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Citation: Caldwell Investment Management Ltd. (Re), 2019 ONSEC 25
Date: 2019-07-19
File No. 2018-36

IN THE MATTER OF
CALDWELL INVESTMENT MANAGEMENT LTD.

ORAL REASONS FOR APPROVAL OF A SETTLEMENT
(Sections 127 and 127.1 of the *Securities Act*, RSO 1990, c S.5)

Hearing:	July 19, 2019	
Decision:	July 19, 2019	
Panel:	Timothy Moseley	Vice-Chair and Chair of the Panel
Appearances:	Derek Ferris Raphael Eghan	For Staff of the Commission
	René Sorell Shane D'Souza	For Caldwell Investment Management Ltd.

ORAL REASONS FOR APPROVAL OF A SETTLEMENT

The following reasons have been prepared for publication in the Ontario Securities Commission Bulletin, based on the reasons delivered orally at the hearing, and as edited and approved by the Panel, to provide a public record.

[1] This case is about an obligation that is commonly known as "best execution". When a client asks their adviser to execute a trade on their behalf, the adviser must make reasonable efforts to ensure that execution of the trade takes place on terms that are as advantageous to the client as they reasonably can be. Those terms include the trading price of the security, as well as the speed, certainty and cost of execution.

[2] Caldwell Investment Management Ltd. (**CIM**) was, at all relevant times, a registered portfolio manager and investment fund manager. Staff of the Commission has alleged, among other things, that CIM failed to meet its best execution obligations. CIM agrees, and Staff and CIM have jointly submitted a settlement agreement for approval by the Commission. I conclude that it would be in the public interest to approve that settlement agreement.

[3] The relevant facts are set out in detail in the agreement, and I need not repeat them here. In essence, the parties have agreed that over an almost four-year period:

a. CIM directed trades for execution to a related firm, Caldwell Securities Ltd.;

b. CIM failed to provide best execution for its clients, including two mutual funds that CIM managed, as well as clients who held separately managed discretionary accounts;

c. CIM made misleading statements about best execution, including in particular by misrepresenting to unitholders of the two mutual funds that brokerage fees would be paid at the most favourable rates available;

d. CIM had inadequate policies and procedures;

e. CIM prevented the Independent Review Committees (**IRCs**) from properly monitoring CIM's best execution practices, because CIM provided insufficient and inaccurate information to the committees; and

f. CIM's failures caused its clients to pay, and CIM's related firm to receive, equity commission rates and bond spreads that were higher (and sometimes significantly higher) than those available at unaffiliated dealers.

[4] By its actions, and in some respects by its inaction, CIM contravened Ontario securities law in three ways. These are more fully set out in the agreement, but to summarize:

a. CIM's failure to comply with its best execution obligation was a violation of section 4.2 of National Instrument 23-101 *Trading Rules*;

b. CIM's failure to have adequate policies and procedures breached section 11.1 of National Instrument 31-103 *Registration Requirements, Exemptions and Ongoing Registrant Obligations*; and

c. CIM's inaccurate representations to the IRCs, and its preventing the IRCs from properly carrying out their responsibilities, constituted a violation of subsection 2.4(1)(a) of National Instrument 81-107 *Independent Review Committee for Investment Funds*.

[5] Best execution is an important obligation. It protects investors and it fosters confidence in our capital markets. CIM's admissions in this settlement agreement demonstrate that CIM did not give that obligation the necessary attention. CIM did not do what it needed to in order to ensure that it preferred its clients' interests over its own interest. That is a serious breach of the trust that was placed in CIM, and it is a serious violation of Ontario securities law.

[6] CIM has acknowledged these violations. CIM co-operated with Staff during its investigation, and CIM has taken proactive steps to enhance its best execution policies and procedures. These are important considerations.

[7] Staff and CIM have agreed that CIM will pay an administrative penalty in the amount of $1.8 million and costs of the investigation in the amount of $250,000. CIM has also agreed to have its registration made subject to terms and conditions that include the retainer, at CIM's expense, of an independent consultant who will review CIM's new policies and procedures and assess CIM's compliance with those.

[8] My obligation at this hearing is to determine whether this negotiated result falls within a range of reasonable outcomes, and whether it would be in the public interest to approve this settlement.

[9] I have reviewed the agreement in detail, and I had the benefit of a confidential settlement conference with counsel for both parties. I asked questions of counsel and I heard their submissions.

[10] This agreement is the product of negotiation between Staff and CIM. When considering settlements for approval, the Commission respects the negotiation process and accords significant deference to the resolution reached by the parties.

[11] Approval of this settlement would resolve the matter promptly, efficiently and with certainty. A settlement avoids the expenditure of significant resources that would be associated with the lengthy contested hearing that is scheduled to begin in about two weeks. The payment of costs helps to reduce the burden on market participants to pay for investigations and enforcement proceedings.

[12] All these factors weigh in favour of approving the settlement. However, I must still be satisfied that doing so would have the necessary deterrent effect, both generally to all those who participate in Ontario's capital market, and specifically to CIM. In particular, is an administrative penalty of $1.8 million within a reasonable range of outcomes?

[13] This is the first enforcement proceeding to come before the Commission relating to the best execution obligation. Staff has submitted that in cases that are the first of their kind, sanctions may be less severe than they might otherwise be. I accept that submission. As a separate point, in the absence of any previous Commission decisions arising out of comparable circumstances, it would be helpful to know how the proposed penalty compares to the excess commissions and spreads that were paid. Counsel for the parties have advised that that

number cannot be easily quantified, and that if this matter were to proceed to a contested hearing, the number would be the subject of competing expert reports, including a dispute as to the basis for calculating that number.

[14] I accept that submission as well, and as I noted earlier, I accord significant deference to the negotiated result arrived at by experienced and able counsel on both sides. I see no reason to conclude that this result is outside the reasonable range. In my view, the settlement properly reflects the principles applicable to sanctions, including general and specific deterrence as mentioned earlier, the seriousness of the misconduct, and the importance of fostering investor protection and confidence in the capital markets. I am reinforced in this view by the terms and conditions to be imposed on CIM's registration, which will serve a preventative and protective purpose.

[15] For all of these reasons, I conclude that it is in the public interest to approve the settlement. I will therefore issue an order substantially in the form of the draft attached to the settlement agreement.

Dated at Toronto this 19th day of July, 2019.

"Timothy Moseley"
Timothy Moseley