ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Ellis, 2024 ABASC 50 **Date: 20240325**

Nickolas Donovan Ellis

Panel:	Kari Horn Tom Cotter
Representation:	Braeden Claringbull Yasifina Somji for Commission Staff Nickolas Donovan Ellis for himself
Submissions Completed:	February 1, 2024
Decision:	March 25, 2024

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I. INTRODUCTION

[1] In a Notice of Hearing issued on December 8, 2023 (the **NOH**), staff (**Staff**) of the Alberta Securities Commission (the **ASC**) sought orders that would permanently prohibit Nickolas Donovan Ellis (**Ellis**) from participating in Alberta's capital market. Staff relied on s. 198.1(2)(a) of the *Securities Act* (Alberta) (the **Act**), which provides that an order may be made under ss. 198(1)(a) to (h) against a person who has been convicted of an offence arising from a course of conduct relating to securities.

[2] On January 17, 2023, Ellis was convicted in the Court of King's Bench of Alberta for several offences including eight counts of fraud over $5,000 (cited as *R v. Ellis*, 2023 ABKB 26 (the **Conviction Decision**)), contrary to s. 380(1)(a) of the *Criminal Code* (Canada). On May 5, 2023, the Court sentenced Ellis to seven years' incarceration and ordered him to pay restitution (*R v. Ellis*, (5 May 2023), Edmonton 210605358QI (ABKB) (the **Sentencing Decision**, and together with the Conviction Decision, the **Reasons**)).

[3] We are satisfied based on affidavit evidence that Ellis was served with the NOH and, although not required by s. 198.1(2) of the Act, was provided an opportunity to be heard. Ellis elected not to present evidence or make submissions.

[4] In support of the orders sought, Staff provided affidavit evidence from an ASC collections officer and an ASC legal assistant. Staff also filed written submissions.

[5] For the reasons that follow, we find that Ellis was convicted of an offence arising from a course of conduct related to securities, and that the public interest warrants permanent market-access bans as requested by Staff.

II. FACTS

A. Ellis's Criminal Misconduct

[6] Ellis was an Alberta resident who raised funds from eight investors for a number of fictitious business opportunities to generate money for himself at the expense of the investors. Most, if not all, of the investors lived or worked in Alberta and were friends, neighbours and co-workers of Ellis. While the Reasons described six interrelated schemes, the four schemes described below formed the basis for the orders sought by Staff.

1. The Dynasty Project

[7] Between February 2016 and August 2018, Ellis raised funds from investors for the development and sale of a software application that would create a subscription service for users to connect with athletes before and after professional sports games (the **Dynasty Project**). Once developed, and upon the sale of the technology to Microsoft, the investors would receive large returns. Each investor believed that he had purchased an exclusive interest in the project, but Ellis sold the very same interest in the technology to three Alberta investors who invested, in aggregate, $1,189,246. The Court concluded that the Dynasty Project was not real and existed only for the purpose of defrauding the investors. Ellis did not repay the investors and retained the funds for his own personal use. As part of the ongoing deception, Ellis:

- invented two Ontario lawyers said to be acting on behalf of the Dynasty Project's investors and negotiating the sale of the application to Microsoft;

- used the fictitious Ontario lawyers to give updates on the pending sale and ask for additional funds;

- created emails impersonating a retired NHL hockey player to give legitimacy to the scheme and entice the investors to pay additional funds; and

- forged a letter from an Edmonton lawyer confirming that $33,000,000 was held in trust for the benefit of Ellis and an investor, which induced that investor to make further payments.

2. The Jersey Program

[8] Between September 2017 and September 2018, Ellis raised funds from investors for the purchase and resale of discontinued Reebok NHL jerseys (the **Jersey Program**). Existing stock of jerseys would be purchased, signed by NHL players, framed, and redistributed. Ellis entered into Joint Venture Agreements with investors, selling them an interest in the project with substantial anticipated returns. Ellis received over $300,000 from investors and, except for one partial repayment of $21,165, Ellis retained the funds for his own personal use. The Court concluded that the Jersey Program was not real and existed to enrich Mr. Ellis at the expense of the investors. In a manner similar to the Dynasty Project, Ellis deceived investors by:

- touring prospective investors through the framing facility that Ellis claimed would be engaged in the framing of the jerseys;

- impersonating the professional framer, using a fictitious email account;

- using the framer's fictitious email to fabricate a Las Vegas photo shoot; and

- selling the same interest in the jerseys to three groups of investors.

