

Re Eley

IN THE MATTER OF:

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

and

Douglas John Eley

2020 IIROC 35

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

Heard: September 14, 2020 in Toronto, Ontario
Decision: October 6, 2020

Hearing Panel:

Louise Barrington, Chair, Charlie Macfarlane and Ron Smith

Appearance:

Robert DelFrate, Senior Enforcement Counsel

Jay Naster, for Douglas John Eley

Douglas John Eley (present)

DECISION ON SANCTION AND COSTS

INTRODUCTION

¶ 1 This is a decision on sanctions following a hearing which took place from September 9 to 19, 2019 with post-hearing briefs following in October 2019. In its decision of January 28, 2020, the Panel found that the Respondent had altered previously signed client documents, seriously violating industry regulations and Euro Pacific Canada Inc. policies governing his conduct at the time. This conduct was unbecoming or detrimental to the public interest, in breach of the high standards and ethics demanded by IIROC Dealer Member Rule 29.1.

¶ 2 As announced at the start of the merits hearing, counsel for both parties had agreed that the issues of sanction and costs were to be dealt with separately. In the event the parties were unable to agree, either party could apply to the Panel for further orders and directions. IIROC applied for a hearing on the issues of Sanctions and Costs, and this was originally scheduled for June 2020.

¶ 3 Dealer Member Rule 29.1 provided as follows:

Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.... Each of the foregoing individuals shall comply with all

Rules required to be complied with by the Dealer Member.

¶ 4 The Compliance Manual of Euro Pacific Canada Inc. (“EPC Manual”)¹ states in article 3.26:

It is a serious violation of industry regulations and Euro Pacific Canada Inc. policies to forge a client’s signature, inappropriately alter a document after it was signed, or otherwise knowingly represent that the client signed a document when that was not the case.

¶ 5 IIROC Dealer Member Rule 20.33 provided for penalties which a Hearing Panel may impose either alone or in combination:

- a. Reprimand
- b. Fine not exceeding \$1,000,000 per contravention
- c. Suspension of approval for any period of time and upon any conditions or terms
- d. Terms and conditions of continued approval
- e. Prohibition of approval in any capacity for any period of time
- f. Termination of the rights and privileges of approval
- g. Revocation of approval
- h. Permanent bar from approval with the Corporation or
- i. Any other fit remedy or penalty.

¶ 6 IIROC Enforcement counsel produced a number of cases as precedents and has proposed the following sanctions and costs:

- a. A permanent bar from approval with IIROC
- b. A prohibition from employment in any capacity with an IIROC Dealer
- c. A fine in the amount of \$25,000
- d. Contribution to costs of \$75,000.

¶ 7 At the hearing, counsel for Mr. Eley produced a number of cases for the guidance of the Panel, without suggesting any specific penalty as appropriate.

¶ 8 The originally scheduled hearing on sanctions and costs (“Sanctions Hearing”) was postponed from June 2020 to September 2020 due to restrictions resulting from the COVID-19 pandemic, and Respondent’s reluctance to proceed virtually. It was agreed by both parties in June that the new date of September 14 – 15, 2020 would be peremptory and the hearing would take place virtually if necessary.

¶ 9 Mr. Naster indicated that he proposed to call ten or eleven witnesses at the Sanctions Hearing. The Panel allowed for a maximum of two witnesses from each side to testify orally, with all other witnesses to testify by affidavit. Affidavits were to be delivered in advance to allow IIROC Enforcement Staff (“Staff”) to require the presence of any or all witnesses for questioning at the hearing. The Respondent produced five affidavits (the “Affidavits”). IIROC Staff indicated that it would not call these witnesses.

¶ 10 In an application dated September 3, 2020 and returnable on September 14, 2020, the first day scheduled for the Sanctions Hearing, IIROC Staff objected to the content of the Affidavits and required the presence of any and all witnesses whose testimony was accepted by the Panel despite IIROC’s objections. The IIROC application was based on three grounds:

¹ Euro Pacific Client Manual, clause 3.26 in Respondent's Compendium of Documents, Ex. R4, Tab 1, p.62.

