Re Metcalfe

IN THE MATTER OF:

The Investment Dealer and Partially Consolidated Rule

and

Donald Warren Metcalfe

2024 CIRO 25

Canadian Investment Regulatory Organization
Hearing Panel (British Columbia District)

Heard: January 29, 2024, in Vancouver, British Columbia (via videoconference)
Decision: February 20, 2024

Hearing Panel:
John Rogers, Chair, Barbara Fraser and Johannes van Koll
Appearances:
Joe Kelly, Enforcement Counsel
Donald Warren Metcalfe (absent)

DECISION ON PENALTY

INTRODUCTION

¶ 1 This matter was commenced pursuant to a Notice of Hearing ("Notice of Hearing") dated November 2, 2020 issued pursuant to what were then sections 8203 and 8205 of the Consolidated Enforcement, Examination and Approval Rules ("Consolidated Rules") of the Investment Industry Regulatory Organization of Canada ("IIROC"), which in 2023 became the Investment Dealer and Partially Consolidated Rules (the "IDPC Rules") of the Canadian Investment Regulatory Organization ("CIRO").

¶ 2 The Notice of Hearing notes that between November 2018 and January 2020, the Respondent, Donald Warren Metcalfe, was an Approved Person with Chippingham Financial Group Limited ("Chippingham") and PI Financial Corp ("PI Financial"), both Dealer Members, and held the position of President and Chief Operating Officer at Chippingham and, later, the position of Executive Vice Chairman and a member of the Board of Directors of PI Financial.

¶ 3 The Notice of Hearing alleges that during this time period, contrary to Consolidated Rule 1400, the Respondent engaged in fraudulent conduct with respect to making false representations as to the ownership of and as to the value of assets offered as collateral in order to secure loan financing in the amount of $172 million.

¶ 4 It is further alleged that the Respondent, contrary to Section 8104 of the Consolidate Rules, failed to cooperate with Enforcement Staff who were conducting an investigation into claims relating to this fraudulent conduct.

¶ 5 Following the issuance of the Notice of Hearing, on December 3, 2020, the Respondent served his response ("Response") denying these allegations against him.

¶ 6 Although initially represented by counsel who appeared on his behalf at all but one of the prehearing conferences prior to the hearing on the merits in this matter and this penalty hearing, the Respondent immediately prior to the hearing on the merits, by way of a Notice of Intention to Act in Person dated September 11, 2023, dismissed his counsel after instructing his counsel to advise Enforcement Staff that he had chosen to act on his own behalf. Although he was in regular communication with Enforcement Staff following his decision to act on his own behalf, he elected not to appear at the final prehearing conference held prior to the hearing on the merits, and, similarly, elected not to appear either at the hearing on the merits or this penalty hearing.

¶ 7 For the hearing on the merits, the Panel was asked by Enforcement Counsel to proceed in the Respondent's absence. The Panel proceeded under IDPC Rule 8423 (12), by videoconference, on October 23 and 24, 2023 for the reasons as set out in our decision on the merits (Re Metcalfe 2024 CIRO 38) (the "Merits Decision").

¶ 8 In the matter at hand, Enforcement Counsel referenced his communication with the Respondent on January 11, 2024 confirming that the Respondent was aware that this penalty hearing was proceeding by way of videoconference on January 29, 2024 and that the Respondent had advised Enforcement Counsel in this communication with him that the Respondent did not intend to attend or to participate in the hearing. As the Respondent had been provided with ample notice of this penalty hearing, Enforcement Counsel submitted that for the same reasons accepted by the Panel in the merits hearing, as set out in the Merits Decision, this matter should proceed in the Respondent's absence.

¶ 9 The Panel agreed with Enforcement Counsel's submission and proceeded with this penalty hearing in the Respondent's absence.

