

Re Marek

IN THE MATTER OF:

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

and

Earl Marek

2017 IIROC 13

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

Heard: January 24, 2017 in Toronto, Ontario
Penalty Decision: February 27, 2017

Hearing Panel:

Thomas J. Lockwood, Q.C., Chair, Lou D'Souza and Daniel Iggers

Appearances:

Kathryn Andrews – IIROC Enforcement Counsel

Earl Marek - In Person

PENALTY DECISION

A. THE ALLEGATION

¶ 1 By Notice of Hearing, dated November, 2015, IIROC made the following Allegation:

“Count 1: On or about February 2012, Earl Marek facilitated off book transactions for two clients without the knowledge or approval of his Member firm, contrary to IIROC Dealer Member Rule 29.1.”

B. CONCISE HISTORY OF PROCEEDINGS

¶ 2 The Hearing Panel heard viva voce testimony and received documentary evidence on the Merits from the parties on April 25, 27 and 28, 2016.

¶ 3 The Hearing Panel, subsequently, received Written Submissions from the parties and heard Oral Submissions on the Merits on May 31, 2016, at which time it reserved its Decision.

¶ 4 On October 3, 2016, the Hearing Panel released its Decision on the Merits. It, unanimously, concluded that the Allegation had been established.

¶ 5 The Hearing Panel requested that the National Hearings Co-Ordinator contact the parties and establish a mutually agreeable date for an Oral Hearing on Penalty. This date was fixed as January 24, 2017.

¶ 6 Prior to that date, the Hearing Panel received extensive Written Submissions on Penalty from the parties.

¶ 7 On January 24, 2017, we heard the Oral Submissions of the parties. After retiring to deliberate, we announced our Decision on Penalty. We advised that written Reasons would follow. These are those Reasons.

C. POSITION OF THE PARTIES

i) IIROC Staff

¶ 8 Staff submitted that, in deciding the appropriate sanction to be imposed, the Hearing Panel should consider three issues, namely:

- (a) whether the sanction will be sufficient to prevent the Respondent from engaging in similar conduct in the future;
- (b) will the sanction be sufficient to restrain other registrants from engaging in similar conduct;
- (c) whether the sanction will encourage the public's confidence in the investment industry and in IIROC's regulation of the capital markets.

¶ 9 After quoting from IIROC Rule 20.33, which sets out the range of sanctions available, Staff proposed that the following penalties be imposed upon the Respondent:

- (a) a one year suspension from registration in any capacity with IIROC;
- (b) a fine of \$50,000;
- (c) successful completion of the Conduct and Practices Handbook course within 12 months of any re-registration with IIROC;
- (d) 12 months of close supervision upon any re-registration with IIROC; and
- (e) a payment of \$15,000 towards the costs of the investigation and prosecution.

¶ 10 Staff then set out a number of facts from the Hearing on the Merits which it felt the Hearing Panel should consider when deciding what sanctions to assess.

¶ 11 On the mitigating side, Staff submitted that the Respondent has no previous disciplinary history.

¶ 12 Staff then listed what it considered to be aggravating factors, as follows:

- (a) the intentional nature of the conduct;
- (b) there was more than one client involved;
- (c) the Respondent had previously been registered as a Branch Manager and so he well knew his responsibilities as a registrant;
- (d) the deceptive nature of the conduct as seen in the various emails after the funds had been advanced; and
- (e) clients' losses - \$28,900 USD each.

¶ 13 Staff then referred the Hearing Panel to the February 2015 IIROC Sanction Guidelines ("Guidelines") to make the following submissions.

- (a) The primary purpose of IIROC disciplinary proceedings is to maintain high standards of conduct in the securities industry and to protect market integrity.
- (b) Sanctions should be proportionate to the conduct in question. Penalties imposed should also strike an appropriate balance by addressing a respondent's specific misconduct but be in line with industry expectations.
- (c) The determination of the appropriate sanction in any given case is discretionary. Hearing panels retain the discretion to impose the sanctions they consider appropriate. The appropriate sanction

depends on the facts of the particular case and the circumstance of the conduct.