- i) The Affidavits were an attempt to re-open the findings of fact and legal conclusions of the Panel
- ii) The Affidavits were irrelevant to the issues of sanctions and costs and
- iii) Admission of the Affidavits would undermine the integrity of the IIROC disciplinary process and constitute an inefficient use of IIROC's resources.

¶ 11 The Respondent replied on September 9, 2020 with a Book of Legal Authorities, presenting his arguments orally at the beginning of the Sanctions Hearing.

¶ 12 After considering the submissions of and facts and law presented by the parties, the Panel adjourned to confer and to decide whether to admit the Affidavits.

¶ 13 The Panel considered the case of *Northern Securities (Re)*² in which the Ontario Securities Commission (the "OSC") held that although the Respondent[s] must have a full opportunity to address sanctions and costs, that did not permit the re-opening and re-litigation of the findings on the merits. The OSC panel stated that evidence tendered at a sanctions and costs hearing must be relevant to the determination of appropriate sanctions or costs, such as evidence relating to the financial impact of proposed sanctions, or character evidence. Thus, evidence relating solely to the merits which had already been decided were therefore inadmissible. The Divisional Court upheld this decision, deciding that it was reasonable for the OSC to refuse to hear evidence which presented in an improper effort to relitigate the merits of the decision.

¶ 14 In another OSC case cited by IIROC, *Re MRS Sciences Inc.*³, the OSC panel stated that "[a]t the Sanctions and Costs Hearing, the role of the Panel is to consider evidence only relevant to the determination of sanctions and/or costs."

¶ 15 This Panel decided that paragraphs 1 to 7 of the Affidavit of Mr. Cavalaris, the compliance officer at Echelon/EuroPacific, were relevant to the Panel's assessment of the character and conduct of the Respondent and therefore admissible for consideration with respect to the issue of sanctions.

¶ 16 The remainder of Mr. Cavalaris' testimony, and of the four other affiants, was inadmissible for the following reasons:

- i) The Affidavits were irrelevant to the issues of sanctions and costs before the Panel, but rather were a thinly disguised attempt to re-open the Panel's findings on the merits. The merits of this case are no longer before the Panel. Its decision released on January 28, 2020 is final as to the merits of this case.
- ii) The Affidavits contained no new evidence. The affiants were available at the time of the hearing on the merits. After declining to call those witnesses for the merits hearing as originally announced, Mr. Eley cannot now have a second chance to present them in the hope of undermining the Panel's findings.
- iii) From a public policy standpoint, allowing the admission of the Affidavits in the present circumstances would encourage parties to split their case, undermine the credibility and efficiency of the IIROC disciplinary process.

¶ 17 After a deliberation, the Panel announced its decision that only the first seven paragraphs of Mr. Cavalaris' affidavit were admitted as relevant to the issues of sanction and costs. The remaining four affidavits

² 2014 LNONOSC 581 at paras 40 - 44, IIROC Book of Authorities, Tab 1. Also, *Northern Securities Inc. v. OSC*, 2015 ONSC 3641 at para 13, IIROC Book of Authorities, Tab 2. The Divisional Court in *Northern Securities* also commented at para 25, "The burden to prove the allegations rested on IIROC staff of course, but this does not preclude the trier of fact from drawing a reasonable inference from the evidence."

³ 2014 ONSEC 14 at paras 75 – 76, IIROC Book of Authorities, Tab 4

were excluded from the record.

¶ 18 The hearing on sanctions and costs began at 2 p.m. Mr. Cavalaris was the only witness examined. Mr. DelFrate then presented his submissions and Mr. Naster presented his case. The hearing finished at 6:00 pm and the Panel declared it closed save for two transcript references, one from each Party, to be delivered the following day.

BACKGROUND AND UNDISPUTED FACTS

¶ 19 Mr. Eley was first registered with IIROC as an Investment Representative in 2000 and as a Registered Representative (“RR”) in 2004. Between September 2006 and April 2013, he was registered as an RR. In May 2013, he changed firms after having been de-registered and terminated for cause. The cause was the disciplinary action arising from his conduct which had resulted in a six-month prohibition from re-applying for registration with IIROC. At his new firm, he was unregistered, acting as assistant to another RR, who assumed carriage of most of his former client files.

