

Re McCarthy

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Joan McCarthy

2021 IIROC 33

Investment Industry Regulatory Organization of Canada
Hearing Panel (Newfoundland and Labrador District)

Heard: October 28, 2021 in St. John's Newfoundland & Labrador (via videoconference)
Written Submissions on Sanctions: November 30, 2021
Decision: December 23, 2021

Hearing Panel:

David Eaton QC, Chair, David Smith and Tony Evans

Appearances:

Fanie Dubuc, Enforcement Counsel

Joan McCarthy, absent and not represented

DECISION ON SANCTIONS

INTRODUCTION

¶ 1 In an industry that has trust as its most fundamental principle, theft is a repudiation of the most basic industry value. Theft from several clients, carried out over a lengthy period, by numerous acts of forgery, and various forms of deceit, adds to the magnitude of this violation. Simply put, it cannot be tolerated. Such is the matter before the Hearing Panel (the **Panel**) for disposition.

BACKGROUND

¶ 2 In a Notice of Hearing dated April 21, 2021, the following two allegations were made against Joan McCarthy (the **Respondent**).

Contravention #1

Between 2006 and 2019, the Respondent falsified signatures and appropriated funds from her clients' accounts, contrary to Dealer Member Rule 29.1 and Rule 1400 of the Consolidated Rules (after September 1, 2016).

Contravention #2

The Respondent failed to cooperate with an IIROC investigation, by refusing to provide documents and failing to attend an interview with Enforcement Staff, contrary to Section 8104 of the Consolidated Rules.

¶ 3 The Notice of Hearing set the Initial Appearance date as July 15, 2021. Ms. McCarthy did not file a

Response in accordance with Section 8415(1) of the Consolidated Rules (the **Rules**) and did not attend the Hearing. The material provided to the Panel was sufficient to satisfy the Panel to agree with Enforcement Counsel's request that a hearing date be scheduled and that the hearing proceed without Ms. McCarthy. Counsel indicated that she would be requesting the Panel to accept as proven the facts and contraventions alleged in the Notice, and that affidavit evidence would be provided in support of that.

¶ 4 The Panel asked that affidavit evidence of service be provided and that the Respondent be served with a further Notice of the hearing when the date was set.

¶ 5 The hearing was set for October 28, 2021 and proceeded at that time. The Respondent was served with Notice of the hearing date but did not attend or file anything. Enforcement Staff was advised by Respondent's counsel that he would not be attending. A summary of the evidence presented to the Panel follows.

KEY FACTS

¶ 6 The Respondent was employed by MD management Ltd. as a Registered Representative in St. John's, Newfoundland and Labrador, from August 2000 to March 2019. She has not been employed in the industry since March 2019.

¶ 7 Between 2006 and 2019, the Respondent appropriated, without client authorization, approximately \$775,000 from the accounts of six elderly clients by forging their signatures on over 160 cheques. In addition, she had client cheques delivered to her at the branch and forged the clients' signatures on the firm's cheque resister.

¶ 8 To establish the forgeries an affidavit and report from Graziella Pettinati, a certified document examiner, was provided. This evidence was clearly relevant and necessary with respect to establishing the forgery and not subject to any exclusionary rule. The Panel was satisfied that Ms. Pettinati's qualifications as a forensic document examiner were more than sufficient to qualify her as an expert for the purposes of providing opinion evidence.

¶ 9 Ms. Pettinati's evidence established that numerous signatures on cheques and the cheque register were forged by the Respondent.

¶ 10 The Panel was satisfied that the evidence established that during the period set out in the Notice of Hearing, the Respondent violated Dealer Member Rule 29.1 and Rule 1400 (after September 1, 2016) as alleged.

¶ 11 Affidavit evidence also provided sufficient information to satisfy the Panel that the Respondent failed to cooperate with IIROC Staff during the investigation and violated Rule 8104. Numerous attempts were made, directly to the Respondent, and through her counsel, to have the Respondent attend for an interview and to provide certain requested information. But for one response from counsel, who advised that all communication for the Respondent should go through him and he would assure that she received it, there was no substantive response. From this it was clear that the Respondent had no intention of cooperating with the investigation in any way.

