

Re Scerbo

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Gennaro Scerbo

2017 IIROC 57

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

Heard: November 9, 2017 in Winnipeg, Manitoba
Decision: December 21, 2017

Hearing Panel:

Thomas J. D. Kormylo, Claude Tétrault, Bruce Henderson (the “**Hearing Panel**”)

Appearances:

David McLellan, Senior Enforcement Counsel.

No one appearing for the Respondent, Gennaro Scerbo

REASONS FOR DECISION

PURPOSE OF HEARING

¶ 1 This Hearing Panel was constituted pursuant to the provisions of the Consolidated Enforcement, Examination and Approval Rules of IIROC (the “**Rules**”) including in particular sections 8203 and 8205 thereof.

¶ 2 The notice of hearing (the “**Notice of Hearing**”) which initiated this matter is dated September 13, 2017 and states that an initial appearance (the “**Initial Appearance**”) was to be held on November 9, 2017 at the Radisson Hotel Winnipeg, Terrace East, 288 Portage Avenue, Winnipeg, Manitoba (the “**Hearing Location**”) for the purpose of scheduling a hearing in order to determine whether the Respondent committed the contraventions set forth in a statement of allegations (the “**Statement of Allegations**”) which accompanied the Notice of Hearing.

¶ 3 The Notice of Hearing also informed the Respondent of his obligation to serve and file a response (the “**Response**”) to the Notice of Hearing and Statement of Allegations and set forth the consequences of failing to do so, including the sanctions that could be imposed by the Hearing Panel and specifically referenced the relevant provisions of section 8415 of the Rules, which provide as follows:

s.8415. Response to a Notice of Hearing

(1) A respondent must serve and file a response within 30 days from the date of service of a notice of hearing.

...

(4) If a respondent who has been served with a notice of hearing does not serve and file a response in accordance with subsection 8415(1), Enforcement Staff may proceed with the hearing of the matter on its merits on the date of the initial appearance set out in the notice of hearing, without further notice to and in the

absence of the respondent, and the hearing panel may accept as proven the facts and contraventions alleged in the statement of allegations and may impose sanctions and costs pursuant to section 8209 or 8210, as applicable.

¶ 4 The Hearing Panel was satisfied that the Notice of Hearing and Statement of Allegations adequately described the obligations of the Respondent to file a Response within 30 days of the date the Notice of Hearing was served upon him and the consequences of his failure to do so and, in the view of the Hearing Panel, the Notice of Hearing and Statement of Allegations contained the requisite information as required by Section 8414 of the Rules and complied with the requirements of that rule.

THE COMMENCEMENT OF THE HEARING

¶ 5 In accordance with the Notice of Hearing, this Hearing Panel convened at 10:00 a.m. on November 9, 2017 at the Hearing Location. IIROC was in attendance and represented by Senior Enforcement Counsel. Neither the Respondent nor anyone acting on his behalf was in attendance at that time.

¶ 6 The Hearing Panel accordingly stood the matter down until 10:30 a.m. to allow additional time for the Respondent to appear, in case he was experiencing some difficulty in attending at the prescribed time. Upon the recommencement of the hearing at 10:30 a.m., neither the Respondent nor anyone acting on his behalf were in attendance and no communication had been received from him by the Hearing Panel or Senior Enforcement Counsel to explain the non-attendance. Senior Enforcement Counsel confirmed no Response had been served on IIROC or filed by the Respondent.

¶ 7 In accordance with the provisions of Section 8415(4) of the Rules, Senior Enforcement Counsel requested the Hearing Panel to proceed with the hearing of the matter on its merits, and accept as proven the facts as alleged in the Notice.

¶ 8 The Hearing Panel agreed to proceed with the hearing of the matter on its merits in the absence of the Respondent, as permitted by Rule 8423, subject to IIROC establishing that the Notice of Hearing and Statement of Allegations had been properly served on the Respondent pursuant to Rule 8406.

SERVICE OF NOTICE OF HEARING

¶ 9 Senior Enforcement Counsel then adduced *viva voce* and affidavit evidence which satisfied the Hearing Panel that on September 13, 2017, IIROC served the Notice of Hearing and Statement of Allegations (together with other related material) (collectively, the “Notice”) on the Respondent by registered mail at the address last known to IIROC as being the Respondent’s address. Senior Enforcement Counsel introduced into evidence and filed as an exhibit the Affidavit attached here to as Schedule “A” confirming the foregoing and indicating that the registered mail was not deliverable. The Affidavit also confirms that the Notice was sent by IIROC to the Respondent by email and indicates that no verification of receipt was obtained in respect of that emailed correspondence.

¶ 10 Senior Enforcement Counsel also provided *viva voce* evidence and introduced into evidence and filed as an exhibit the Affidavit attached hereto as Schedule “B”, confirming that an unsuccessful attempt was made by IIROC to have the Respondent personally served with the Notice at the address last known to IIROC as being the Respondent’s address.