3. The Bridge Financing Project

[9] In November 2017, Ellis approached an employee about an investment opportunity to provide bridge financing to cover the carrying costs of a construction project until the completed building was sold. Once the building was sold, the bridge financing was to be repaid along with a portion of the profit from the sale. The employee made several payments for a total investment of $40,250. In April 2018, Ellis reported to the investor that the property had sold and the investor's share had been rolled over into a new opportunity. The investor felt unable to disagree with a second investment because Ellis was his employer. Some months later, Ellis advised the investor that $75,000 would be forthcoming. On March 15, 2019, Ellis issued a cheque knowing the account had insufficient funds. The investor was never repaid. The Court concluded that the project was never real.

4. The Business Acquisition Project

[10] In January 2019, after approaching two Dynasty Program investors who declined to participate, Ellis approached another previous investor (in the Jersey Program) to invest in Ellis's company, B&G Group Ltd., which he said was in the process of acquiring 23.5% of Steelcraft Door Products Ltd. (**Steelcraft**) and 93.75% of its subsidiary, Barcol Doors and Windows Ltd. (**Barcol**). Ellis had been the General Manager of Barcol since September 2017 and had experience in mergers and acquisitions. Believing he was purchasing a 50% interest in B&G Group Ltd., with the remaining shares to be retained by Ellis, the investor made several payments for a total investment of $49,475. The Court concluded that B&G Group Ltd. never existed and therefore Ellis could not have conveyed shares to the investor. In addition, the Court found that the proposals to purchase Steelcraft and Barcol were not real.

[11] The Dynasty Project and the Jersey Project account for six of Ellis's eight fraud convictions, while the Bridge Financing and Business Acquisition projects account for the remaining two. Ellis was also convicted of an additional six counts relating to forgery and personation, carried out as part of his deception of investors.

B. Sentencing

[12] After hearing victim impact statements and reviewing a pre-sentence report, the Court sentenced Ellis (globally for all 14 convictions) to seven years in prison. Ellis was also ordered to pay restitution in the total amount of $1,672,000.

[13] The Sentencing Decision highlighted the impact of the fraud on three of the investors. Their financial losses affected their retirement, ability to fund children's post-secondary educations, marital relationships, and in one case, the investor's physical and mental health. Ellis's lack of remorse, planned deception, and impersonation of a lawyer were considered aggravating factors. The Court found that Ellis was "a financial predator" and "had a very high level of moral blameworthiness" (p. 4).

III. ANALYSIS

[14] Section 198.1(2)(a)(i) of the Act establishes the basis upon which an order may be made by the ASC under s. 198(1), providing ". . . an efficient means for furthering investor protection and the fair operation of Alberta's capital market, and confidence in that market, on the basis of a finding already made [by a court]" (*Re Braun*, 2007 ABASC 694 at para. 12).

[15] The issues under consideration are: first, whether Ellis has been convicted of an offence arising from a transaction, business or course of conduct related to securities or derivatives; and second, whether we should exercise our jurisdiction to make protective orders in the public interest against Ellis.

A. Transaction, Business, or Course of Conduct Related to Securities

[16] Ellis's fraud convictions arose from five fraudulent investment schemes. The four schemes relevant to our analysis were carried out over time, from approximately three months in the case of the Business Acquisition Project to three years in the case of the Dynasty Project. To maintain the façade of reality, Ellis's deceptive actions were ongoing. We are satisfied that Ellis's actions

constituted a course of conduct and we turn now to consider whether that conduct related to securities or derivatives within the meaning of the Act.

[17] The term "security" is defined in s. 1(ggg) of the Act to include: a share; a bond or other evidence of indebtedness; a document evidencing an interest in a company's property, profits or earnings; a profit-sharing agreement; and an investment contract. The definition is "broadly worded" and "designed to cover virtually every method by which money could be raised from the public" (*R v. Stevenson*, 2017 ABACA 420 at para. 9).

