



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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Citation: Elliott (Re), 2020 ONSEC 27

Date: 2020-10-27

File No. 2020-31

**IN THE MATTER OF
DEREK F.C. ELLIOTT**

**REASONS AND DECISION
(Subsections 127(1) and 127(10) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: In Writing

Decision: October 27, 2020

Panel: Wendy Berman Vice-Chair and Chair of the Panel

Submissions: Alvin Qian For Staff of the Commission

Nader Hasan For Derek F.C. Elliott
Carlo Di Carlo

REASONS AND DECISION

I. OVERVIEW

- [1] On August 27, 2014, Derek F.C. Elliott was convicted in the United States District Court for the Northern District of California (the “**US Court**”) of one count of conspiracy to commit fraud in violation of Title 18 of the United States Code, Section 1349. In pleading guilty to the offence, Mr. Elliott admitted to engaging in a conspiracy to defraud investors.¹ Mr. Elliott was sentenced to 24 months imprisonment and was ordered to make full restitution to harmed investors in the amount of approximately US\$38.7 million.
- [2] Staff of the Ontario Securities Commission (**Staff**) applies for a protective order in the public interest pursuant to s. 127(10) of the *Securities Act*, RSO 1990 c.S.5 (the **Act**), which provides that an order may be made under s. 127(1) of the Act against a person who has been convicted of an offence arising from a transaction, business or course of conduct related to securities or derivatives. Staff submits that this precondition has been met and that it is in the public interest based on these circumstances to make an inter-jurisdictional enforcement order on the terms proposed.
- [3] Mr. Elliott consents to the order requested by Staff, subject to the inclusion of carve-outs that allow Mr. Elliott to trade in personal accounts, as described more fully below. Staff consents to the requested carve-outs to the proposed order.
- [4] For the reasons that follow, I find that Mr. Elliott’s conviction arose from transactions and a course of conduct related to securities, and that it is in the public interest to issue the order requested by Staff, subject to certain limited carve-outs requested by Mr. Elliott.

II. RESPONDENT’S PARTICIPATION

- [5] Mr. Elliott participated in this proceeding and was represented by counsel.
- [6] Staff brought this inter-jurisdictional proceeding under the expedited procedure providing for a hearing in writing.² On September 17, 2020, Mr. Elliott requested an oral hearing in this matter.
- [7] On October 8, 2020, Mr. Elliott advised the Commission that he would consent to the sanctions proposed by Staff with carve-outs to permit him to trade securities or derivatives in his personal registered retirement, registered education or tax-fee savings accounts held through a registered dealer. Staff consented to such carve-outs. Accordingly, on the consent of the parties, this matter was heard in writing.

III. FACTUAL BACKGROUND

A. Conduct at issue, Guilty Plea and Conviction

- [8] Mr. Elliott is a resident of Ontario and has never been registered with the Commission in any capacity.
- [9] Between August 2006 and July 2008 (the **Material Time**), Mr. Elliott was the President and Chief Executive Officer of a number of entities related to the

¹ Exhibit 1, Staff’s Hearing Brief, Plea Agreement of Derek F.C. Elliott dated August 27, 2014, Tab 6

² *Ontario Securities Commission Rules of Procedure and Forms*, (2019) 42 OSCB 9714, r 11(3)

hospitality business in the Dominican Republic, including a resort in the Dominican Republic called the Sun Village Juan Dolio Resort (**Juan Dolio**).

- [10] During the Material Time, Mr. Elliott and a co-conspirator, either directly or through sales agents, raised approximately US\$91.3 million from investors in two types of investment products related to the Juan Dolio, one investment product where investors were promised a guaranteed interest rate of 8% to 12% for a five year term (the **Residence Investment**) and the second where investors were told that they invested through a trust and received the option of using a room at the resort or collecting a share of room revenues, and could resell their investment at market rate (the **Passport Investment**).
- [11] Mr. Elliott and his co-conspirator made misleading material statements to, and omitted material information from, investors.
- [12] Instead of investing the funds into the Juan Dolio and completing renovations as represented to investors, substantial portions of the funds raised were diverted to pay sales commissions to agents, make interest payments to investors in the Residence Investment, and fund other real estate development projects not connected to Juan Dolio. Investors were not told that their money would be diverted in this fashion.
- [13] Mr. Elliott and his co-conspirator made misrepresentations in promotional materials provided to investors regarding the status of the renovations and time frame for opening the Juan Dolio when, in fact, the renovations were never completed and the investor money was spent on, among other things, a different project.
- [14] Mr. Elliott and his co-conspirator made misrepresentations to investors, directly or through sales agents, regarding guaranteed investment returns when they knew that such returns in the Residence Investment could not be reasonably expected.
- [15] On August 27, 2014, Mr. Elliott plead guilty to conspiracy to commit fraud before the US Court.

B. Sentencing

- [16] On November 20, 2019, Mr. Elliott was sentenced to 24 months imprisonment³ and also ordered to make restitution to harmed investors in the amount of US\$38,724,570.17.⁴
- [17] The US Court considered Mr. Elliott's guilty plea, his cooperation with the prosecution and the prosecutor's recommendation of a three-year term of probation⁵ but concluded that the seriousness of the conduct warranted a custodial sentence of two years.