THE ALLEGATIONS IN THE NOTICE OF HEARING

The Allegation of Fraudulent Conduct

¶ 10 The fraudulent conduct alleged against the Respondent in the Notice of Hearing involved the Respondent's relationship with Gary Man King Ng ("Mr. Ng"). During the relevant time period, Mr. Ng was an Approved Person and a Registered Representative with firstly Chippingham, and, subsequently, with PI Financial.

¶ 11 Mr. Ng was the founder of Chippingham, which he owned through a structure of various entities controlled by him (the "Ng Group").

¶ 12 In November of 2018, Mr. Ng through the Ng Group acquired a 100% controlling interest in PI Financial for a cash purchase price of $100 million, money partially financed by two lenders, Lender One who advanced approximately $80 million, and Lender Two, who advanced approximately $20 million.

¶ 13 As security for these and other loans, Mr. Ng provided his personal guarantee and granted security to Lender One, Lender Two and another lender ("B Corp") (collectively, the "Lenders") over financial assets contained in securities accounts purportedly owned by him, firstly at Chippingham and, later following his purchase of PI Financial, at PI Financial.

¶ 14 Despite his representations to the contrary:

- Mr. Ng did not own, control or have trading authority over the securities accounts pledged as collateral to the Lenders, and/or
- such securities accounts did not exist, and/or
- the account documentation provided to the Lenders by Mr. Ng were modified to grossly overstate the value of the financial assets purportedly held in these securities accounts.

¶ 15 With respect to the Respondent, the Notice of Hearing alleges that the Respondent perpetrated a fraud as he directly and actively participated with Mr. Ng in the falsification and distribution of this false and/or fictitious account documentation to the Lenders.

The Allegation of Failure to Cooperate

¶ 16 Enforcement Staff scheduled an interview with the Respondent for August 13, 2020. The Respondent failed to attend this interview.

¶ 17 It is alleged that this failure to attend by the Respondent constituted a failure to cooperate contrary to Section 8104 of the Consolidated Rules.

THE RESPONSE

¶ 18 In the Response, the Respondent submitted that:

- the Respondent was an Approved Person working closely with Mr. Ng, firstly at Chippingham and later at PI Financial,
- the Respondent joined Chippingham at the request of Mr. Ng in December of 2012,
- as Vice Chairman of PI Financial, the Respondent reported directly to Mr. Ng and was at all material times acting under the instructions of Mr. Ng, and
- as an employee of PI Financial, the Respondent was paid an annual salary and bonus and did not receive shares or any equity interest in PI Financial.

¶ 19 With respect to the allegations of fraudulent conduct, the Response stated that:

- the Respondent was not party to any discussions with the Lenders who advanced funds to Mr. Ng and had no knowledge of what was discussed with respect to the PI Purchase Loans or other loans, and
- the Respondent did not falsify any Chippingham or PI Financial account statements and, any account statements allegedly emailed by the Respondent, were sent on behalf of and at the direction of Mr. Ng.

¶ 20 If the Respondent is found to have breached the standards of conduct required under Consolidated Rule 1400, the Respondent asks that any sanction imposed should take into account that:

- the Respondent acted under instructions and pressure from Mr. Ng,
- the Respondent trusted Mr. Ng as an experienced and successful businessperson and as the Respondent's boss,
- the Respondent's actions were carried out under duress, and
- the Respondent received no financial, personal or other material benefit in respect of the activities referenced in the alleged fraudulent conduct.

¶ 21 In reference to the allegation of failure to cooperate contrary to Section 8104 of the Consolidated Rules, the Respondent in the Response states that his counsel attended the interview and made a statement on his behalf.

THE PROCEEDING AGAINST MR. NG

¶ 22 As was noted above, this matter was commenced pursuant to the Notice of Hearing dated November 2, 2020 naming both the Respondent and Mr. Ng and was subsequently severed resulting in separate hearings on the merits for Mr. Ng and for the Respondent.

¶ 23 In Re Ng 2022 IIROC 15, (the "Ng Decision"), the Panel found that Mr. Ng:

- between November 2018 and January 2020, engaged in fraudulent conduct with respect to loan financing, contrary to Rule 1400 of the Consolidated Rules, and
- in July, 2020, contrary to Section 8104 of the Consolidated Rules, failed to cooperate with Enforcement Staff who were conducting an investigation.

