

Re Echelon and Burns

IN THE MATTER OF:

**The Investment Dealer and Partially Consolidated Rules and the Dealer
Member Rules**

and

Echelon Wealth Partners Inc. and Stephen Burns

2024 CIRO 94

Canadian Investment Regulatory Organization
Hearing Panel (Ontario District)

Motion heard: December 2, 2024
Reasons for Decision: December 31, 2024

Hearing Panel:

Marvin J. Huberman, Chair

Appearances:

Francis Larin, CIRO Senior Enforcement Counsel
David McLellan, CIRO Senior Enforcement Counsel
Rohit Kumar, for Echelon Wealth Partners Inc.
Geoff Clarke, for Echelon Wealth Partners Inc.
Lindsay Moffatt, for Echelon Wealth Partners Inc.
Natalia Vandervoort, for Fidelity Clearing Canada ULC
Natalia Paunic, for Fidelity Clearing Canada ULC
Martina Svoboda, Senior Legal Counsel for Fidelity Clearing Canada ULC
Ashley Ramnaraine, Legal Counsel for Fidelity Clearing Canada ULC

REASONS FOR DECISION ON MOTION

INTRODUCTION

A. The Motion

1. On November 1, 2024, the Hearing Panel heard a production motion (the “Motion”) brought by Echelon Wealth Partners Inc. and Stephen Burns (collectively, “Echelon”) and made an order requiring Fidelity Clearing Canada ULC (“Fidelity”), a non-party to the subject enforcement proceedings against Echelon, to produce the following records to Echelon by December 3, 2024:
 - (a) Fidelity’s policies and procedures relating to U.S. Over the Counter (“OTC”) trading (including account opening and supervision) in effect for the period July 2018 to June 2020 (“Relevant Period”);
 - (b) All records of Fidelity’s due diligence in respect of account opening for the client accounts of Financial Worldwide Inc., Valor Capital Ltd., Weiser Asset Management and Blacktower Ltd. (the “Foreign Broker-Dealers”); and
 - (c) All records in respect of Fidelity’s compliance monitoring and supervision of U.S. OTC trading in the accounts of the Foreign Broker-Dealers during the Relevant Period (collectively, the “Fidelity Records”).
2. On the Motion, in response to an order sought by Echelon that CIRO Staff make further disclosure, which

included the Fidelity Records, CIRO Staff argued that the Fidelity Records were not relevant. However, unlike the Production Order, the Hearing Panel dismissed the order sought by Echelon for Staff to make further disclosure in respect of the Fidelity Records and other records on the following grounds:

- (a) that Echelon has not met its onus of proof as regards to relevance, including relevance to the issues in the proceeding, or relevance to the Respondents' ability to make full answer and defence;
- (b) that disclosure sought was overly broad, speculative and colloquially known as going on a fishing expedition, which is not generally permitted; and
- (c) that disclosure sought appears to be potentially, if not actually, oppressive, uncontrollable and disproportionate to the complexities of the issues set out in the Statement of Allegations and the Response.

3. Fidelity did not receive the Notice of Motion, dated September 16, 2024, and was not provided with any opportunity to respond to the Motion in which an order was sought by Echelon under Rule 8421 of the Investment Dealer and Partially Consolidated Rules (the "CIRO Rules") for the production of the Fidelity Records.

4. In a letter to the Hearing Panel, dated November 6, 2024, Fidelity, through its counsel, raised concerns that its right to procedural fairness was compromised and requested that the Hearing Panel not issue the order requiring production of the Fidelity Records until proper notice was provided to Fidelity and Fidelity was given an opportunity to make submissions.

5. On November 6, 2024, the Hearings Office informed Fidelity that the Hearing Panel would issue the Order as granted but would hear submissions from all parties on December 2, 2024, which was the earliest date available.

6. On November 7, 2024, Fidelity, through its counsel, again asked the Hearing Panel not to give effect to the Order until after Fidelity has an opportunity to consider its position on the Echelon motion.

7. On November 7, 2024, Fidelity received the signed Order from the Hearings Office requiring that the Fidelity Records be provided to Echelon by December 3, 2024.

8. On November 11, 2024, Fidelity received copies of the Motion materials exchanged between CIRO Staff and Echelon in advance of the November 1, 2024 motions.

B. The Fidelity Motion

9. On December 2, 2024, in the interests of procedural fairness and justice in the circumstances of the present case, the Hearing Panel heard the motion brought by Fidelity (the "Fidelity Motion"), which was supported by the Motion Record, Memorandum of Fact and Law, and Book of Authorities, in the presence and with the participation of counsel for Fidelity, Echelon and CIRO Enforcement Staff.