¶ 12 At the conclusion of the October 28, 2021 hearing, the Panel indicated that it was satisfied that the allegations had been proven. Enforcement Counsel requested that the submissions on sanctions be in writing and that no in-person hearing be required. The Panel agreed.

¶ 13 Enforcement Counsel filed her written submissions by date agreed and those submissions have now been reviewed and considered by the Panel.

ENFORCEMENT COUNSEL'S SUBMISSIONS

¶ 14 Enforcement Counsel has submitted that the appropriate sanctions are:

- 1) a permanent ban on registration in any capacity;
- 2) a fine in the amount of \$950,000 on Count #1, which includes disgorgement of the \$775,000 in financial benefits derived by the Respondent; and
- 3) a fine of \$50,000 on Count #2.

In addition, it was submitted that we should order costs in the amount of \$103,522.14.

¶ 15 Enforcement Counsel referred the Panel to the IIROC Discipline Sanction Guidelines (**Sanction Guidelines**) and numerous precedent cases from other IIROC panels. A summary of the key submissions relating to both principles and factors follows:

- The sanctions must be significant enough to prevent and discourage future misconduct by the Respondent;
- The sanctions must be significant enough to deter other registrants from engaging in similar misconduct;
- The sanctions must reinforce the public trust in the investment industry regulatory system and IIROC's ability to protect the investing public and market integrity;
- The primary purpose of sanctions is prevention and not punishment;
- That the sanctions imposed should be similar to those imposed on other respondents for similar contraventions under similar circumstances;
- That the Sanction Guidelines are for guidance and the Panel retains the discretion to impose the sanctions that it considers appropriate; and
- That the sanctions should ensure that the Respondent has not profited from the misconduct;
- That a permanent bar should be considered when:
 - there has been significant harm to the investing public or the integrity of the market;
 - the misconduct had an element of criminal or quasi-criminal activity; and
 - that there is reason to believe that the Respondent cannot be trusted to act honestly in the future;
- That the significant factors to consider here are that:
 - The conduct was premeditated, intentional and has criminal-like components;
 - The Respondent took advantage of six vulnerable clients over a long period of time;
 - The Respondent forged over 160 cheques and misappropriated \$775,000 by cashing those cheques;
 - The Respondent was completely non-cooperative during the investigation and chose not to attend the hearing; and
 - That the fact the Respondent has no prior disciplinary record is not relevant here, given the other surrounding circumstances.

ANALYSIS

Rule Changes

¶ 16 Given that Count #1 took place over several years, some of which were before the IIROC Consolidated Enforcement, Examination and Approval Rules (**Consolidated Rules**) came into force in September, 2016, it is

necessary to examine the differences in the available sanctions under each of the applicable Rules.¹

¶ 17 Under the former Rule 20.33, a Hearing Panel had the following “penalties” available to impose upon an Approved Person:

- 1) a reprimand;
- 2) a fine not exceeding the greater of;
 - i. \$1,000,000 per contravention;
 - ii. An amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention;
- 3) suspension of approval for any period of time and upon any conditions or terms;
- 4) terms and conditions of continued approval;
- 5) prohibition of approval in any capacity for any period;
- 6) termination of the rights and privileges of approval;
- 7) revocation of approval;
- 8) a permanent bar from approval with the Corporation; or
- 9) any other fit remedy or penalty.