¶ 24 By way of penalty, the Panel ordered that:

- the maximum fine permissible under the Rules in the amount of $5,000,000 be imposed on Mr. Ng,
- Mr. Ng be permanently banned from registration in any capacity, and
- Mr. Ng pay costs in the amount of $194,000.

THE PANEL'S MERIT DECISION

¶ 25 As above noted, the hearing on the merits in this matter proceeded in the absence of the Respondent, and the decision of the Panel, as set out in the Merits Decision, was that:

- the Panel did not accept the defences set out by the Respondent in the Response and found that the Respondent committed continuous egregious breaches of Consolidated Rule 1400 by participating in and enabling the fraudulent acts committed by Mr. Ng with the Lenders, which clearly constituted conduct unbecoming contrary to Consolidated Rule 1400, and
- by failing to attend an interview with Enforcement Staff on August 13, 2020, the Respondent failed to cooperate and, therefore, committed a breach of Consolidated Rule 8104.

PENALTY & COSTS AWARD SOUGHT BY CIRO STAFF

¶ 26 Enforcement Counsel on behalf of CIRO Staff submitted that based upon the finding of the Panel in the Merits Decision, the following penalty and cost awards should be imposed on the Respondent:

- pursuant to Section 8210 of the Consolidated Rules:
  - a fine of $2,500,000, and
  - a permanent bar to approval in any capacity; and
- pursuant to Section 8214 of the Consolidated Rules, costs in the amount of $68,908 should be assessed and imposed upon the Respondent, representing the costs to CIRO Staff for investigating and prosecuting this matter.

SUBMISSIONS OF ENFORCEMENT COUNSEL ON PENALTY

¶ 27 In his submissions on penalty, Enforcement Counsel referenced the Sanction Guidelines published by CIRO's predecessor, IIROC. He noted that these guidelines are divided into two parts entitled "General Sanction Principles" and "Key Factors in Determining Sanctions".

General Sanction Principles

¶ 28 Enforcement Counsel noted that the purpose of sanctions in a regulatory proceeding is to strike an appropriate balance to protect the public interest by restraining future conduct that may harm the capital markets. In achieving this goal, he submitted, such sanctions should be significant enough to prevent and discourage future misconduct by the particular respondent. In other words, amounting to specific deterrence. At the same time, such sanctions should be significant enough to deter others from engaging in similar misconduct. In other words, amounting to general deterrence.

¶ 29 This appropriate balance, he submitted, would be one which was in line with investment industry expectations, was proportionate to the conduct at issue, and was similar to sanctions imposed on respondents for similar contraventions in similar circumstances.

Key Factors in Determining Sanctions

¶ 30 Enforcement Counsel submitted that the following key factors outlined in the Sanctions Guidelines were relevant to the matter at hand in determining appropriate sanctions for the Respondent based upon the findings of the Panel in the Merits Decision:

1. The Number, Size and Character of the Transactions at Issue

- The Respondent participated in falsifying at least nine accounts, sending to the Lenders falsified securities account statements, summaries and screen shots so that these accounts could be used as collateral security to obtain loans from the Lenders.
- The Respondent executed many legal agreements falsely purporting to verify the falsified account statements.
- The Respondent's fraudulent conduct enabled Mr. Ng to obtain loans totalling $172,000,000 conduct without precedent in the history of CIRO and its predecessors and which reflected an extraordinary degree of misconduct through fraud.

2. Whether the Respondent Engaged in Numerous Acts and/or a Pattern of Misconduct.

The Respondent engaged in a definite pattern of misconduct over numerous acts.

3. Whether the Respondent Engaged in Misconduct Over an Extended Period of Time

The Respondent's misconduct was approximately 15 months extending from November 2018 to January 2020.