- (d) The Guidelines indicate that a suspension should be considered where the contraventions involve fraudulent, willful and/or reckless misconduct or has caused some measure of harm to investors, the integrity of a marketplace or the securities industry as a whole.
- (e) The Guidelines set out a number of Key Factors which should be considered when determining the appropriate sanctions. Staff submitted that the following Key Factors were present in the case before us:
 - (i) Multiple clients (two).
 - (ii) Pattern of misconduct.
 - (iii) Intentional conduct.
 - (iv) Neither client was a knowledgeable or sophisticated investor.
 - (v) Harm to clients (client losses).
 - (vi) Harm to market integrity/reputation of the marketplace.
 - (vii) Respondent has no previous disciplinary history.
 - (viii) Respondent did not accept responsibility for his actions.
 - (ix) Respondent attempted to conceal misconduct from his firm.

¶ 14 Although conceding that each case is fact specific, Staff undertook a review of what it considered to be similar cases, in an attempt to show that the penalties which it was seeking against the Respondent were appropriate and in line with previous Decisions. The cases reviewed included:

- (a) *Pariak-Lukic (Re)*, 2014 IIROC 1.
- (b) *McCrimmon (Re)*, 2011 IIROC 77.
- (c) *Blackmore (Re)*, 2014 IIROC 43.
- (d) *Stefiuk (Re)*, 2011 IIROC 24.
- (e) *Scoten (Re)*, 2012 IIROC 67.

¶ 15 Costs: On the issue of costs, Staff relied upon IIROC Rule 20.49 which states, in part, that:

“the Hearing Panel may assess and order any Corporation Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.”

¶ 16 Staff served and filed an Affidavit of Ricki Ann Newmarch, the IIROC Enforcement Litigation National Coordinator, which attested to the hourly rates of both the Senior Enforcement Counsel and the Senior Investigator and showed that a total time value of \$77,406.00 was incurred by IIROC Staff in the investigation and prosecution of this matter. This amount did not include time spent by other IIROC Staff, who worked on the file, or any disbursements incurred. The Respondent did not take any issue with the contents of the affidavit in either his written or oral submissions.

¶ 17 Staff requested that the Hearing Panel fix costs in the amount of \$15,000. It relied on the case of Re Steinhoff, 2012 IIROC 39, which stated, in part, that:

“costs should not constitute an additional penalty against the Respondent but should reflect the time and effort expended by IIROC, and the panel’s assessment of how much of those costs the Respondent should be asked to bear.”

¶ 18 Staff concluded its Penalty Submissions as follows:

“Registrants occupy a privileged position in the securities industry. Those privileges are balanced by responsibilities set out in the Dealer Member Rules, including the obligation to observe high standards of ethics and conduct, and to not engage in any business conduct or practice which is unbecoming or detrimental to the public interest. Honesty in dealing with clients and one’s own Member firm is crucial. Sanctions imposed by this Panel should encourage registrants to observe these high standards.”

(ii) The Respondent

¶ 19 In an overview of his position, the Respondent stated as follows:

“In deciding the appropriate sanction to be imposed, the Hearing Panel should consider these three issues:

- Whether there is any proof beyond a shadow of a doubt that the two investors involved in the decision derived from the alleged transaction were, in fact, clients.
- The Respondent retired as an investment advisor in April 2014, and has no interest in joining any IIROC Dealer Member in any capacity in the future.
- IIROC’s questionable practice of posting numerous allegations online, is severely lacking in fairness in both a slanderous and libelous fashion.”

¶ 20 The Respondent then proceeded to contest that PL and DL were, in fact, clients as found by this Hearing Panel in its Decision on the Merits at paragraphs 140 through 143.

¶ 21 At the Oral Hearing on Penalty, the Respondent agreed that he had made a conscious decision not to be present when PL and DL testified before the Hearing Panel. He had also made a conscious decision not to have either of them cross-examined on any of their evidence.

¶ 22 He conceded that the appropriate time to contest their evidence was at the Hearing on the Merits and not during the Penalty Hearing.