¶ 20 In March of 2015, the Respondent again changed firms. He joined an IIROC Dealer Member Euro Pacific Canada, later known as Echelon Wealth Partners Inc. (“Echelon”),⁴ in its Burlington branch office. Mr. Eley was at that time unregistered and working as assistant to the RR who still had carriage of his former clients’ accounts and who moved with him to Echelon.

¶ 21 On May 19, 2015, the Respondent re-registered as an RR with Echelon. On May 28, 2015, he became registered as a Portfolio Manager. He resumed carriage of his former clients’ accounts, and the RR who had covered his files de-registered and became his assistant, as an Investment Representative.

¶ 22 IIROC contended that the Respondent made or instructed or allowed others to make significant alterations to client documents which were then submitted to third parties who were unaware that the alterations had been made after the clients had signed them, or retained the altered documents in client files as evidence of client instructions. Specifically, IIROC alleges that, between May 2015 and November 2015, the Respondent:

- altered client documents after signature, specifically dates when the documents were purportedly signed, so that the records in the client files were not accurate
- completed fee schedules after clients had signed their account documentation and added client objectives and risk tolerances after the client had signed the documents
- used previously signed mutual fund switch tickets to facilitate transfers of 10% free units from the deferred sales charge version of a fund to the front-end load version of the same fund, using photocopied or altered switch tickets to facilitate subsequent transactions rather than obtaining newly signed switch tickets from the clients and
- altered some switch tickets from the company where the Respondent had previously worked by superimposing the Echelon letterhead on the amended switch tickets.

DECISION ON THE MERITS

¶ 23 The issue determined by the Panel in these proceedings was whether the Respondent improperly altered, caused to be altered improperly, or was aware of improper alterations to previously-signed client documents as alleged and, if this question was answered in the affirmative, did the alteration of those documents constitute a contravention of Dealer Member Rule 29.1?

⁴ Echelon Wealth Partners Inc. was at the relevant time known as Euro Pacific Canada Inc. However, in most of the evidence and argument before the Panel, the company was referred to as Echelon; throughout this Decision, the company is referred to as Echelon.

¶ 24 The Respondent denied making improper alterations to his clients' files but could offer no explanation as to how they had occurred.

¶ 25 The hearing of this matter lasted nine days, during which the Panel viewed hundreds of documents from the Respondent's client files - some in two or three different versions. The Panel reviewed the impugned documents during the hearing, finding several on which improper erasures or substituted information were clear on their faces. Other documents, examined in series, showed several iterations of the same client document, containing improper additions, erasures and substituted information. Mr. Eley's evidence was that he was unaware of the alterations and that they must have been made by his colleague, Ms. M or two temporary clerks. Neither Ms. M nor the two clerks testified at the hearing.

¶ 26 Considering the circumstances in which the alterations took place and the absence of any other evidence as to another person both capable and motivated to make the changes, the Panel found it impossible to credit the Respondent's denial. It was "simply implausible that Mr. Eley was not aware of the alterations, as he testified to the Panel."⁵ The Panel found, on the balance of probabilities, that the Respondent was responsible for the alterations, either by making the improper changes himself or by instructing someone else to do so.⁶

¶ 27 The Panel concluded that, between May 2015 and November 2015, the Respondent contravened Rule 29.1(ii) of the IROC Dealer Member Rules by engaging in business conduct and practices unbecoming or detrimental to the public interest, specifically by inappropriately altering documents after they were signed, and knowingly representing that clients had signed documents when that was not the case, in serious violation of industry regulations and Euro Pacific Canada Inc. policies governing his conduct at the time.

¶ 28 The Panel's decision on the merits was released on January 28, 2020. The parties have been unable to agree on appropriate sanctions or costs. The Panel reconvened to determine the sanctions to be applied and the allocation of IROC's costs.

¶ 29 The IROC Guidelines on Disciplinary Sanctions provides that sanctions should be designed to protect the investing public, strengthen market integrity, and improve overall business standards and practices. They are not meant to be punitive.