¶ 11 Senior Enforcement Counsel also provided *viva voce* evidence and introduced into evidence and filed as an exhibit the Affidavit of Mr. Mark Pallas, the Manager of Investigations with IIROC. Mr. Pallas’s affidavit, which is attached hereto as Schedule “C”, indicates, among other things, that the most recent address of the Respondent known to IIROC was the address provided to IIROC by the Respondent’s counsel.

¶ 12 Notwithstanding the apparent non-receipt by the Respondent of the Notice, the Hearing Panel was satisfied that the Notice had been satisfactorily served on the Respondent in accordance with the requirements of Rule 8406.

THE CONTRAVENTIONS

¶ 13 Being satisfied that proper service of the Notice had been effected on the Respondent and that no Response had been served and filed by the Respondent as required by Section 8415 and Section 8406(7) of the

Rules, the Hearing Panel withdrew to review the allegations set forth in the Statement of Allegations and the Affidavit of Mr. Pallas regarding the Respondent's failure to attend an interview and deliberate on the matter. Upon returning, and as permitted by Rule 8415(4), which reads as follows:

“If a respondent who has been served with a notice of hearing does not serve and file a response in accordance with subsection 8415(1), Enforcement Staff may proceed with the hearing of the matter on its merits on the date of the initial appearance set out in the notice of hearing, without further notice to and in the absence of the respondent, and the hearing panel may accept as proven the facts and contraventions alleged in the statement of allegations and may impose sanctions and costs pursuant to section 8209 or 8210, as applicable.”

and Rule 8423(12), which reads as follows:

“If a respondent who has been served with a notice of hearing does not attend the Hearing on the merits, the hearing panel

- (i) may proceed with the hearing in the respondent's absence and may accept as proven the facts and contraventions alleged in the notice of hearing and statement of allegations, and
- (ii) if it finds that the respondent committed the alleged contraventions, may hear submissions on sanctions from Enforcement Staff immediately, without a further hearing on sanctions and costs, and may impose sanctions and costs pursuant to sections 8209 or 8210, as it considers appropriate.”

the Hearing Panel proceeded with a hearing on the merits and accepted as proven the facts and contraventions alleged in the Notice of Hearing and Statement of Allegations.

¶ 14 Specifically, the Hearing Panel accepted as proven, that the Respondent, while a registered representative with RBC Dominion Securities Inc., in Winnipeg:

- (a) forged his spouse's signature on RRSP de-registration forms 57 times in order to misappropriate approximately \$271,000 from her RRSP account over a period of approximately four years;
- (b) failed to attend an interview with IIROC Staff in May 2017 which he was compelled to attend by IIROC Staff.

¶ 15 The Hearing Panel noted that Rule 8100 “Enforcement Investigations” enables Enforcement Staff of IIROC to require the full cooperation of all of the "persons" enumerated in Rule 8100 when it is discharging its mandate to initiate and conduct enforcement investigations to ensure compliance with the Rules and the Standards of Conduct set forth in Rule 1400. Failure to obtain the cooperation of the "persons" referenced in the Rules seriously impairs the ability of IIROC Enforcement Staff to initiate and conduct enforcement proceedings.

¶ 16 The Respondent's obligation to attend an interview with IIROC Enforcement Staff is set out clearly in Section 8104 of the Rules, which reads as follows:

8104. Obligations of Regulated Persons and Other Persons

- (1) A person who receives a request made under section 8103 must comply with the request within the time specified in it.
- ...
- (3) A person must cooperate with Enforcement Staff who are conducting an investigation, and a Regulated Person must require its employees, partners, directors and officers to cooperate with Enforcement Staff conducting an investigation and to comply with a request made under section 8103.

¶ 17 Accordingly, the Hearing Panel accepted as proven that the Respondent committed the following

contraventions, as set forth in the Statement of Allegations:

- (a) by virtue of having misappropriated funds from his spouse's RRSP account, the Respondent's actions constituted conduct unbecoming, contrary to Dealer Member Rule 29.1;
- (b) by virtue of failing to attend the compelled interview, the Respondent failed to cooperate with an IIROC investigation, contrary to Section 8104 of IIROC Consolidated Enforcement, Examination and Approval Rules.

SANCTIONS

¶ 18 Following the determination by the Hearing Panel that it was satisfied on the basis of the evidence placed before it that the Respondent had committed the contraventions as set forth in the Statement of Allegations, Senior Enforcement Counsel proceeded (pursuant to the provisions of section 8415 of the Rules, *supra*) to make submissions with respect to the appropriate sanctions to be imposed by reason of such contraventions. Senior Enforcement Counsel on behalf of IIROC provided the Hearing Panel with a number of prior decisions in support of its position that the appropriate penalty or sanctions for contraventions of this nature should include:

- (a) a fine of \$400,000;
- (b) a permanent ban on registration in any capacity of the Respondent;
- (c) costs in the amount of \$15,000.

