut them off from

guaranteed income supplement". He did not recommend or discuss any alternative product to the couple. He earned \$ 522 of commission from the transaction.

24. In light of the investment goals of the couple, the product recommended by the Respondent was not appropriate, although he believed it was an appropriate investment vehicle at the time.
25. On December 1, 2008, due to the market turmoil resulting from the credit crisis, Bank of Montreal declared a "Capital Preservation Event" for BMO-PPN. As a result of this declaration, no return would be paid at the maturity of BMO-PPN. Therefore, any investors, including the complainant, would only get the full principal back at the expiry of the 15-year term. The complainant had the option of selling this product in the secondary market, but since late December 2008, BMO-PPN has been consistently trading at less than 20% below its Adjusted Cost Base, which would have resulted in a loss to the complainant and SR.
26. The complainant and SR were looking to invest their liquid assets into an investment that would relatively secure their capital while providing them with monthly cash flow. Given its lengthy term, the BMO-PPN was an unsuitable investment for the couple in light of their age, investment objectives, their short-term investment horizon, and their annual income amount.
27. In or about May 2009, Raymond James reached an agreement with the widowed complainant to liquidate the complainant's BMO-PPN for \$ 47,319.30. This amount, in combination with the monthly return of capital paid between January 2008 and May 2009, effectively reimbursed the entire invested amount to the complainant.

Mitigating Factors

28. The Respondent cooperated with Staff throughout the Investigation. He provided a full statement and met with the staff subsequently with a view to resolving the matter quickly.
29. The Respondent has no prior disciplinary record with IIROC or the IDA.
30. The Respondent has been subject to strict supervision and a conditional registration status since July 31, 2009 arising from the IIROC investigation.

IV. TERMS OF SETTLEMENT

31. 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.
32. The Settlement Agreement is subject to acceptance by the Hearing Panel.
33. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.
34. 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.
35. 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.
36. 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.
37. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel.
38. 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.

39. Monetary penalties and costs imposed upon the Respondent are payable on dates agreed upon by Staff and the Respondent.
40. Unless otherwise stated, any suspensions, bars, expulsions, restrictions or other terms of the Settlement Agreement shall commence on the effective date of the Settlement Agreement.

AGREED TO by the Respondent at the City of Toronto in the Province of Ontario, this 17th day of June, 2011.

“Witness signature”

Witness

C. SCHAEFER, BARRISTER

“Radoslaw Chrabalowski”

Radoslaw Andrzej Chrabalowski

Respondent

AGREED TO by Staff at the City of Toronto in the Province of Ontario, this 28th day of June, 2011.

“Rob Del Frate”

Witness

Rob Del Frate

“Milton Chan”

Milton Chan

Enforcement Counsel on behalf of

Staff of the Investment Industry

Regulatory Organization of Canada

ACCEPTED at the City of Toronto in the Province of Ontario, this 27th day of July, 2011, by the following Hearing Panel:

Per: **“Terrance Sweeney”**

Terrance Sweeney, Panel Chair

Per: **“Leo Ciccone”**

Mr. Leo Ciccone, Panel Member

Per: **“Colleen Wright”**

Ms. Colleen Wright, Panel Member

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