4. Whether the Respondent's Misconduct was Intentional, Willfully Blind, or Reckless with Respect to Regulatory Requirements

There was no doubt that the Respondent's misconduct was intentional and deliberate.

5. Extent of Harm to Clients or Other Market Participants

There was no evidence of client losses, however the Lenders were significantly impacted in that they provided millions of dollars in loans to the Ng Group in reliance on false collateral.

6. Extent of Harm to Market Integrity or the Reputation of the Marketplace or Both

The Respondent's conduct clearly harmed both market integrity and the reputation of the marketplace.

8. The Respondent's Relevant Disciplinary History

The Respondent has no prior formal disciplinary history.

9. Extent to which the Respondent Obtained or Attempted to Obtain a Financial Benefit from the Misconduct

There is no evidence that the Respondent benefited directly from the misconduct.

10. Whether the Respondent Accepted Responsibility for and Acknowledged Misconduct to His Employer Prior to Detection

The Respondent did not accept responsibility prior to having been called to account by PI Financial.

12. Whether the Respondent Was Subject to Internal Discipline by the Dealer Member

The Respondent resigned from his duties with PI Financial on February 11, 2020 following an internal investigation and a resulting report to the Board of Directors of PI Financial.

15. Whether the Respondent Provided Proactive or Exceptional Assistance to CIRO in the Investigation of the Misconduct

The Respondent has not cooperated with CIRO.

16. Whether the Respondent Attempted to Delay CIRO's Investigation, to Conceal Information from CIRO or Intentionally Provided Inaccurate or Misleading Testimony or Documentary Information to CIRO

The Respondent failed to attend an interview with CIRO Staff on August 13, 2020.

19. Whether the Respondent Attempted to Conceal His Misconduct or to Lull into Inactivity, Mislead, Deceive or Intimidate a Client, Regulatory Authorities or the Member Firm in Which He Was Associated

The entire basis of the Respondent's misconduct arises out of deception. He helped to perpetrate a fraudulent scheme by deceiving the Lenders into providing Mr. Ng with millions of dollars in loans in reliance upon falsified and fictitious documentation purportedly evidencing substantial financial assets as security when this was not true.

Relevant Case Law

¶ 31 In support of the position on penalties and costs put forward by CIRO's Staff with respect to the Panel's finding of the continuous egregious breaches of Consolidated Rule 1400 against the Respondent, Enforcement Counsel referenced, in addition to the *Ng Decision*, the following case law:

- *Re Phillips & Wilson* 2013 IIROC 52, noting that the panel had stated in paragraph 8 that the respondents "thoroughly abused their clients' trust for their own benefit" were "an embarrassment to our capital markets" and in imposing fines of $2,000,000 against Phillips and $500,000 against Wilson, with permanent bans and costs in the amount of $230,000, the panel stated that the respondents were "beyond redemption and should suffer serious penalties".
- *Re TD Waterhouse Canada* 2020 IIROC 09, noting that in this decision even though there were no client complaints, the panel imposed what was then the largest fine imposed against either a registrant or a Dealer Member firm by an IIROC Hearing Panel in imposing a fine of $4,000,000 plus costs for failing to include certain position information on quarterly account statements despite a new specific rule to this effect.
- *Re Ryan* 2012 IIROC 29, noting that when the panel found that the respondent registrant had misappropriated $970,000 through unauthorized transactions operating to her benefit and to that of her friends and relatives, that the maximum fine permissible at that time under IIROC rules, prior to its increase to $5,000,000 in September 2016, was the appropriate penalty and imposed the sum of $1,000,000 (including disgorgement) together with cost of $7,500.
- *Re Dennis* 2012 ONSEC 24, noting that in reviewing the panel's decision to limit the fine to $1,000,000 despite the submission of IIROC Staff to the effect that it should amount to the sum of $1,400,000 as being the amount misappropriated together with a fine of $50,000 for a failure to cooperate, the OSC found that when, as in this matter, an order was sought for disgorgement, the $1,000,000 limit did not apply.
- *Re Connacher* 2011 IIROC 28, noting that in finding that the respondent had "knowingly violated critical rules of his employer and his industry" creating a loss of $33 million to his employer resulting in its bankruptcy, that in ordering a fine of $500,000 and costs of $71,000 that it was "vital to send a strong message to the securities industry and the investing public that this type of conduct must bear harsh sanctions".
- *Re McCarthy* 2021 IIROC 33
- *Re Scerbo* 2017 IIROC 57
- *Re Kumar* 2015 IIROC 33
- *Re Melville* 2014 IIROC 51
- *Re Conville* 2013 IIROC 5
- *Re Ahn* 2011 IIROC 31
- *Re Hart,* [2006] I.D.A.C.D. No. 2

