

Re Budnik

IN THE MATTER OF:

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

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

and

Nicholas Jason Budnik

2011 IIROC 55

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

Heard at Montreal: September 8, 2011

Decision: September 19, 2011

(20 paras.)

Hearing Panel:

Michèle Rivet (Chair)

Danielle Le May

François Gervais

Appearances:

Sébastien Tisserand, Enforcement Counsel

Michael Garellek, Counsel for the Respondent

REASONS FOR DECISION ON SETTLEMENT AGREEMENT

¶ 1 This is a decision on a Settlement Agreement signed and submitted under Rules 14 and 15 of the Rules of Practice and Procedure.

¶ 2 The Settlement Agreement was signed on August 2, 2011 and reads as follows:

[CITED IN ENGLISH IN THE FRENCH DECISION]

SETTLEMENT AGREEMENT

I. INTRODUCTION

1. IIROC Enforcement Staff and the Respondent Nicholas Jason Budnik (**the Respondent**), 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 the Respondent;

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. On June 1, 2008, the Respondent became a Regulated Person of IIROC and 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 IDA By-Laws, Regulations or Policies (**IDA Regulation**):

Contravention 1:

From January to September 2006 inclusive, the Respondent engaged in unauthorized discretionary trading in the accounts of a client, although such accounts had not been approved as discretionary accounts by the firm, contrary to IDA Regulation 1300.4 and 1300.5;

Contravention 2:

From July 2, 2003 to September 15, 2006 inclusive, the Respondent engaged in excessive trading for the purpose of generating commissions and without regard to the client's investment objectives, contrary to IDA Regulations 1300.1(b) and (c) (which later became IDA Regulations 1300.1 (o) and 1300.1 (p) in 2004 - 2006);

8. Staff and the Respondent agree to the following terms of settlement:
 - a) The Respondent will pay a fine in the amount of \$50,000; and
 - b) The Respondent will disgorge the profits received in the amount of \$77,000; and
 - c) The Respondent will re-write the Conduct and Practices Handbook (CPH) examination within a period of 12 months from the acceptance of the present settlement;
 - d) The Respondent will be suspended from registration in any capacity with IIROC for a period of three (3) months; and
 - e) Upon being re-registered with IIROC, the Respondent will be subject to strict supervision for a period of 18 months, followed by close supervision for an additional period of 6 months, with such strict and close supervision reports to be filed with IIROC's Registration Department within 10 days of the end of each month during the entire period of supervision; and
9. The Respondent agrees to pay costs to IIROC in the sum of \$3,000;

III. STATEMENT OF FACTS

(i) Acknowledgement

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

A. The Parties

a. The Respondent

11. The Respondent is a registered retail representative who has been a registrant since 1986;
12. At all material times, the Respondent was employed by Canaccord Capital Corporation (**Canaccord**);
13. Before he left Canaccord, the Respondent was responsible for investments worth between \$50 million and \$55 million;
14. From February 2008 to August 2011, the Respondent had been employed by Wellington West Capital Inc. as a registered retail representative;
15. On June 1, 2008 the Respondent became a person regulated by IIROC;
16. On or about February 13, 2008, the Respondent was dismissed from Canaccord;

b. Client A

17. Client A began doing business with the Respondent in 1992;
18. At all material times, Client A had limited knowledge of the industry;
19. Client A was between 87 and 90 years of age at the time of the violations committed by the Respondent;
20. Client A's clearly stated investment objective was 50% income and 50% moderate growth in order to provide for her needs commensurate with her age;
21. Client A's portfolio should have been therefore evenly divided between income and moderate growth, which classified Client A's accounts and investor profile in Canaccord "moderate risk" category;

B. Discretionary Trades

22. A sample of 632 telephone calls made and received by the Respondent on his office line for the period from January to September 2006, recorded by Canaccord was examined during the investigation;
23. On 17 business days on which trades were recorded in Client A's accounts, 97 trades were effected by the Respondent without the prior authorization or consent of Client A;
24. Client A's accounts were not designated as discretionary accounts;

C. Churning

25. For the period from July 2, 2003 to September 15, 2006, the Respondent traded in income trust securities, without regard to Client A's investment objectives and for the purpose of generating commissions;
26. An analysis of the trades effected by the Respondent in Client A's accounts for the period from July 2003 to September 2006 has shown that the Respondent made approximately 1,183 trades;
27. These trades correspond to an average rotation rate of approximately 10 times annually;
28. A sample of the retention period for the income trust units from July to September 2004 shows an average of 4.71 days;
29. Most of the transactions were done through Client A's margin account and formed a substantial

part of her portfolio;

