

IN THE MATTER OF
INVESTMENT INDUSTRY REGULATION ORGANIZATION OF CANADA

(Applicant)

- AND -

BRIAN MICHAEL SUTTON

(Respondent)

APPLICATION

(For Hearing and Review of a Decision Under Section 21.7
of the *Securities Act*, R.S.O. 1990, c S.5)

A. ORDER SOUGHT

The Applicant, Investment Industry Regulatory Organization of Canada ("IIROC"), requests that the Ontario Securities Commission make the following order(s):

1. The IIROC Hearing Panel's Sanctions Decision dated January 31, 2018 in the matter of the Respondent, Brian Michael Sutton ("Sutton"), is set aside.
2. The following sanctions are substituted and imposed upon Sutton:
 - (a) a reprimand;
 - (b) a fine in the amount of \$100,000;
 - (c) a prohibition on Sutton's approval for registration as a CFO with an IIROC Dealer Member; and
 - (d) costs in the amount of \$50,000.

B. GROUNDS

The grounds for the request and the reasons for seeking a hearing and review are:

1. On January 31, 2018, following a contested hearing and a finding that Sutton had breached Dealer Member Rule 38.6(c) in respect of his position as Chief Financial Officer (“CFO”) of Dealer Member First Leaside Securities Inc. (“FLSI”), the IIROC Hearing Panel (“Panel”) ordered that Sutton was reprimanded and that he pay a fine in the amount of \$25,000. No order was made as to costs.
2. The sanctions imposed by the Panel were proportionately inappropriate and fell outside acceptable parameters considering, *inter alia*, the importance of the Dealer Member Rule that was breached, factual findings made by the Panel at the conclusion of the merits hearing including in relation to investor harm, Sutton’s experience in the industry, and the principle of general deterrence.
3. In imposing sanctions upon Sutton, the Panel proceeded upon incorrect principles and/or erred in law in the following respects:
 - (a) The Panel failed to have due regard for the seriousness of the Respondent’s breach of Dealer Member Rule 38.6(c) (the “Rule”) and the harm caused to investors as a result of his breach of the Rule. This includes, as the Panel observed in its Decision on the Merits (“Merits Decision”), that as a result of Sutton’s breach of the Rule, investors in the funds in issue did not have “true information as to the current value of their investment, including that such information wasn’t available”, and in fact “they actually had information that was designed to mislead them into believing that their investment was worth more than it actually was”. As a result, investors were deprived of information that they were entitled to “and any protection such information would have given them”;
 - (b) The Panel failed to have due regard for the importance of the interests that the Rule was designed to protect, including, as the Panel found in its Merits

Decision, that the objective of the Rule is to ensure that investors have accurate information necessary to enable them to make informed investment decisions;

- (c) The Panel placed undue weight upon its conclusion in its Merits Decision that Sutton made an honest mistake, to the exclusion of the following:
 - (i) its finding in the Merits Decision that Sutton “must have known” as early as 2010 that FL Group “faced financial difficulties which would become overwhelming if it couldn’t maintain the confidence of its investors”;
 - (ii) its finding in the Merits Decision Sutton knew that the price of \$1 per unit shown on the statements sent to investors was a “weak proxy” for market price, and that the price of \$1 “originated from Mr. Phillips and not from any market activity whatsoever”;
 - (iii) its finding in the Merits Decision that Sutton failed to act rationally in sticking to that position over the 2 year period in issue; and
 - (iv) the inherent seriousness of a breach of the Rule;
- (d) The Panel erred in concluding that an honest mistake precludes a period of suspension;
- (e) The Panel erred in treating Sutton’s extensive industry experience as a mitigating, rather than an aggravating, factor;
- (f) The Panel erred in its interpretation and application of the principle of general deterrence through the lens of what a reasonable member of the industry would think about a particular sanction, rather than what sanctions are appropriate to prevent and protect against similar breaches in the future as a deterrent to other participants in the capital markets. The Panel failed to consider that the

imposition of a significant sanction may be required in order to send a message to the market about the importance of the Rule that was breached in order to avoid further breaches and protect the public;

- (g) The Panel erred in its finding that it was procedurally unfair for IIROC Staff to argue in the sanctions hearing that, based upon the evidence in the record at the merits hearing, Sutton's conduct involved more than just an honest mistake, without having put that suggestion to Sutton when he testified at the merits hearing; and
 - (h) The Panel erred in concluding that it was not appropriate and reasonable in the circumstances to award costs to IIROC Staff.
4. The Panel's perception of the public interest conflicts with, and stands in stark contrast to:
- (a) the sanctions imposed by the Commission upon officers of reporting issuers who participate in breaches of their employers' public disclosure obligations, which requirements have the same purpose as the Rule, namely, to ensure that investors have accurate information necessary to enable them to make informed investment decisions; and
 - (b) the Commission's treatment of industry experience as an aggravating factor when imposing a sanction;
5. Dealer Member Rule 20.33 and 20.49;
6. IIROC Sanction Guidelines;
7. S.8, *Ontario Securities Act*, R.S.O. 1990, c. S-5, as amended; and
8. Such further and other grounds as counsel may advise and the Commission permit

C. DOCUMENTS AND EVIDENCE

The Applicant intends to rely on the following documents and evidence at the hearing:

1. The Panel's Sanctions Decision dated January 31, 2018 and released on February 5, 2018;
2. The Panel's Merits Decision dated July 5, 2017;
3. Notice of Hearing dated April 12, 2016;
4. Response of Sutton dated May 12, 2016;
5. Transcript of Oral Submissions relating to sanctions on November 16, 2017;
6. Affidavit of Ricki Ann Newmarch sworn September 26, 2017 and Exhibit "A" thereto, Bill of Costs of IIROC Staff; and
7. Such further and other evidence as counsel may advise and the Commission may permit.

DATED this 7th day of March, 2018.

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