¶ 23 With respect to the “Mitigating/Aggravating Factors”, replied on by Staff, the Respondent took the following positions:

- (a) He agreed that he had no previous disciplinary history.
- (b) With respect to intent, he stated that “intent did not exist in any manner.”
- (c) The “clients” acted in “their” transaction, not one that he was associated with.
- (d) He agreed that he had been registered as a Branch Manager and that is “Why I handled matters as I did.”
- (e) With respect to the deceptive nature of the conduct, he submitted that “there is excessive oversight in the financial industry re transactions without incurring compliance over non-transactions.”

¶ 24 The Respondent then provided his position with respect to each of the Key Factors in determining sanctions.

¶ 25 With respect to Staff’s review of the Caselaw, the Respondent stated that “I only reviewed one of the cases . . . and . . . saw no relevance in these Staff exercises.”

¶ 26 With respect to the issue of a possible fine and/or costs, the Respondent submitted: “Should the Panel decide to go forward with the levy of a fine, I will state that inability to pay is a matter of fact.”

¶ 27 The Respondent then stated that: “The questionable ethics of IIROC posting allegations online which

are viewable worldwide, without a response from the respondent, has irreparably damaged my livelihood.”

¶ 28 The Respondent then listed 6 items which, allegedly, proved his inability to pay.

¶ 29 At the Oral Hearing on Penalty, the Hearing Panel expressed concern that what the Respondent stated was a copy of a second mortgage which he, allegedly, had been forced to take out was, in fact, just a letter referring to a transfer of an already existing second mortgage.

¶ 30 More generally, we were concerned that bald assertions, without appropriate documentary support, did not comply with the requirements of the Guidelines, dealing with inability to pay, which states, in part, as follows:

“The burden is on the respondent to raise the issue and prove evidence of financial hardship. Evidence of financial hardship should be in the form of sworn affidavits or declarations, along with standard or commonly accepted documents such as tax returns, audited financial statements or other externally verified financial statements.”

¶ 31 The Respondent concluded his Penalty Submissions as follows:

“In summary:

- 1) No client was involved in this matter
- 2) I have no previous disciplinary issues
- 3) I am no longer in the industry
- 4) There are no resources to pay any imposed fine.”

For all of the foregoing reasons, the Respondent respectfully requests that the Hearing Panel dismiss this matter in its entirety.”

D. DECISION ON PENALTY

¶ 32 The Respondent acted contrary to IIROC Dealer Member Rule 29.1 by facilitating off book transactions for two clients without the knowledge or approval of his Member firm.

¶ 33 By doing so, he breached the trust between his clients and himself. He also breached the trust between his Member and himself.

¶ 34 Serious consequences must follow the breaches of these trust relationships. It is necessary for this Hearing Panel to convey to both the Respondent and the investment industry as a whole that this type of conduct will not be tolerated.

¶ 35 In our view, the Penalty Sanctions proposed by Staff, along with the \$15,000 payment towards the cost of the investigation and prosecution, will convey the appropriate message. At the end of the Penalty Hearing, on January 24, 2017, we made an Order to this effect.

¶ 36 We believe that the contents of this Order are appropriate, given the Respondent’s actions. We further believe that the penalties imposed will foster public confidence in the investment industry, are in keeping with previous IIROC Decisions and will send an important message to both the Respondent and the investment industry in general that a registrant must act with honesty and integrity at all times.

¶ 37 With respect to the claim of impecuniosity, made by the Respondent in both his written and oral submissions, we do not believe that the Respondent has satisfied the burden placed upon him to provide credible evidence in a satisfactory evidentiary form. Mere assertions of financial hardship are not sufficient.

¶ 38 The Respondent, however, is free to seek to make mutually satisfactory arrangements with Staff for the payment of both the fine and costs.

E. PENALTIES IMPOSED

¶ 39 Accordingly, the following Order is made against the Respondent:

- (a) a one year suspension from registration in any capacity with IIROC;
- (b) a fine in the amount of \$50,000;
- (c) successful completion of the Conduct and Practices Handbook course within 12 months of any re-registration with IIROC;
- (d) 12 months of close supervision upon any re-registration with IIROC; and
- (e) costs in the amount of \$15,000.

DATED at Toronto this 27th day of February, 2017.

Thomas J. Lockwood

Lou D'Souza

Daniel Iggers

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