

# Re Northern Securities

IN THE MATTER OF:

**The Dealer Member Rules of the Investment Industry Regulatory  
Organization of Canada (IIROC)**

**and**

**The By-Laws of the Investment Dealers Association of Canada (IDA)**

**and**

**Northern Securities Inc., Victor Philip Alboini, Douglas Michael  
Chornoboy and Fredrick Earl Vance**

2012 IIROC 33

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Ontario District Council)

Heard: May 18, 2012 in Toronto, ON

Decision: May 18, 2012

**Hearing Panel:**

Fred Webber (Chair), F.Michael Walsh, Ron Smith

**Appearance:**

Brian H. Greenspan, Greenspan Humphrey Lavine, for IIROC Staff

Jeffrey A. Kaufman, Fasken Martineau DuMoulin LLP, for the Respondents

---

## Motion to Stay Decision

---

### 1. Introduction

¶ 1 On the second day of this disciplinary hearing, which commenced before this hearing panel (“Panel”) on Monday May 7, 2012, certain evidence went into the record as a result of which the Respondents brought the motion described below.

### 2. Evidence

¶ 2 The evidence which gave rise to the motion is as follows: during the course of the examination in chief of Maureen Jensen, IIROC counsel, James Douglas, referred the witness to an email from a Mr. Prior and asked “...the reference to classifying Northern Securities as a high risk firm, is that a common occurrence at IIROC?”

¶ 3 The witness replied: “What we have is a very detailed risk analysis of all the firms, where we do a risk assessment based on a set formula for all IIROC firms on their trading conduct, their business conduct, as well as their financial and operational conduct. And they are assigned a risk score. And every firm who is classified as a high risk in any one, two or three areas gets a copy of that risk report every year. And every three years, all firms get a copy of the risk report. And Northern Securities was ranked a very high risk firm.” She was then asked whether that was a good thing to which she replied “...that’s not a very good thing. That’s a bad thing.”

¶ 4 There was no objection to this evidence at the time but during his cross-examination of Ms Jensen, Respondents’ counsel, Mr. Brush, advised the panel that his client had just turned up the risk trend report (RTR)

which Ms Jensen had referred to, but wished to discuss with Mr. Douglas a procedural issue regarding the document. After a short break Mr. Brush completed his cross-examination of Ms Jensen in which she confirmed that the high risk ranking for NSI came from its RTR.

### **3. Confidentiality of Risk Trend Report**

¶ 5 On May 10<sup>th</sup>, during the examination in chief of an IIROC witness, Mr. Sasha Latka, IIROC co-counsel, Ms Caitlin Sainsbury asked about high risk firms and how the risk level is determined. In response, Mr. Latka referred to a risk trend report which is completed for all firms, in which the risk rating for the firms is set out. Respondents counsel, Mr. Brush objected to any evidence regarding RTRs and stated that he was considering a motion to deal with the issue at the end of IIROC's case. Mr. Douglas responded that IIROC had not, and would not introduce any RTR into evidence and then produced a standard form cover document which is attached to all IIROC RTRs which he stated dealt with the confidentiality aspects of the RTR. After some discussion between counsel and the panel about how to proceed, Mr. Brush again mentioned the possibility of a motion regarding Ms. Jensen's testimony; Mr. Douglas replied that Mr. Brush could bring his motion at the end of the case, but the hearing should not be held up while he contemplates a motion.

¶ 6 Copies of the confidentiality cover sheet were distributed and the hearing took a short break in order that the Panel could review the confidentiality cover sheet in order to determine how the witness could continue regarding any reference to risk trend reports.

¶ 7 After the Panel returned, the cover sheet was marked as Exhibit 14. In relevant part, Exhibit 14 provided:

“...the use of the report is restricted as follows:...

#### **Legal and regulatory proceedings:**

¶ 8 Neither the Dealer member nor IIROC, nor any person acting on behalf of either of them, shall assert, use or rely on the Report or any of its contents in any legal or regulatory proceeding (including proceedings by IIROC in respect of the Dealer Member or any of its Approved Persons) provided that nothing shall prevent:

IIROC from instituting or maintaining any such proceeding or other regulatory action as a result of its authorized investigations and reviews of its Dealer Members which may be based on facts or information which are the same or similar to information contained in the report or received by IIROC otherwise than in connection with the preparation or delivery of the Report; or...”