¶ 19 Senior Enforcement Counsel proceeded to review the decisions of the other hearing panels provided to us, including: *Re MacArthur*, 2017 LNIROCC 29; *Re Turcotte*, 2017 LNIROCC 33; *Re Sojka*, 2016 LNIROCC 33; *Re Howell*, 2016 LNIROCC 48; *Re Malley*, 2014 LNIROCC 29; *Re Ramsay*, 2013 LNIROCC 41; *Re Ryan*, 2012 LNIROCC 29; *Re Rao*, 2011 LNIROCC 12; *Re Connacher*, 2011 LNIROCC 28; and *Re Wong*, 2010 LNIROCC 50.

¶ 20 In determining the penalties, the Hearing Panel had regard to the cases cited by Senior Enforcement Counsel and considered as well IIROC's Sanctions Guidelines which reference the following factors as key factors in determining sanctions:

"Part II -- Key Factors in Determining Sanctions

1. The number, size and character of the transactions at issue.
2. Whether the respondent engaged in numerous acts and/or a pattern of misconduct.
3. Whether the respondent engaged in the misconduct over an extended period of time.
4. Whether the misconduct was intentional, willfully blind, or reckless with respect to regulatory requirements.
5. Extent of harm to clients or other market participants.
6. Extent of harm to market integrity or the reputation of the marketplace, or both.
7. The level of vulnerability of the injured or affected client(s).
9. Extent to which the respondent obtained or attempted to obtain a financial benefit from the misconduct (see General Principle No. 4)."

¶ 21 Having reviewed the cases submitted by Senior Enforcement Counsel and considered the numerous additional decisions referenced in such cases, the Hearing Panel determined that, while the sanctions imposed by other Hearing Panels for offences of a similar nature are helpful and provide guidance as to what an appropriate response should be for contraventions of this nature, the Hearing Panel found the following facts, as proven, to be aggravating elements of the Respondent's conduct:

- (a) the Respondent made 57 fraudulent withdrawals from his wife's account totaling \$271,000, without her knowledge or consent, over a period of approximately four years, by submitting

RRSP de-registration withdrawal forms with signatures of his wife that he had forged. This demonstrated a deliberate, contrived pattern of conduct by the Respondent, involving multiple acts over an extended period of time;

- (b) the Respondent took calculated steps to hide his actions by:
 - (i) arranging his wife's RRSP account so that monthly statements were mailed to him and were never provided to his wife; and
 - (ii) assuming responsibility for filing his wife's tax returns, which he failed to do, thereby resulting in his wife being assessed significant income tax and penalties and being liable for the payment of interest on the tax arrears;
- (c) the Respondent's actions, in addition to exposing his wife to tax penalties and liabilities, have deprived her of RRSP retirement funds which cannot be recontributed.

¶ 22 The Hearing Panel found the IIROC Sanction Guidelines particularly relevant when reviewing the Respondent's conduct and had no difficulty in finding the Respondent's actions to have demonstrated a total lack of integrity, and an intentional pattern of dishonest conduct over an extended period of time involving a significant number of fraudulent acts, pursuant to which the Respondent personally benefited in a significant amount at the expense of a vulnerable client and, in doing so, caused serious harm to the integrity of the market place.

¶ 23 It is accordingly the view of the Hearing Panel that the sanctions sought by Enforcement Counsel in this particular matter do not sufficiently provide an appropriate sanction for the contraventions committed by the Respondent and would not act as sufficient deterrent to the industry. In coming to that conclusion, the Hearing Panel found no mitigating factors which may have persuaded the Hearing Panel to consider the penalties recommended by IIROC Senior Enforcement Counsel as appropriate.

¶ 24 The Hearing Panel noted that the fees and costs (\$15,000) sought by IIROC in this matter pursuant to Section 8214 of the Rules only represents approximately one-half of the investigation and prosecution costs incurred up to but not including the costs of preparation for the conduct of this hearing itself, as evidenced by an affidavit from IIROC Staff adduced and filed as an Exhibit by Senior Enforcement Counsel. Accordingly, the Hearing Panel determined that the amount claimed is more than reasonable in the circumstances.

DECISION

¶ 25 In the result, the Hearing Panel has determined to impose the following sanctions on the Respondent for his contraventions of the Rules:

- (a) a fine of \$50,000 for failing to cooperate with an IIROC investigation;
- (b) a fine of \$420,000 for his contravention of Dealer Member Rule 29.1, which includes disgorgement;
- (c) a permanent ban from registration in any capacity with IIROC; and
- (d) the Respondent to pay costs to IIROC in the amount of \$15,000.

¶ 26 These reasons maybe signed in counterpart.

DATED at Winnipeg, Manitoba this 21st day of December, 2017.

Thomas J. D. Kormylo

Claude Tétrault

Bruce Henderson