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Securities
Commission

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File No.: 2020-35

**IN THE MATTER OF
DOUGLAS JOHN ELEY**

**REASONS FOR DECISION ON A STAY MOTION
(Subsection 8(4) of the *Securities Act*, RSO 1990, c S.5)**

Hearing: November 9, 2020

Decision: December 15, 2020

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

Appearances: Jay Naster For Douglas John Eley
Robert DelFrate For Staff of the Investment
Industry Regulatory Organization
of Canada
Gavin MacKenzie For Staff of the Commission
Alexandra Matushenko

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REASONS FOR DECISION ON A STAY MOTION

I. OVERVIEW

- [1] This is a motion by Douglas John Eley (**Eley**) for a stay (the **Stay Motion**) of two decisions of the Investment Industry Regulatory Organization of Canada (**IIROC**) dated January 28, 2020¹ and October 6, 2020² (collectively the **IIROC Decisions**) until the disposition of his application for hearing and review of the IIROC Decisions (the **Review Application**).
- [2] Pursuant to the IIROC Decisions, Eley was disciplined for certain conduct, including inappropriately altering client documents. Among other sanctions imposed, his registration as an advisor was suspended for 12 months. In the absence of a stay, the sanctions ordered remain in effect, including the suspension.
- [3] On October 16, 2020, and upon the consent of the parties, I granted an interim order that the IIROC Decisions be stayed pending the disposition of the Stay Motion or further order of the Commission.
- [4] The hearing of the Stay Motion was conducted by videoconference on November 9, 2020. On November 16, 2020, I granted an order, with reasons to follow, that the IIROC Decisions be stayed subject to certain conditions described below, until the disposition of the Review Application or further order of the Commission (the **Stay Motion Order**).³ These are my reasons.

II. FACTUAL BACKGROUND

- [5] Eley is a registered representative with Echelon Wealth Partners Inc. (**Echelon**). Eley has been registered since 2000 with the exception of the period 2013 to 2015 during which he was not registered.
- [6] In November 2016, IIROC commenced an investigation into Eley's conduct and on November 22, 2018, IIROC commenced disciplinary proceedings against Eley that resulted in the IIROC Decisions.
- [7] On January 28, 2020, an IIROC hearing panel (the **IIROC Panel**) issued its decision on the merits, in which it found that Eley had engaged in business conduct and practices unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1 (the **Merits Decision**). The IIROC Panel found that between May 2015 and November 2015, Eley engaged in conduct unbecoming of a registrant by inappropriately altering documents after they had been signed, and by knowingly misrepresenting that clients had signed documents.⁴
- [8] On October 6, 2020, the IIROC Panel issued its decision on sanctions and costs (the **Sanctions Decision**) and imposed the following sanctions against Eley:
 - a. a suspension from registration with IIROC for a period of 12 months, effective ten days from the date of the Sanctions Decision, and an order

¹ *Eley (Re)*, 2019 IIROC 35

² *Eley (Re)*, 2020 IIROC 35

³ (2020) 43 OSCB 8793

⁴ Merits Decision at para 114

prohibiting him from taking employment in any capacity with any IIROC Dealer Member during the suspension period;

- b. an 18-month period of close supervision should Eley obtain re-registration;
- c. a fine of \$50,000; and
- d. costs of \$50,000.⁵

[9] In its Sanctions Decision, the IIROC Panel noted that the number and pattern of inappropriate alterations to clients' file records were of serious concern but declined IIROC Staff's request for a permanent suspension. The IIROC Panel noted that there was no evidence of harm to any client, that Eley acted in some cases for the convenience of his clients and at their direction and that there was no evidence that Eley received any financial benefit from his misconduct.⁶

[10] The IIROC Panel also noted that Eley had previously been disciplined by IIROC (in October 2014) for, among other things, inappropriately endorsing client signatures on documents and using pre-signed client forms. For such misconduct, he was sanctioned with a 6-month suspension, a fine and costs.⁷

[11] On October 7, 2020, Eley filed the Review Application pursuant to s. 21.7(1) of the *Securities Act*, RSO 1990, c S.5 (the **Act**) and also filed the Stay Motion.