10. For the reasons set out in its Memorandum of Fact and Law and articulated during oral submissions at the hearing of the Fidelity Motion, Fidelity requested an order, pursuant to CIRO Rule 8403:

- (a) that the Order issued by the Hearing Panel on November 1, 2024 requiring Fidelity to produce the Fidelity Records to Echelon be set aside; and
- (b) costs of this motion.

11. Counsel for CIRO Enforcement Staff reiterated its position taken on the November 1, 2024 motion when the Order was made, but made no specific submissions, nor took a particular position, with respect to the Fidelity Motion.

12. Counsel for Echelon opposed the Fidelity Motion and submitted that nothing presented at the Fidelity Motion warrants this Hearing Panel reversing the Order that was previously made.

13. Echelon's position on the Fidelity Motion was, in summary, that this motion should be dismissed because:

- (i) There is actual recognition in the introducer/carrier broker agreement that the carrying broker, Fidelity, should be providing Echelon and CIRO Staff with such information as is necessary to be fully

informed about the client accounts, including sections 5.2, 5.3, and 6.10 thereof, and that there are very limited exemptions thereto in the agreement or the CIRO Rules;

- (ii) Regarding Fidelity's stated concerns about producing commercially sensitive information, Fidelity asserts that the order should consider Fidelity's rights to privacy and proprietary and confidential information, and that there is a very limited privacy interest in this kind of cases;
- (iii) Fidelity's conduct forms part of the material facts underlying the allegations against Echelon. That role is evident from a review of the Statement of Allegations and the Response. The pleadings in this matter include material facts relating to Fidelity's involvement in the events giving rise to the very allegations that are the subject of the enforcement proceedings, and there is relevance based on the CIRO Rules, including Rules 3202(1), 1402 and 3904; and
- (iv) The test for relevance is whether there is a reasonable possibility that the documents are relevant to the defence arguments intended to be advanced, or that they are not clearly irrelevant to the arguments the Respondents intend to advance; Fidelity is not a stranger to the events giving rise to the allegations made in the Statement of Allegations and the Response pled relating to Fidelity's involvement in the events at issue; Fidelity was an active business partner with Echelon and their activities were highly integrated with each other in regard to this business that they both dealt in with these clients.

C. The Decision on the Fidelity Motion

14. Pursuant to CIRO Rule 8421, on the request of a party, a hearing panel may order a non-party to an enforcement proceeding to produce documents.

15. On November 1, 2024, on the request of the Respondents, I ordered a non-party to this enforcement proceeding, namely Fidelity Clearing Canada ULC ("Fidelity"), to produce certain documents (the "Order").

16. The Order was made by way of a motion brought by the Respondents on notice to CIRO Enforcement Staff. Counsel for the parties appeared, submitted material for my consideration, made oral arguments, and the Order was made, including the productions as against Fidelity.

17. However, Fidelity was not given notice of the motion in which the Respondents sought a production order as against Fidelity for the Fidelity Records (as defined in the Order) nor was it given an opportunity to attend to make submissions in advance of the Order being made. In my view, that constituted procedural unfairness.

18. After the Order was made, Fidelity was provided with the Order and the motion materials which supported it and asked for the opportunity to attend before the Hearing Panel to make submissions, with materials being filed, to set out its position with respect to the Order. Fidelity did attend on December 2, 2024, with counsel, having served and filed written materials in support of its position, namely, a Memorandum of Fact and Law, a Motion Record and Book of Authorities.

19. Fidelity's position, having taken the opportunity to attend and make submissions, is that the Order as it relates to Fidelity ought to be set aside under CIRO Rule 8403, which it submits gives the Hearing Panel jurisdiction to do so.

20. The Respondents and CIRO Enforcement Staff made no submissions as to whether or not I have jurisdiction to set aside the Order as against Fidelity. In my view, I do have jurisdiction to make the order sought by Fidelity on the basis that Fidelity was made subject to a production order with respect to which they did not have any notice or opportunity to consider their position and attend at the time when the motion was being argued to set out their position for my consideration.

21. Counsel for Enforcement Staff stated that they are taking no position on the Fidelity Motion, and they made no specific submissions with respect thereto, including on whether or not I have jurisdiction to make an order setting aside/vacating the Order as against Fidelity. The Respondents opposed the Fidelity Motion and made oral submissions as to why it should be dismissed, without filing any further written materials in support of their position and made no submissions that I do not have jurisdiction to make the order sought by Fidelity.

