

Re Jacob Securities

IN THE MATTER OF:

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

and

Jacob Securities Inc.

2019 IIROC 26

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

Hearings: June 17, July 23, October 4, and October 10, 2019 in Toronto, Ontario
Written Decision: October 25, 2019

Hearing Panel:

Susan Lang, Chair, Peter Dymott and Edward Jackson

Appearance:

April Engelberg, Enforcement Counsel

Jeremy Devereux for Jacob Securities Inc.

REASONS FOR ACCEPTANCE OF SETTLEMENT AGREEMENT

¶ 1 After hearing submissions, the Hearing Panel accepts the October 10 settlement proposed by counsel, which results in an Order expelling Jacob Securities Inc. (Jacob or JSI) from IIROC and in terminating the rights and privileges of its IIROC membership, in accordance with Consolidated Rule 8212(4)(v). These reasons, written as required by Consolidated Rule 8203(7), explain why we accept that settlement agreement in the context of the history of this matter and address the challenges resulting from the initial presentation of this motion as a consent order instead of as a motion for consideration of a settlement agreement.

The 2015 Order

¶ 2 Almost four years ago, on December 17, 2015, this Panel (then differently constituted) granted a Suspension Order against Jacob based on Staff's evidence that Jacob posed a risk of imminent harm to the public. As our 2015 Reasons concluded, that risk arose from Jacob's "numerous and significant repeated deficiencies in compliance as well as other supervisory deficiencies" and its "precarious" financial situation. In addition to the suspension, the 2015 Order provided that IIROC could move subsequently to reattend before this Hearing Panel regarding Jacob's continued membership in IIROC.

The 2018 Motion

¶ 3 About three years later, in June 2018, Staff brought such a motion. It moved pursuant to Rule 8212(4)(v) for an order "expelling a Dealer Member from IIROC and terminating the rights and privileges of membership." Accordingly, the draft Order submitted with that motion material was worded both to expel Jacob and to terminate its IIROC membership. That motion did not proceed, was adjourned and subsequently

was cancelled.

Jacob's Application to the Board of Directors

¶ 4 Instead, Jacob brought an application to the Board of Directors of IIROC seeking permission to resign its membership. Staff opposed that application. In November 2018, the Board conducted an oral hearing. In February 2019, the Board released its reasons rejecting Jacob's request to resign. The Board's decision included a history of the matter and a review of the Panel's Reasons for Suspension. The Board concluded that Staff must establish "an affirmative reason" not to accept Jacob's resignation. The Board concluded that Staff had established such a reason and that it would not be in the public interest to accept Jacob's proffered resignation. In reaching this conclusion, the Board outlined the serious and repeated nature of the misconduct set out in the Reasons underlying the 2015 Suspension Order.

¶ 5 Although the Board recognized and accepted that the termination application might result in a "negative signal" of "public condemnation" about Jacob's conduct, it observed that Jacob's "original conduct invited" this result.

The June 2019 Motion

¶ 6 In June 2019, Staff brought a new in-writing motion before this Panel. In the Notice of Motion, Staff sought the termination of Jacob's membership in IIROC. The grounds for the Motion referred to the denial of Jacob's application to the Board to resign its membership and Jacob's "consent" to "this motion". Staff relied on the 2018 Affidavit of Ciro Mirabella, which stated that it was provided "in support of a motion to expel" Jacob and to "terminate" its membership. It also relied on the Decision of the Board of February 4, 2019 declining to allow Jacob to resign its membership. Finally, the written submissions proposed that Jacob's membership in IIROC be "terminated". While the parties' proposed "Consent" Order specifically stated that the relief granted was "[p]ursuant to Section 8212(4)(v)", the wording that followed referred only to the termination of Jacob's membership and not to its expulsion. The Respondent did not file submissions. Neither party sought an oral hearing.

¶ 7 On June 17, 2019 the Hearing Panel considered the parties' in-writing motion. Assuming wrongly, as it turns out, that the absence of expulsion language was simply a slip, the Panel delivered reasons on July 3, 2019 granting the Order using both the expulsion and the termination language and requesting a further draft order that included both components.

The July 23 Hearing

¶ 8 Counsel promptly raised concerns with the National Hearing Coordinator about the form of the Order. A conference call was arranged with counsel, which proceeded on July 23. At that time, for the first time, counsel for the Respondent advised that the absence of the word "expulsion" had in fact been deliberate and that the omission was a specific term of an agreed-upon settlement. Enforcement counsel acknowledged that was so but took the position that she was content with either the termination language agreed upon in the settlement or the expulsion and termination language used by the provision, as long as Jacob was effectively terminated from IIROC membership.

¶ 9 On July 31, in response to that conference call, the Panel issued reasons for a Direction on Settlement of the Terms of the Order. To ensure procedural fairness, our Direction called for an oral hearing with delivery of further materials, if so advised, and with submissions by counsel. The date of October 4 was eventually arranged by the National Hearing Coordinator.