³ Exhibit 1, Staff's Hearing Brief, Judgment in Criminal Case of the United States District Court for the Northern District of California dated November 20, 2019, Tab 7A

⁴ Exhibit 1, Staff's Hearing Brief, Stipulation and Amended Order Regarding Restitution of the United States District Court for the Northern District of California, San Francisco Division, dated February 24, 2020, Tab 10

⁵ Exhibit 1, Staff's Hearing Brief, United States District Court for the Northern District of California Sentencing Memorandum dated October 30, 2019, Tab 15 at 22

IV. LEGAL FRAMEWORK

- [18] Subsection 127(10) of the Act provides that an order may be made under s. 127(1) where a person has been convicted in any jurisdiction of an offence arising from a transaction, business or course of conduct related to securities or derivatives. If that precondition is met, the Commission must consider whether it should exercise its jurisdiction to make a protective order in the public interest.
- [19] In determining whether such an order should be made in the public interest, the Commission may consider, among other factors, the seriousness of the misconduct, the harm suffered by investors, specific and general deterrence and any aggravating or mitigating factors. The purpose of such an order is “protective and preventative” and made to restrain potential conduct that could be detrimental to the integrity of the capital markets and therefore prejudicial to the public interest.⁶

V. ANALYSIS AND CONCLUSION

- [20] I am satisfied that Mr. Elliott’s conviction for conspiracy to commit fraud arises from transactions and a course of conduct related to securities.
- [21] The Residence Investment and the Passport Investment both involved investments of funds with an expectation of profit, in a common enterprise, which was to be derived solely from the efforts of Mr. Elliott and others relating to the development of the Juan Dolio resort.⁷ The investors in one investment product were promised high rates of return and in the other investment product were promised a share of the revenues and an ability to sell their investment at “market rates”.
- [22] These investment products sold to investors constitute securities for the purposes of the Act.
- [23] Mr. Elliott’s misconduct was extremely serious. Over a period of approximately two years, Mr. Elliott and his co-conspirator solicited investor funds of approximately US\$91.3 million through fraudulent representations. Investors suffered significant losses, which caused significant financial and personal hardship for some investors.⁸
- [24] Fraud is one of the most egregious securities regulatory violations. It causes direct and immediate harm to investors, and it significantly undermines confidence in the capital markets.
- [25] Given these circumstances, it is important that this Commission impose sanctions that will protect Ontario investors by specifically deterring Mr. Elliott from engaging in similar or other misconduct in Ontario, and by acting as a general deterrent to other like-minded persons.
- [26] Mr. Elliott does not contest the sanctions proposed by Staff, subject to his request for limited carve-outs for personal trading. Given the nature of the misconduct, it is not necessary to prohibit Mr. Elliott from trading in registered

⁶ *Theroux (Re)*, 2019 ONSEC 20, (2019) 42 OSCB 5043 at paras 22 and 23.

⁷ *Furtak v Ontario (Securities Commission)*, 2018 ONSC 6616 at para 36 (Div Ct); *Reeve (Re)*, 2018 ONSEC 55, (2018) 41 OSCB 9433 at paras 18-22.

⁸ Exhibit 1, Staff’s Hearing Brief, United States District Court for the Northern District of California Transcript of Proceedings dated November 6, 2019, Tab 14B at 42-45, 49-50, 53-56

accounts for which he has beneficial ownership, subject to the conditions specified below.

- [27] For the reasons set out above, I find that it is in the public interest to limit Mr. Elliott's future participation in Ontario's capital markets on the following terms. I therefore order that:
- a. pursuant to paragraph 2 of subsection 127(1) of the Act, trading in any securities or derivatives by Mr. Elliott shall cease permanently, except that he shall not be precluded from trading in securities or derivatives in a registered retirement savings plan, registered education savings plan, any registered retirement income funds, and/or tax-free savings account (as defined in the *Income Tax Act* (Canada)⁹) in which he has sole legal and beneficial ownership, provided that he carries out any permitted trading through a registered dealer (which dealer must be given a copy of the order that I will issue) and through accounts opened in his name only;
 - b. pursuant to paragraph 2.1 of subsection 127(1) of the Act, acquisition of any securities by Mr. Elliott shall be prohibited permanently, except that he shall not be precluded from purchasing securities in a registered retirement savings plan, registered education savings plan, any registered retirement income funds, and/or tax-free savings account (as defined in the *Income Tax Act* (Canada)) in which he has sole legal and beneficial ownership, provided that he carries out any permitted acquisitions through a registered dealer (which dealer must be given a copy of the order that I will issue) and through accounts opened in his name only;
 - c. pursuant to paragraph 3 of subsection 127(1) of the Act, any exemptions contained in Ontario securities law do not apply to Mr. Elliott permanently;
 - d. pursuant to paragraphs 7 and 8.1 of subsection 127(1) of the Act, Mr. Elliott must resign any positions that he holds as a director or officer of any issuer or registrant;
 - e. pursuant to paragraphs 8 and 8.2 of subsection 127(1) of the Act, Mr. Elliott is prohibited permanently from becoming or acting as a director or officer of any issuer or registrant; and
 - f. pursuant to paragraph 8.5 of subsection 127(1) of the Act, Mr. Elliott is prohibited permanently from becoming or acting as a registrant or promoter.

Dated at Toronto this 27th day of October, 2020.

"Wendy Berman"

Wendy Berman

⁹ RSC, 1985, c 1 (5th Supp)