¶ 18 Currently Rule 8210 (1) of the Consolidated Rules provides for the following sanctions with respect to an Approved Person:

- i. a reprimand;
- ii. disgorgement of any amount obtained, including any loss avoided, directly or indirectly, as a result of the contravention;
- iii. a fine not exceeding the greater of
 - (a) \$5,000,000 for each contravention, and
 - (b) an amount equal three times the profit made or loss avoided by the person, directly or indirectly, as a result of the contravention;
- iv. suspension of the person’s approval or any right or privilege associated with such approval, including access to a Marketplace, for any period of time and on any terms and conditions;
- v. imposition of any terms and conditions on the person’s continued approval or continued access to a Marketplace;
- vi. prohibition of approval in any capacity, for any period of time including access to the Marketplace;
- vii. revocation of approval;

¹ [IROC Rules Notice on the Implementation of the Consolidated Rules](#) provides:

Implementation

The new Transition Rule (see Appendix 3 at 4-6) ensures that provisions of the Consolidated Rules affecting (or indirectly affecting) substantive rights of regulated persons apply only to conduct occurring on or after the Implementation Date. Consolidated Rules that are procedural in nature will apply as of the Implementation Date, regardless of when the conduct at issue took place. Any ongoing disciplinary proceedings as of today’s date will continue under the procedural rules in force when those proceedings began, even though such rules will be repealed September 1, 2016. New proceedings that begin on or after the Implementation Date will be governed by the Consolidated Rules.

- viii. permanent bar to approval in any capacity or access to a Marketplace;
- ix. permanent bar to employment in any capacity by a regulated person; and
- x. any other sanction determined to be appropriate under the circumstances.

¶ 19 There are two significant differences in Rule 8210 (1) that change the substance of what sanction can be imposed. The first is the amount of the fine per contravention – an increase from \$1,000,000 to \$5,000,000. The second is the provision for disgorgement of any amount obtained directly or indirectly as a result of the contravention. A specific order of disgorgement is only available for any amount obtained after Rule 8210 came into effect in September 2016. As more fully addressed below, we do not have specific information as to when the various acts of misappropriation occurred, so we will deal with the sanctions for Count #1 as if the former Rule 20 is applicable throughout.

Absence of Respondent

¶ 20 We must note here that having not had the benefit of evidence or submissions on behalf of the Respondent, we must proceed to impose sanctions based on the information that we have from Enforcement Counsel. We have no explanation about the underlying reasons for what took place or the personal circumstances of the Respondent either during the period in question, or now. We have no mitigating circumstances to consider.

Application of Principles to Facts

¶ 21 Principle #1 in the Sanction Guidelines suggests that sanctions are designed to protect the investing public, strengthen market integrity and improve overall business standards and practices. Permanently barring a respondent from all possible employment in the industry in the future is a major step, and many would suggest the most significant step, that can be taken towards this goal.

¶ 22 It is unquestionable that the Respondent's conduct is among the most serious breaches of trust and integrity in which any registered representative could engage, and that the sanction should properly reflect that. The conduct demonstrates a total lack of integrity and a pattern of dishonesty involving fraudulent conduct over a significant period of time for the personal benefit of the Respondent. When the failure to cooperate is added, it is not difficult to conclude that here the Respondent's conduct amounted to a complete rejection of the most fundamental requirements of the industry and has demonstrated that she cannot, and should not, be trusted to ever be involved in the industry in the future. A permanent ban from any future involvement in the industry is appropriate.

¶ 23 It is appropriate that fines be imposed for the contraventions as well. However, the determination of the appropriate fine for the misappropriation contravention is a more difficult task than for the failure to cooperate.

¶ 24 The facts provided to the Panel do not establish exactly when the misappropriation occurred. We are unable to be precise about the amount that was misappropriated before the Consolidated Rules became effective in September 2016, and what was misappropriated after. We therefore cannot apply the disgorgement provision in Rule 8210 (1) (ii). Similarly, the maximum amount of the fine must be that which was applicable at the time the contravention occurred, or if that is not established, then the lower of the two amounts.

¶ 25 As the fines sought by Enforcement Counsel are within the maximum permitted fines under Rule 20.33, we do not need to be concerned about the changes.

¶ 26 We accept that the sanctions here should include disgorgement of the benefit obtained by the Respondent by misappropriating the funds. We also accept that an additional amount should be added to reflect the need to deter others from similar conduct – to demonstrate that there is more at stake than simply

paying back what has been taken. The additional amount sought by Enforcement Counsel provides for the appropriate deterrent effect.