¶ 30 Appropriate sanctions are "protective, preventive and prospective" to prevent future harm in the capital markets.⁷ Their purpose is to protect the public interest by discouraging future misconduct by the Respondent and deterring others from engaging in similar misconduct. Thus, an appropriate sanction is proportionate to the Regulated Person's specific misconduct, and within the general context of industry expectations.

FACTORS TO CONSIDER IN DETERMINING SANCTIONS

¶ 31 The number and character of the transactions are relevant. Mr. Eley's actions took place over a period of several months. The Panel found there was a pattern of improper additions and alterations to clients' file records. Although the transgressions in this case are less egregious than his former activities, which included falsifying client information to make it appear they were eligible to make certain investments when that was not the case, their number and pattern are of serious concern. The Panel had concluded in its Decision on the merits that the Respondent acted repeatedly and with negligent disregard for the potential consequences of leaving misleading, inaccurate information in client files.

⁵ *Re Eley* 2019 IROC 35 at para 77

⁶ *Ibid* at para 78

⁷ IROC Penalty Submissions, para 10, referring to *Asbestos Minority Shareholders v. OSC* [2001] 2 S.C.R 132 at paras 42-43

¶ 32 There was no evidence of harm to any client, and Mr. Eley acted - in some cases at least - for the convenience of his clients and at their direction. There is no evidence that Mr. Eley received any financial benefit from his misconduct. The harm was to the integrity of regulatory system which governs the Respondent's conduct. By his actions, the Respondent demonstrated his disregard for the dangers of leaving misleading documents in a client's file.⁸

Aggravating Factors

i) Sanctions should be more severe for Respondents with prior disciplinary records

¶ 33 IIROC Staff contends that the sanction in this second case should not be less than that in the Respondent's first disciplinary hearing. A prior disciplinary record strongly suggests that the prior sanction was not a sufficient deterrent. In October 2014, in an Agreed Statement of Facts and Contraventions, Mr. Eley admitted contravening IIROC Dealer Member Rule 29.1 by making misrepresentations as to his firm's compliance staff by inflating certain clients' worth and by falsely endorsing the signatures of several clients on account documentation and other forms. He admitted concealing his conduct from his colleagues over a period of 16 months. On that occasion, he was suspended for six months, obliged to undergo strict supervision for one year, and fined \$50,000 plus costs of \$15,000. In determining the sanction, the panel took into account his co-operation and admissions during that investigation, and the fact that he had not been able to act as a registered representative since April 2013. They also considered supporting testimony from his employer who testified that Mr. Eley was remorseful and determined not to repeat the conduct.

ii) For multiple sanctions, the cumulative sanction should appropriately reflect the totality of the misconduct

¶ 34 The Panel concluded that the Respondent's actions constituted a pattern of repeated misconduct which began just around the time his suspension was lifted and he re-registered as an RR and changed firms. Although numerous similar contraventions may warrant higher sanctions, the Guidelines provide that the total sanction for multiple contraventions should be limited to what is appropriate for the overall misconduct.

¶ 35 Throughout the proceedings, the Respondent denied any wrongdoing. There was thus no question of co-operating with IIROC investigation as he had done in the first case.

iii) Suspension may be appropriate

¶ 36 Suspension may be appropriate if there have been one or more serious contraventions, a pattern of misconduct, prior disciplinary history, fraudulent, wilful and/or reckless misconduct or there has been harm to investors, the integrity of the marketplace or the securities industry as a whole.

¶ 37 The Respondent's conduct took place over a period of several months. Although there is no evidence that any client suffered harm as a result of his conduct, his actions did, in the words of the Panel in their conclusion, "...result[...] in a crack in the edifice [of self-regulation] which has earned public trust and respect. It decreases the value of the self-regulation in the perception of the public generally, and specifically of the clients."⁹

iv) A permanent bar should be considered

¶ 38 Counsel for IIROC Staff argued for a permanent bar, citing the IIROC Guidelines. Where there is reason to believe that the Respondent cannot be trusted to act in an honest and fair manner in their dealings with the public, their clients, and the securities industry as a whole, the Panel should consider a permanent bar.