- *Re Gurion,* [2004] I.D.A.C.D. No. 32

¶ 32 In support of CIRO's Staff's position on penalties and costs with respect to the Panel's finding of the Respondent committing a breach of Consolidated Rule 8104, Enforcement Counsel referenced, in addition to the Ng Decision, the following case law:

- *Re Morrison* 2009 IIROC 4
- *Re Lower* 2009 IIROC 39
- *Re Smith* 2009 IIROC 48
- *Re O'Neill* 2011 IIROC 19
- *Re Dirani* 2016 IIROC 13

Closing Submissions

¶ 33 As he had in his submissions at the Hearing on the Merits, Enforcement Counsel submitted that although Mr. Ng was the predominant figure in the fraudulent conduct involving a total of $172,000,000 in loans secured from the three Lenders, the evidence clearly demonstrated that the Respondent played an important role enabling Mr. Ng to commit this fraud in that during the relevant time period, he was President and CEO of Chippingham and, subsequently, the Executive Vice Chairman and a director of PI Financial.

¶ 34 Based upon his profile in the investment industry, Enforcement Counsel submitted, the Respondent used his position of trust and authority to give credibility to the fraudulent transactions committed by Mr. Ng. He submitted that but for this profile, it would have been far more difficult, perhaps impossible, for Mr. Ng to have had access to account information in order to represent the fraudulent account statements as legitimate and to enable thereby this level of fraud.

¶ 35 He noted that the evidence demonstrated that it was mainly the Respondent who was communicating with the Lenders and providing them with the fraudulent documentation, an occurrence which the evidence demonstrated, he submitted, dealt with nine different accounts.

¶ 36 Although there were no client losses from the fraudulent conduct of the Respondent and there is no evidence that the Respondent obtained a direct financial benefit from his misconduct, Enforcement Counsel submitted that the Respondent's actions reflect an extraordinary level of fraud and deception, they were planned and deliberate, they occurred over a 15-month period, and they involved a high degree of planning and deliberation. He submitted that that these actions clearly require sanctions appropriate to this extraordinary level of fraudulent conduct.

¶ 37 Enforcement Counsel submitted that in an industry built on trust, in the case of a finding of misconduct arising from fraud and deception as in the matter at hand, the harshest sanctions should be imposed. Therefore, in keeping with both the Sanction Guidelines and existing caselaw as above referenced, the appropriate sanctions for the Panel to impose on the Respondent are a fine of $2,500,000, a permanent ban, and costs of $68,908.

THE PANEL'S DECISION ON PENALTY

Opening Observations

¶ 38 The Panel is in full agreement with Enforcement Counsel on the egregious conduct of the Respondent and that his profile in the investment industry certainly appeared to facilitate the series of fraudulent acts committed over the 15-month period by him and Mr. Ng.

¶ 39 To that end, the Panel initially questioned the amount of the fine recommended against the Respondent in light of the amount of the fine recommended by Enforcement Staff against Mr. Ng and accepted by the Panel in the Ng Decision. In the Ng Decision, the Panel imposed a fine of $5,000,000 against Mr. Ng. In the matter at hand, Enforcement Staff is recommending a fine of one half that amount or $2,500,000.