[18] The Act does not define "investment contract" but the term has been consistently construed as "an investment of money in a common enterprise with the expectation of profit to come significantly from the efforts of others" (*Re Cerato*, 2022 ABASC 36 at para. 247, citing *Pacific Coast Coin Exchange of Canada Limited v. Ontario (Securities Commission)*, [1978] 2 S.C.R. 112).

[19] The Reasons do not refer to any statutory definition of, or conclude that Ellis sold, securities. However, we found sufficient detail in the Reasons to determine that the four schemes of Ellis described in these reasons related to securities within the meaning of the Act.

[20] When Ellis raised funds for the Dynasty Project, the investors' only role was to provide capital, and in turn, they understood that they would share in the profits with Ellis. At least one investor believed he had purchased a 50/50 interest in the Dynasty Project (and its profits) with Ellis. The precise share that each of the other investors understood they were purchasing is not stated by the Court, although the Reasons are clear that each investor was to derive a substantial profit from the (pending) sale of the application to Microsoft. We are satisfied that the investments in the Dynasty Project constituted investment contracts with Ellis, and therefore fall within the definition of securities under the Act.

[21] The Jersey Program involved Ellis entering into a Joint Venture Agreement (**JVA**) with each investor. The investors agreed to invest funds into the Program, again with the expectation of substantial returns. The investors' only involvement in the program was to provide the capital. Ellis, as the partner, would share in the profit with the investors according to the JVA. We are satisfied that the JVAs constituted investment contracts between Ellis and the investors, and therefore his conduct related to securities.

[22] The Bridge Financing Project was an agreement among nine individuals to share carrying costs of a newly-constructed building, pending its sale. The investors did not purchase an ownership interest in the building. When the sale closed, each investor would be repaid their respective investment and receive a portion of the profit from the sale. We find that the investors were party to a profit-sharing agreement, and therefore, the investment falls within the definition of security under the Act.

[23] The Business Acquisition Project involved the fraudulent sale of shares in B&G Group Ltd. Shares in a company are securities under the Act.

[24] For the foregoing reasons, we find that Ellis's fraud convictions related to the Dynasty Project, the Jersey Program, the Bridge Financing Project, and the Business Acquisition Project arose from a course of conduct relating to securities.

B. Public Interest

[25] Having found that the necessary conditions of s. 198.1(2)(a) are met, we next turn to whether the imposition of the protective orders sought by Staff is warranted in the public interest (see *Re Leemhuis*, 2008 ABASC 585 at para. 12).

[26] The ASC has previously considered and issued protective orders under s. 198(1) in relation to criminal convictions for securities-related fraud: see for example, *Re Uitvlugt*, 2022 ABASC 1, *Re Carruthers*, 2020 ABASC 177 and *Re LaFramboise*, 2020 ABASC 12. In each decision, the panel followed the principle that making such orders is in the public interest ". . .only when doing so would provide protection to Alberta investors and the Alberta capital market" (*Braun* at para. 17, citing *Re O'Connor*, 2005 ABASC 987 at para. 26).

[27] ASC decisions have consistently noted that fraud is among the most serious types of capital-market misconduct. For example, an ASC panel in *Re TransCap Corporation*, 2013 ABASC 201 (at para. 155) stated that it is ". . .self-evident that conduct that perpetrates a fraud on Alberta investors is wholly inconsistent with the welfare of investors and the integrity of our capital market". Other cases, such as *Uitvlugt* and *LaFramboise*, have reiterated the seriousness of fraud, citing *Re Reeve*, 2018 ONSEC 55 at para. 28:

> . . .fraud is one of the most egregious violations of securities law. It causes direct and immediate harm to its investors, and it significantly undermines confidence in the capital markets.

[28] Consequently, as stated by an ASC panel in *Carruthers* (at para. 32):

> . . .where Staff seek reciprocation of a criminal conviction for securities-related fraud, particularly where that fraud was perpetrated on Alberta investors, it is difficult to conceive of a circumstance when orders under section 198(1) would not be considered to be in the public interest.