Mitigating Factors

⁸ *Supra* note 5 at paras 96 - 104

⁹ *Supra* note 5 at para 100

¶ 39 The Panel considered the evidence of Mr. Louis Cavalaris of Echelon, who joined the company in March of 2016 and since May of that year has been its Chief Compliance Officer. He testified by affidavit and attended the hearing to respond to questions at the request of Mr. DelFrate. Mr. Cavalaris stated enthusiastically that since he arrived at Echelon, he had no problem with Mr. Eley and had had no misconduct reported to him. He stated that Mr. Eley's conduct faithfully complied with rules and regulations. The Respondent's satisfactory conduct over more than four and a half years does offer some reassurance that he is unlikely to revert to his prior conduct.

¶ 40 We heard nothing at the Sanctions Hearing about the Respondent's financial position in mitigation, although his counsel did refer us to the testimony from the hearing on the merits regarding Mr. Eley's family situation, including four school-aged children.

ARGUMENTS

¶ 41 Mr. DelFrate argued that to be a deterrent to Mr. Eley and to other potential respondents, the sanction for this second offence must be more serious than that in his first disciplinary hearing.

¶ 42 Mr. Naster argued that the conduct in this case is not as serious as that in the first. He repeatedly made submissions calling into question the findings and decisions of the Panel on the merits. He repeatedly suggested that the Panel was wrong, the conduct of the Respondent was not serious and therefore the sanctions should be lower than those in the first case, to reflect their lesser importance. He did concede that the penalty in this case would be increased because it is a second offence.

¶ 43 The Panel has taken both these points of view into consideration but did not permit Mr. Naster to continue arguing about the merits. The Panel has decided that the nature of the misconduct in this case, although egregious, is not of itself deserving of the permanent bar requested by IIROC Staff. On the other hand, because this a second offence, and occurring directly after the Respondent's earlier suspension ended, the sanction must be heavy enough to have the necessary deterrent effect to deter both Mr. Eley and others working in the public markets. In making our decision, we have considered these arguments and compared the circumstances and sanctions in more than twenty cases referred to us by both counsel.

¶ 44 The Panel notes that the penalty in Mr. Eley's first disciplinary hearing was suspension for six months from the date of the hearing, strict supervision for one year, a fine of \$50,000 and costs of \$15,000.

¶ 45 This penalty followed a settlement agreement on the merits in which the facts were agreed. The panel deciding on the sanctions for that case considered Mr. Eley's cooperation with the investigation including agreeing to a statement of facts. That panel also made allowance for the fact that by the time of the hearing, Mr. Eley had already been unregistered for about six months.¹⁰

¶ 46 That panel observed, "The proper functioning of the investment industry, and protection of public investors, depends on each registered representative executing his or her duties with honesty. [...] Others using the document must be able to have total confidence that the document was signed by the person whose signature apparently appears on the document and that the document is being used properly. It is these fundamental principles underlying the investment industry that Mr. Eley abused."¹¹

COSTS

¶ 47 IIROC Staff submitted an affidavit sworn on April 24, 2020 by Ms. Ricki Ann Newmarch, Enforcement Litigation National Coordinator for IIROC. Ms. Newmarch reviewed the Bill of Costs prepared for IIROC Staff in this matter. The total cost for the time spent by Mr. DelFrate, Senior Enforcement Counsel and Mr. Mucchi, Senior Investigator, was \$132,375.00, excluding the work of other staff, transcripts and disbursements. IIROC

¹⁰ *Re Eley* 2014 IIROC 52 paras 68 - 70

¹¹ *Ibid* at para 52

Staff suggested that Mr. Eley pay \$75,000 of this amount.

ORDER

¶ 48 The Panel hereby orders that:

- a) Mr. Eley shall be suspended from registration with IIROC for a period of 12 months, effective ten days from the date of this Decision. During the suspension period he shall not take employment in any capacity with any IIROC Dealer Member;
- b) Should he obtain re-registration with IIROC, Mr. Eley shall be subject to close supervision for a period of 18 months;
- c) Mr. Eley shall pay a fine of \$50,000; and
- d) Mr. Eley shall contribute the sum of \$50,000 to IIROC's costs in this matter.

Dated at Toronto, Ontario this 6 day of October 2020.

Louise Barrington

Charlie Macfarlane

Ron Smith

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