30. In aggregate, the Respondent made cumulative purchases worth approximately \$26,000,000 for the period of 2003 to 2006, for a portfolio having an average value of \$670,000 over that period;
31. During the relevant period, the Respondent received approximately \$77,038 in commission payable by the issuers of the income trusts for new share issuances;
32. In addition, Client A paid approximately \$42,500 in commissions;

D. The Complaint

33. In September 2006, Client A informed the Respondent that she wished to close all her accounts with Canaccord;
34. The Respondent proceeded to liquidate, without Client A's authorization, substantially all of the securities held in Client A's portfolio;
35. On or about April 11, 2007, Client A filed a complaint with Canaccord against the Respondent;
36. In her complaint, the client, who was 90 years of age at that time, informed Canaccord that she had absolute confidence in the Respondent and that she did not question him. She erroneously believed he was acting in her best interest and did not put her capital at significant risk;
37. On or about December 15, 2008, the Respondent agreed to indemnify Client A by paying her an amount equal to \$42,500 representing the commissions paid by the Client;

IV. AGGRAVATING AND MITIGATING FACTORS

(i) Aggravating factors

38. The parties considered for the determination of their joint recommendations the following aggravating factors:
 - (a) The client was a vulnerable person who fully trusted the Respondent;
 - (b) The Respondent engaged in approximately 97 discretionary trading transactions;
 - (c) The transactions generated commissions of approximately \$119,500;
 - (d) The turnover ratio of the portfolio during the period of reference was greater than 6 times;

(ii) Mitigating factors

39. The parties also considered the following mitigating factors:
 - (a) The Respondent personally compensated the client in an amount of \$42,500;
 - (b) Client A did not incur any financial loss;
 - (c) The Respondent has never been disciplined in over 25 years of practice;
 - (d) The Respondent fully collaborated during the investigation and disciplinary process and admitted his wrongdoing;

V. TERMS OF SETTLEMENT

40. 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;
41. The Settlement Agreement is subject to acceptance by the Hearing Panel;
42. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel;

43. 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;
44. If the Hearing Panel accepts the Settlement Agreement, the Respondent waives his rights under IROC rules and any applicable legislation to a disciplinary hearing, review or appeal;
45. 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;
46. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel;
47. 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;
48. Unless otherwise stated, any monetary penalties and costs imposed upon the Respondent are payable immediately upon the effective date of the Settlement Agreement;
49. 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 Montreal in the Province of Quebec this 2nd day of August, 2011.

“Respondent’s signature”

Respondent Budnik

“Michael Garellek”

Michael Garellek

Counsel for the Respondent

AGREED TO by Staff at the City of Montreal in the Province of Quebec this 2nd day of August, 2011.

“Witness signature”

Witness

“Sébastien Tisserand”

Sébastien Tisserand

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

¶ 3 The acts committed by the Respondent, which he admits to in the Settlement Agreement, are contrary to Regulation 1300 - Supervision of Accounts, as it existed at the time the acts were committed.

¶ 4 More particularly, from January to September 2006 inclusive, the Respondent effected trades, without being duly authorized to do so under these Regulations, by engaging in discretionary trading in accounts that had not been approved as discretionary accounts by the firm, contrary to Regulations 1300.4 and 1300.5.

¶ 5 Furthermore, from July 2, 2003 to September 15, 2006 inclusive, contrary to Regulations 1300.1(b) and 1300.1(c), later to become Regulations 1300.1(o) and 1300.1(p) in 2004 - 2006, the Respondent engaged in excessive trading for the sole purpose of generating commissions, without regard to the client’s investment objectives.

¶ 6 As specified in ss. 22 to 37 of the Settlement Agreement, the facts disclosed therein, and admitted to by the Respondent, show on their face that contraventions have been committed, without it being necessary to repeat them here.

¶ 7 The issue facing the Hearing Panel, therefore, is to verify whether the sanctions fall “within a reasonable range of appropriateness” in the light of the violations. The Hearing Panel may thus accept or reject the

Agreement, but it cannot in any way amend it nor consider facts not disclosed therein. That is where the powers of the Hearing Panel end.

¶ 8 As regards the jurisdiction of the Hearing Panel, both the regulatory provisions and the case law interpreting the same are very clear. In this respect and on this issue, Reynolds and Chang (Re), [2009] IIROC No. 50 reviews the consistent state of the law in this matter.