[12] The Review Application is scheduled to be heard on January 14 and 15, 2021.

III. LAW AND ANALYSIS

[13] The Commission has authority to grant a stay of the IIROC Decisions pending the disposition of the Review Application pursuant to s. 8(4) of the Act and to impose conditions on such order pursuant to section 16.1(2) of the *Statutory Powers Procedure Act*.⁸

[14] The test to be applied for the grant of a stay is the three-part test articulated by the Supreme Court of Canada and adopted by the Commission in numerous cases:⁹

- a. there is a serious issue to be tried;
- b. the moving party would suffer irreparable harm if the stay were refused; and
- c. the balance of convenience favours granting the stay.¹⁰

[15] Eley bears the onus of establishing that all three parts of the above test have been met.

[16] IIROC Staff opposes the Stay Motion. Commission Staff takes no position with respect to the outcome of the Stay Motion.

⁵ Sanctions Decision at para 48

⁶ Sanctions Decision at para 32

⁷ Sanctions Decision at paras 33 and 43; *Eley (Re)*, 2014 IIROC 52 at paras 11 and 73

⁸ RSO 1990, c S.22; see also *Argosy Securities Inc (Re)*, 2015 ONSEC 38, (2015) 38 OSCB 9711 (**Argosy**) at paras 14-16

⁹ *RJR-MacDonald Inc. v Canada (Attorney-General)*, [1994] 1 SCR 311 (**RJR-MacDonald**); *Argosy* at para 12

¹⁰ *RJR-MacDonald* at 334

A. Is there a serious issue to be tried?

- [17] The threshold to establish that there is a serious issue to be tried is low. The Commission is required to make a preliminary assessment, not a prolonged examination, of the merits of the Review Application to be satisfied that the application is neither vexatious nor frivolous.¹¹
- [18] Eley argued that the Review Application raises serious issues based on various grounds, including that the IIROC Panel erred by reversing the burden of proof, admitting improper evidence, failing to order disclosure of relevant documents, making factual findings based on improper inferences and excluding relevant evidence.
- [19] IIROC Staff argued that there is no serious issue to be tried as none of the grounds asserted by Eley are capable of meeting the established standards for intervention by the Commission on a hearing and review of an IIROC decision. Importantly, however, IIROC Staff conceded that the Review Application is neither vexatious nor frivolous.
- [20] As established by the Supreme Court of Canada, the serious issue part of the test is satisfied as long as the underlying matter is neither vexatious nor frivolous. All parties agreed that this is the case in this matter.
- [21] Based on a preliminary assessment, I am satisfied that there are grounds in the Review Application which raise serious questions to be determined and that the Review Application is neither vexatious nor frivolous. Accordingly, Eley has satisfied this part of the test.

B. Will Eley suffer irreparable harm if a stay is not granted?

- [22] The second part of the test requires the Commission to determine whether a refusal to grant the stay could so adversely affect Eley's interests that the harm could not be remedied.¹²
- [23] The evidence to demonstrate irreparable harm must be "clear and not speculative".¹³ "Irreparable" refers to the nature of the harm suffered rather than its magnitude.¹⁴ The magnitude of the harm, however, may be considered as part of the balance of convenience stage of the test, discussed further below.
- [24] Eley submitted that if a stay were refused, he would suffer the loss of his employment as a registered representative, the loss of his "book of business" and reputational damage.
- [25] Eley provided evidence which demonstrated that his income as a registered representative and portfolio manager is the primary source of income for him and his family and the loss of such income pending the disposition of the Review Application would have devastating consequences.
- [26] IIROC Staff submitted that the evidence provided by Eley with respect to the financial impact of refusing the stay was "soft and speculative", that Eley failed to provide detailed information relating to his income, assets and liabilities and that the evidence is insufficient to establish irreparable harm.