¶ 10 At the October 4 hearing, counsel submitted that the Panel was not *functus officio*. We agree for several reasons, including that the Order had not been signed or issued. Staff counsel maintained the position taken on the July 23 conference call that the wording of the Order was not significant from her perspective as long as the result was the termination of Jacob's membership in IIROC. The Respondent now took the position

that the original written hearing in June was in substance a motion for the approval of a settlement.

¶ 11 On the basis of the information we now have, the Panel accepts the motion is in substance one for consideration of a settlement agreement. That settlement was a compromise to eliminate the expulsion language from the Order. We agree with counsel for the Respondent that, on such a settlement motion, a Panel has only two options: to accept or to reject the settlement: *Re Kloda*, 2016 IIROC 50. There is no scope to vary the terms of the settlement.

¶ 12 At the time of the October 4 in-person appearance, after hearing oral submissions, the Panel decided that it would reject the proposed settlement that uses only the termination language and accepted the submission that the Panel did not have jurisdiction to vary the settlement in this case to add expulsion language. If the Panel rejected the settlement, the parties could proceed to have the motion heard on a contested basis or to bring another settlement proposal before another panel.

The October 10 Settlement

¶ 13 While our reasons for that result were being written, counsel provided a further Consent on October 10, 2019. This Consent, which specifically refers to an agreement to settle, attaches an Order using both the expulsion and termination language of Section 8212(4)(v). Counsel did not request a further hearing provided the Panel accepted the form of the new Order. The Panel accepts the October 10 settlement of the motion. In our view, this is the appropriate result.

The Result

¶ 14 On the evidence before the Panel, there is reason to expel Jacob from IIROC membership and to terminate Jacob's rights and privileges under Rule 8212(4)(v). Those reasons include that Jacob is currently subject to a Suspension Order and has terminated its business. The evidence establishes that Jacob has complied with the terms of the Suspension Order; Jacob has not dealt with the public since the Suspension Order; IIROC has not been advised of any client complaints against Jacob; Jacob, which operated as a Type 2 Introducing Broker, did not and does not hold any client assets, Jacob's misconduct was significant, and Jacob consents to the termination of its membership and its expulsion from IIROC.

¶ 15 To be clear, the Panel does not accept Staff's submission that termination and the termination accompanied by expulsion are the same in this case. In light of the nature and circumstances of Jacob's misconduct, it is appropriate to use the stronger language of expulsion together with the termination of its membership. An Order will go in accordance with the terms of the parties' October 10 proposed Order.

¶ 16 The Panel does not address the question of whether in all cases the language used must contain both the expulsion and the termination components. In this case, since the conduct called for both and the parties ultimately agreed on including both components, it was unnecessary for us to consider that issue. However, it is appropriate to comment on the challenges that led to the result in this case in order to inform such motions in the future.

The Process

¶ 17 In this case, at the time of the June hearing, the Panel was not told that the parties had negotiated a settlement of the motion by agreeing to eliminate the expulsion language of Rule 8212(4)(v) nor that the motion was in substance one for approval or rejection of a settlement agreement. In the context of the conduct at issue as described in the 2015 Hearing Panel reasons and the 2019 Board of Directors' reasons, if the Panel had been told that the parties had agreed to remove the expulsion language, the Panel would have requested oral submissions at a minimum. In our view, the Panel should have been provided with the information relevant for its determination.

¶ 18 The Panel agrees with the acknowledgement of Respondent's counsel, made at the October 4 hearing

and with the benefit of hindsight, that it would have been preferable had counsel sought an oral hearing in the first place. Also, the Panel agrees with Staff that, going forward, it ought to clarify any agreement that results in a meaningful deviation in language from the provision at issue so that a Panel is in a position to give appropriate consideration to the issue on a fully-informed basis.

DATED at Toronto, Ontario, this 25 day of October 2019.

Susan Lang

Peter Dymott

Edward Jackson

ORDER

THIS MOTION, made by Staff of the Investment Industry Regulatory Organization of Canada (“IIROC”) for an Order expelling Jacob Securities Inc. from IIROC and terminating its rights and privileges of membership was heard on June 17, July 23, October 4 and October 10 at Toronto, Ontario, pursuant to Sections 8212, 8409, 8426 and 8413 of the Consolidated Enforcement, Examination and Approval Rules of IIROC (the “Consolidated Rules”).

ON READING the materials filed in support of this motion, and the consent of the parties, filed:

THIS HEARING PANEL ORDERS that:

1. Pursuant to Section 8212(4)(v) of the Consolidated Rules, Jacob Securities Inc. shall be and hereby is expelled from IIROC effective immediately.
2. Pursuant to Section 8212(4)(v) of the Consolidated Rules, Jacob Securities Inc.’s rights and privileges of IIROC membership shall be and hereby are terminated effective immediately.

DATED at Toronto, Ontario, this 25 day of October 2019.

Original Executed by:

Susan Lang

Chair

Peter Dymott

Panel Member

Edward Jackson

Panel Member

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