[29] Ellis targeted and defrauded Alberta investors of nearly $1,600,000. Fraud strikes at the heart of investor confidence in the capital markets. Accordingly, we find that it is in the public interest to issue protective and preventative orders under s. 198 of the Act.

C. Orders Sought

[30] Sanctions are intended to protect the public and prevent future misconduct (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at paras. 39-45). To assess whether the orders sought by Staff appropriately address deterrence and protection, we have considered sanctioning factors that have been applied in prior decisions, including: the seriousness of the misconduct, the respondent's characteristics and history, any benefit sought or obtained by the respondent, and any mitigating or aggravating considerations (*Re Homerun International Inc.*, 2016 ABASC 95 at para. 20).

[31] As discussed, fraud is one of the most serious securities law contraventions due to its harmful effects on investors and the capital market. However, the seriousness of Ellis's conduct

was compounded by the degree of deception he used in his schemes. In that regard, we consider certain of his actions to be aggravating. He not only lied to the investors; he orchestrated a false reality in which investors believed that they had legal counsel representing their interests, that celebrities were part of the business, and that the investments were guaranteed by funds held in a lawyer's trust account. To create that fiction, Ellis communicated with his investors via false email addresses, impersonated legal counsel and forged a letter from an Alberta lawyer.

[32] The Court found that Ellis's continuing lack of remorse and callous disregard for the victims were aggravating factors for sentence. In matters before the ASC, a Respondent's genuine appreciation and acknowledgement of harm done to victims may be treated as mitigating, but the absence of such appreciation is not aggravating (see *Homerun* at para 41). However, belligerent contempt for victims or the law may "reasonably indicate a pronounced risk of future misconduct (and send a disconcerting message of defiance to observers). . ." (*Homerun* at para. 46). While we consider Ellis's lack of remorse to be a neutral consideration, we also find that his callous disregard for the victims warrants heightened specific and general deterrence.

[33] We consider Ellis's business acumen to be relevant. Ellis had been employed as a general manager and led companies through changes of control. He identified himself as having extensive experience in mergers and acquisitions. Some of the defrauded investors had worked with him as a colleague or employee through prior business dealings. Ellis was sophisticated and used his business knowledge to carry out the fraudulent schemes.

[34] Through the Dynasty Project, the Jersey Program, the Bridge Financing Program, and the Business Acquisition, Ellis raised nearly $1,600,000. Apart from one repayment of approximately $21,000, Ellis retained all of the funds for his own use. The impact of the financial losses suffered by the investors was significant, including negative effects on retirement plans, ability to contribute financially to their children's education, marriages and physical and mental well-being.

[35] The Court found that there were no mitigating circumstances.

[36] Having considered the Reasons and sanctioning factors, we agree that the orders sought by Staff are reasonable and proportionate to the seriousness of Ellis's misconduct, and are necessary to protect the public interest.

IV. SANCTIONS ORDERED

[37] Accordingly, we order in the public interest, with permanent effect:

- under ss. 198(1)(b) and (c), Ellis must cease trading in securities or derivatives, and all of the exemptions contained in Alberta securities laws do not apply to him;

- under s. 198(1)(d), Ellis must immediately resign from all positions he holds as a director or officer of any issuer, registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator;

- under s. 198(1)(e), Ellis is prohibited from becoming or acting as a director or officer (or both) of any issuer (or other person, or company that is authorized to issue securities), registrant, investment fund manager, recognized exchange, recognized self-regulatory organization, recognized clearing agency, recognized trade repository, designated rating organization or designated benchmark administrator; and

- under ss. 198(1)(c.1), (e.1), (e.2), and (e.3), Ellis is prohibited from:

    - engaging in investor relations activities;

    - advising in securities or derivatives;

    - becoming or acting as a registrant, investment fund manager, or promoter;

    - acting in a management or consultative capacity in connection with activities in the securities market.

[38] This proceeding is concluded.

March 25, 2024

For the Commission:

"original signed by"
Kari Horn

"original signed by"
Tom Cotter