¶ 9 Enforcement Counsel submitted several decisions on the role of the Hearing Panel in connection with a settlement agreement and the determination of sanctions deemed reasonable for the alleged violations.

¶ 10 The Dealer Member Disciplinary Sanction Guidelines of March 2009 set out the key considerations for the determination of such sanctions.

¶ 11 Disciplinary sanctions are a deterrence. As stated in paragraph 2 of section 2 of the Guidelines: “General deterrence will follow from an appropriate decision and deter others from engaging in similar misconduct and improve overall business standards in the securities industry. This can be achieved if a sanction strikes an appropriate balance by addressing a registrant’s specific misconduct, but also being in line with industry expectations”.

¶ 12 Section 3 of the Guidelines specifies that: “Since sanctions should be tailored to address the misconduct involved in a particular case, a penalty must be proportionate to the gravity of the misconduct and the relative degree of responsibility of a respondent.” A non-exhaustive list of factors which the Hearing Panel must take into consideration is referred to therein: harm to clients, employer and/or the securities market; blameworthiness; degree of participation; extent to which the respondent was enriched by the misconduct; prior disciplinary record; acceptance of responsibilities, acknowledgement of misconduct and remorse; credit for cooperation; voluntary rehabilitative efforts; reliance on the expertise of others; planning and organization; multiple incidents of misconduct over an extended period of time; vulnerability of victim; failure to cooperate with the investigation; and significant economic loss to the client and/or dealer member firm.

¶ 13 The various decisions brought to the attention of the Hearing Panel are entirely consistent with the sanctions set forth in the Settlement Agreement placed before us.

¶ 14 Several factors in this case are aggravating factors, as mentioned in the Agreement:

- The great vulnerability of the Respondent’s client who, at the time of the violations, was over 86 years old;
- The very high number of trades, which leaves no doubt as to the existence of churning, including some 1,183 trades from July 2003 to September 2006; and
- The commissions generated by the Respondent, which totalled some \$119,500.00.

¶ 15 However, we should note that the Agreement also mentions significant mitigating factors:

- The Respondent has already compensated the client in the amount of \$42,500.00;
- The client incurred no financial loss;
- The Respondent has never been disciplined in some 25 years of practice; and
- The Respondent cooperated throughout the disciplinary process and admitted his wrongdoing.

¶ 16 The Settlement Agreement sets out penalties which should be repeated here:

“Staff and the Respondent agree to the following terms of settlement:

- a) The Respondent will pay a fine in the amount of \$50,000; and
- b) The Respondent will disgorge the profits received in the amount of \$77,000; and
- c) The Respondent will re-write the Conduct and Practices Handbook (CPH) examination within a

period of 12 months from the acceptance of the present settlement;

- d) The Respondent will be suspended from registration in any capacity with IIROC for a period of three (3) months; and
- e) Upon being re-registered with IIROC, the Respondent will be subject to strict supervision for a period of 18 months, followed by close supervision for an additional period of 6 months, with such strict and close supervision reports to be filed with IIROC's Registration Department within 10 days of the end of each month during the entire period of supervision."

¶ 17 At the hearing, Counsel for the Respondent asked the Hearing Panel, should it accept the Agreement, to do so at the hearing so that the Agreement could, in each of its findings, become immediately enforceable, even before the filing of the written reasons for the decision. Enforcement Counsel did not object to this request.

¶ 18 Considering the importance of ensuring that justice is done efficiently and quickly, the Hearing Panel withdrew for this purpose.

¶ 19 The sanctions imposed are consistent with the objective of deterrence. The weight given to each of the aggravating and mitigating factors allows this Hearing Panel to accept this Settlement Agreement and to find that the sanctions are reasonable within the meaning of applicable law. They are consistent with the main concerns involved in determining an appropriate penalty, which are:

1. Protection of the investing public;
2. Protection of the Investment Industry Regulatory Organization of Canada's membership;
3. Protection of the integrity of the Investment Industry Regulatory Organization of Canada's process;
4. Protection of the integrity of the securities markets; and
5. Prevention of a repetition of the conduct of the type under consideration.

¶ 20 The Hearing Panel accepts the Agreement from the bench and the Agreement therefore becomes enforceable as of September 8, 2011.

FOR THESE REASONS, the Hearing Panel **APPROVES** the Settlement Agreement set forth in section 2 above as of September 8, 2011 and gives reasons therefor in writing.

Montreal, September 19, 2011

Michèle Rivet
Danielle Le May
François Gervais

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