22. I have carefully considered the submissions of all counsel, including the submissions of the Respondents

with respect to the business relationship between Echelon and Fidelity, whether they are introducing or carrying brokers, their history, and the fact that Fidelity no longer has a relationship with Echelon, and other submissions with respect to their relationship, former, current, future, and their respective CIRO and other legal requirements with respect to which they each must comply.

23. I have also taken into consideration submissions with respect to the relevance or weight that should be given to any confidentiality or sensitive commercial information that may be contained in the documents which are the subject of the Order and whether or not that is something that ought to be considered or has traditionally not been given much weight, as counsel for the Respondents submitted.

24. The predominant considerations in determining whether to make an order under CIRO Rule 8421 include procedural fairness, the relevance of the evidence to be provided by the witness, and whether the evidence will be unduly repetitious. The Hearing Panel must balance a respondent's rights to disclosure and a full hearing with other systemic demands, practicalities, and the interests of others involved in the securities regulatory proceedings.

25. In doing so, it is important for the Hearing Panel to be judicious, to base its decision on a principled basis, and to ensure that the hearing resources are not squandered in fishing expeditions for irrelevant evidence.

26. The Respondents in this case must demonstrate to the Hearing Panel that the documents sought from Fidelity are likely relevant to the proceeding. To be likely relevant, the jurisprudence establishes that there must be a reasonable possibility that the information is logically probative to an issue at the hearing or the competence of a witness to testify: *Re Steinhoff* 2009 IIROC 44, at paragraph 6, citing *R. v. McNeil*, 2009 SCC 3.

27. Despite the fact that the likely relevance threshold is not a high one, it is a significant burden because it requires the Hearing Panel to play a meaningful role in the screening process and ensure that the Respondents' request for production is not speculative, fanciful, unmeritorious, obstructive, or time consuming.

28. Having carefully considered the materials filed and the submissions made by counsel, I am not satisfied that the Respondents have met their onus for production of the Fidelity Records in the circumstances of this case, and for the reasons advanced by counsel for Fidelity.

29. Moreover, I have to consider the impact and inconvenience to Fidelity in terms of whether or not that outweighs the production of the Fidelity Records in the case at hand. Having regard to that consideration, I find that the balance is further tipped in favour of vacating the Order requiring the production of the Fidelity Records in the circumstances of the present case.

30. Another factor that may be taken into consideration is Fidelity's privacy interest as a non-party. In my view, the Order does impact Fidelity's right to privacy with regards to proprietary and confidential information, and the materials before me establish that the Fidelity Records do include internal policies and procedures, as well as internal communications, that bring about privacy and confidentiality concerns.

31. I further find that the Order does place a burden on Fidelity, a non-party, both from a cost and time perspective, to collect and produce records to the Respondents, which records I find do not have likely relevance to Enforcement Staff's Statement of Allegations and the Response filed with respect thereto, or to the Respondents' ability to make full answer and defence with respect to the relevant issues for determination in the present case.

32. In the result, the Order requiring the production of the Fidelity Records is set aside.

33. In my view, this decision promotes the purposes of the CIRO Rules, particularly Rule 8403(1), which provides that:

1. The Rules of Procedure shall be interpreted and applied to secure a fair hearing and just determination of a proceeding on its merits and the most expeditious and least expensive conduct of the proceeding.

34. In making my decision, I have had regard to the interests of not only the parties, but also those of Fidelity, a non-party, who is affected by the Order that may have resulted in procedural unfairness in the making of the Order without given Fidelity an opportunity to address the issues raised at the motion before the

Order was made.

35. I find that setting aside the Order as against Fidelity not only promotes the purposes of CIRO Rule 8403 but is also consistent with justice and fairness of the process as it relates to all the parties in this case.

D. Disposition of the Fidelity Motion

36. For the reasons stated above, I order that the Order issued by the Hearing Panel on November 1, 2024, requiring Fidelity to produce the Fidelity Records to Echelon, be and is hereby set aside.

37. I further order pursuant to CIRO Rule 8403(3)(i), (ii), (iv), and (vi) that if Fidelity is interested in pursuing costs of the Fidelity Motion, counsel for Fidelity shall let counsel for the Respondents and CIRO Enforcement Staff know within 5 days from the date of this decision whether Fidelity is interested in pursuing costs. If Fidelity is not interested in pursuing costs, that will end the matter of costs. If Fidelity advises counsel for the parties that it is interested in pursuing costs, then the issue of costs of the Fidelity Motion shall be addressed at the conclusion of the hearing of this case on the merits.

DATED at Toronto this 31st day of December 2024.

“Marvin J. Huberman”

Marvin J. Huberman, Chair

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