¶ 27 For Count #1 Enforcement Counsel's submission for a fine of \$950,000 (\$775,000 of which is intended as disgorgement) is within the appropriate range having regard to all surrounding circumstances and precedent cases.² In these cases, which were prior to the Consolidated Rules, fines regularly included an amount to disgorged benefits improperly obtained and an additional punitive or deterrent amount. Being unable to make a separate disgorgement order we agree with that approach and the fine amount submitted - \$950,000.

¶ 28 For Count #2, Enforcement Counsel is seeking a fine of \$50,000. Many panels have imposed a fine of \$50,000 for similar contraventions of failure to cooperate. This fine demonstrates the seriousness of failing or refusing to cooperate with the regulator³ and is consistent with prior decisions.³ We agree that this amount is appropriate here.

¶ 29 Two other factors from the Sanction Guidelines need to be considered: (1) principle #3 - the totality of the sanctions, and (2) principle #7 - the ability to pay.

¶ 30 Where there are multiple contraventions the overall sanctions should not be excessive or disproportionate to the gravity of the total misconduct. In some circumstances it is appropriate to impose an overall sanction rather than separate sanctions for individual contraventions. In other circumstances it is appropriate to impose individual sanctions as long as the total is not excessive.

¶ 31 We recognized that the totality of the fines is an extremely large amount, that many, if not most, individuals will be unable to pay. But, it is not disproportionate to the conduct of the Respondent and the amount of money misappropriated and the need to disgorge what was obtained through the misconduct. Given the distinct conduct involved in each contravention, rather than impose a single overall fine, we agree with Enforcement Counsel's submissions and will specify the fine amounts for each Contravention.

¶ 32 Principle #7 of the Sanction Guidelines suggests that the ability to pay a monetary sanction is a factor only when it is raised by the respondent and there is evidence of financial hardship. The absence of any cooperation from the Respondent and her failure to attend the hearing has left us without any evidence about her ability to pay any of the fines or costs ordered. It may be that there is no realistic possibility that the fines and costs will be paid, but, in the absence of any evidence on that matter, we have no basis to reduce what are otherwise considered to be appropriate fines and costs.

¶ 33 Enforcement Counsel is seeking costs in the amount of \$103,522.14, as supported by affidavit evidence from Enforcement Staff. On its face the hourly rates applied for the investigator and counsel, and the number of hours spent, seem entirely appropriate for this matter. Similarly, the disbursements incurred, including the Expert Document Examiner, are entirely reasonable.

¶ 34 Based on the precedents provided the past practice has been for Enforcement Counsel to seek costs that represent partial recovery of the total expenses, usually in some round number.⁴ In *Re O'Neill* 2011 IIROC 19, the Panel ordered full recovery of costs. However, there was no discussion of the reasons why full recovery was requested or ordered.

¶ 35 No submissions were made to explain why what seems to be the normal request for partial costs has not been followed here. However, given the complete lack of cooperation from the Respondent which logically increased the time and expense necessary to investigate and prosecute this matter, full indemnity is

² See for example *Re Ryan* 2012 IIROC 29, *Re Ahn* 2011 IIROC 31, *Re Dennis* 2011 IIROC 35.

³ See for example *Re Scerbo* 2017 IIROC 57, *Re Dirani* 2016 IIROC 13, *Re Ahn* 2011 IIROC 31.

⁴ *Re Sojka* 2016 IIROC 33 is an example where the total costs were \$48,275 and Enforcement Counsel only sought recovery of \$20,000.

appropriate. There is nothing in the Respondent's conduct that justifies any reduction.

CONCLUSION

¶ 36 The decision of the Panel is as follows:

Contravention #1

- Permanent bar from approval in any capacity or access to a Marketplace;
- Permanent bar from employment in any capacity by a Regulated Person; and
- Fine of \$950,000.

Contravention #2

- Fine of \$50,000.

Costs

- Costs of \$103,522.14.

¶ 37 The permanent bar is effective as of this date. The fines and costs are payable within 30 days of the date of this decision.

Dated at St. John's, Newfoundland and Labrador this 23 day of December 2021.

David Eaton

David Smith

Tony Evans

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