¹¹ *RJR-MacDonald* at 337

¹² *RJR-MacDonald* at 341; *Argosy* at para 24

¹³ *Sazant v College of Physicians & Surgeons (Ontario)*, 2011 CarswellOnt 15914 (ONCA) at para 11

¹⁴ *RJR-MacDonald* at 341

- [27] IIROC Staff further argued that the evidence of the loss of the book of business is speculative and undermined by the fact that Eley previously retained almost all his clients following a prior two-year interruption of his registration (which included the six-month suspension resulting from the prior IIROC disciplinary proceedings).
- [28] The evidence demonstrates that Eley will suffer financial harm if the stay is not granted, although the extent of such financial harm is unclear. He will lose his employment with Echelon and his primary source of income. Eley is the primary income earner in a family with four school aged children. While Eley may have the ability to earn income from other sources, such as his license as an insurance agent, his ability to do so, as well as the timeline and quantum of any such income, are uncertain.
- [29] Although Eley regained his clients following the suspension of his registration in 2013, there is a real possibility that Eley will suffer the permanent loss of some or all of his book of business. Importantly, should Eley succeed in the Review Application, he would have no right of action to recover any income lost as a result of the suspension.
- [30] Eley faces a real prospect of irreparable damage to his career, income, business and reputation as a registered representative from immediate enforcement of the suspension. Accordingly, I find that Eley has satisfied this part of the test.

C. Does the balance of convenience favour granting a stay?

- [31] The third and final part of the test requires an assessment of which of the parties will suffer greater harm from granting or refusing to grant the stay.
- [32] In this balancing exercise, the broad public interest mandate of IIROC to protect investors and the integrity of the capital markets must be given substantial weight.¹⁵
- [33] Eley argued that given the lack of any harm to clients from his conduct, the short duration of the stay and the fact that he continued to work as a registered representative for approximately four years throughout the IIROC investigation and proceedings, the balance of convenience favours the grant of a stay.
- [34] IIROC Staff argued that given the serious nature of the conduct, including a sustained pattern of altering clients' file records, Eley's previous disciplinary sanctions for similar conduct and the harm to the public interest, including undermining the public's confidence in IIROC's disciplinary regime, the balance of convenience weighs in favour of denying a stay.
- [35] The nature of the conduct at issue in the IIROC Decisions, being the alteration of client records, is serious and harms the integrity of the capital markets regulatory regime. However, Eley continued to work as an advisor without restriction and without any further incident throughout the almost four-year time period from the commencement of the IIROC investigation to the issuance of the Sanctions Decision. The IIROC Panel recognized that his satisfactory conduct over such time period provided reassurance that the likelihood of any recurrent

¹⁵ *RJR-MacDonald* at 343 and 346; *Azeff v Ontario Securities Commission*, Endorsement of Kruzick J. dated October 19, 2015 at 3

conduct was low and that the conduct did not result in client harm nor any financial benefit to Eley.

- [36] In these circumstances, I am not satisfied that there is sufficient risk of harm to the public interest to outweigh the harm that may be suffered by Eley in the short term if a stay is not granted.
- [37] At the Stay Motion hearing, I sought submissions from the parties regarding what, if any, terms and conditions would be appropriate to include in a stay order to address potential investor protection concerns should I grant the stay.
- [38] Eley advised that he was willing to be subject to close supervision by Echelon as a condition of any stay order. IIROC Staff submitted that a condition of strict supervision should be imposed at a minimum.
- [39] Given the short duration of the stay, the specific financial and personal circumstances of Eley and the low risk of client harm, I find that the balance of convenience weighs in favour of granting a stay.
- [40] Further, I am satisfied that in the circumstances, the risk of harm to investors is adequately addressed by the imposition of the condition of close supervision, as outlined below.

IV. CONCLUSION AND ORDER

- [41] For the reasons set out above, I issued the Stay Motion Order granting the stay of the IIROC Decisions until the disposition of the Review Application or further order of the Commission, subject to the following conditions:
- a. the registration of Eley shall be subject to close supervision by his sponsoring firm; and
 - b. Eley's sponsoring firm must submit written monthly close supervision reports (in the form specified in Appendix "A" of the Stay Motion Order) to IIROC. These reports must be submitted within 15 calendar days after the end of each month.

Dated at Toronto this 15th day of December, 2020.

"Wendy Berman"

Wendy Berman