¶ 40 The Panel referenced the onus on it to ensure that in imposing a sanction on a respondent that the message sent by such imposition clearly serves as a general deterrence as well as an individual deterrence. By imposing a monetary fine on the Respondent which is one half of the fine imposed on Mr. Ng, notwithstanding that it is a lot of money at an individual level, the Panel questioned whether or not it sends a message at a general level to the investment industry that a party, such as the Respondent, who has been found to have been an equal participant in the fraudulent conduct is only subject to one half of the fine imposed on his fellow fraudster.

¶ 41 To that end, the Panel reviewed the evidence before it with respect the Respondent's participation in the fraudulent activity, what appears to be the actual benefit derived by the Respondent from the fraudulent conduct, the Respondent's prior disciplinary history, and the Respondent's participation in this hearing process following his resignation from PI Financial.

The Respondent's Participation in the Fraudulent Activity

¶ 42 In his Response, the Respondent excused his actions in the fraudulent activity on the basis that:

- he acted under instructions and pressure from Mr. Ng,
- he trusted Mr. Ng as an experienced and successful businessperson and as his boss, and
- his actions were carried out under duress.

¶ 43 Unfortunately, for the Respondent, the Panel has not accepted these excuses and in the Merits Decision held the Respondent equally as responsible as Mr. Ng.

The Respondent's Actual Benefit

¶ 44 In his Response, the Respondent claimed that as an employee of PI Financial, the Respondent was paid an annual salary and bonus and did not receive shares or any equity interest in PI Financial. In other words, it was Mr. Ng who mainly benefited from the fraudulent conduct and that the Respondent was merely compensated as an employee of PI Financial for his participation in the fraudulent conduct and performing acts required of him by Mr. Ng as his boss.

¶ 45 Enforcement Counsel in his submissions acknowledged that there is no evidence before the Panel to suggest that the Respondent benefited from the fraudulent conduct other than as acknowledged in the Response.

The Respondent's Prior Disciplinary History

¶ 46 Prior to his resignation from PI Financial on February 11, 2020 following the evidence provided to the Board of Directors of PI Financial that serious misconduct had been committed, the Respondent had no formal disciplinary history with CIRO or any of its predecessor organizations.

The Respondent Conduct Since His Resignation from PI Financial

¶ 47 As is above noted, since the issuance of the Notice of Hearing in this matter on November 2, 2020, the Respondent has participated in this hearing process through his counsel up until September 11, 2023 when he determined to act on his own behalf. Prior to this decision to dismiss his counsel, his direct personal participation was limited as he claimed to have been faced with what appeared to have been rather severe health challenges. Following this dismissal of his counsel, however, he has failed to participate in any manner despite having been fully advised of the proceedings by Enforcement Counsel.

The Panel's Conclusion

¶ 48 Although as above referenced, the Panel was initially uneasy about the lesser fine being recommended by Enforcement Staff against the Respondent as opposed to that recommended against and accepted against Mr. Ng, the Panel has determined to accept the recommendations of Enforcement Staff.

¶ 49 The Panel finds that the lack of evidence of the Respondent benefiting personally from the fraudulent

acts committed by him and Mr. Ng, his prior clean disciplinary record, and, importantly, unlike Mr. Ng, his participation in the hearing process, albeit on a limited basis, leads the Panel to the determination that the recommendations of Enforcement Staff constitute appropriate sanctions to be imposed against the Respondent.

The Panel's Decision

¶ 50 The Hearing Panel therefore orders that pursuant to Rule 8210 of the IDPC Rules that:

- the fine of $2,500,000 be imposed on the Respondent, and
- a permanent bar from registration in any capacity be imposed on the Respondent.

¶ 51 The Hearing Panel further orders that pursuant to Rule 8214 of the IDPC Rules that the Respondent pay to CIRO costs in the amount of $$68,908.

Dated at Vancouver, British Columbia this 20 day of February 2024.

"John Rogers"

John Rogers, Chair

"Barbara Fraser"

Barbara Fraser

"Johannes van Koll"

Johannes van Koll