¶ 9 The Panel ruled that Exhibit 14 prohibited any reference to the NSI RTR and its contents, which were confidential and should not have been revealed by Ms Jensen. Regarding the witness who was testifying, Ms Sainsbury could ask questions about, and the witness could testify regarding facts upon which the report was based but could not refer to the RTR itself or its contents. It is to be noted that the NSI RTR which Ms Jensen apparently referred to, was not in evidence (and in fact never went into evidence).

### **4. The Respondents' Motion**

¶ 10 Because of Ms Jensen's evidence, on May 15<sup>th</sup>, the Respondents, through additional counsel, Mr. Jeffrey Kaufman and Mr. Leslie Rose of Fasken Martineau, filed a Notice of Motion (the NOM) requesting:

- a) “an adjournment of this hearing pending the determination of the issues contained herein;
- b) an order staying the hearing on the grounds of procedural unfairness, reasonable apprehension of bias and/or abuse of process;
- c) a determination whether the Hearing Panel has the jurisdiction to remove James Douglas and Borden Ladner Gervais as counsel for IIOC;
- d) if the Hearing Panel determines that it has the jurisdiction, an order removing James Douglas and Borden Ladner Gervais as counsel for IIROC;
- e) an order for directions regarding the following matters in respect of the motion;

- i. A timetable relating to the scheduling of this motion;
  - ii. The need for the motion to be in camera;
  - iii. A sealing order in relation to the confidential information; and
  - iv. A determination as to whether an independent Hearing Panel should hear some or all of the motion;
- f) an order, if necessary, abridging the time for service and filing of the within materials.”

¶ 11 The essential basis for the relief sought is that “The Hearing Panel by virtue of the breach in the confidentiality of the RTRs is now privy to highly sensitive and inflammatory confidential information concerning the Respondents, in circumstances where the Respondents are unable to provide a full and effective response.”

## **5. Preliminary Jurisdictional Issues**

¶ 12 Before proceeding with the motion on the merits, Respondents’ counsel raised two jurisdictional issues:

- 1) This Panel does not have the jurisdiction to hear the motion for a stay set out in item (b) of the motion; the issue should be heard by a different panel; and
- 2) This Panel does not have the jurisdiction to remove James Douglas and Borden Ladner Gervais as counsel for IIROC as set out in item (c) of the motion; the issue should be determined by the Ontario Securities Commission (OSC) or the courts.

¶ 13 On the first issue, IIROC counsel referred the panel to *Administrative Law in Canada, Fifth Edition*, by Sara Blake for a correct statement of the law. At p. 119 the author states: “An allegation of bias should be made first to the tribunal member.” At page 120, the author states: “When an allegation of bias is made, the tribunal should rule on the allegation. If it rules that it is not biased, it may continue with the hearing. It is not obliged to halt the proceeding.” This statement of the law was not contradicted by counsel for the Respondents and accordingly the Panel decided that it was the proper Panel to hear the matters raised in item (b) of the motion and it should not be determined by a different panel.

¶ 14 On the second issue, the Respondents’ counsel took the position that this Panel did not have the jurisdiction to remove counsel and the hearing should be stayed while it brought the issue to the OSC or to the courts. IIROC counsel asserted that this Panel could and should decide the issue. This appears to be a unique issue and no specific rule or precedent was cited for either position. There is nothing in the IIROC Rules of Practice and Procedure dealing with removal of counsel, although Rule 3.2 deals with a party changing its counsel and Rule 3.3 deals with withdrawal of counsel. However Dealer Member Rule 20.2 and Rule 1.5(a) of the Rules of Practice and Procedure give the Panel broad procedural powers. This panel decided that these Rules gave it jurisdiction to remove counsel if it saw fit to do so.

¶ 15 Furthermore, IIROC Rule 8.3 states that “A motion shall be heard...by the Hearing Panel [the panel hearing the disciplinary matter] after the commencement of the proceeding.” This confirms our decision that this Panel is the proper forum to decide both jurisdictional issues.

¶ 16 These conclusions are also supported by case law which IIROC counsel presented to the Panel in its Book of Authorities in opposition to Respondents’ motion, in particular a decision of the OSC on October 23, 2007, *Re TSX, Market Regulation Services Inc., Northern Securities Inc., Vic Alboini and Chris Shaule*, and cases referred to therein. Essentially these cases determined that administrative tribunals can examine the boundaries of their jurisdiction and in fact are the best and most appropriate forums in which to do so, at least in the first instance and that their decisions are then reviewable on a correctness standard.

## **6. Adjournment of Motion Hearing**

¶ 17 The Respondents’ counsel advised the Panel that he needed more time to properly prepare materials in support of the motion and requested an adjournment of the hearing in order to do so. IIROC counsel responded that the hearing should not be adjourned while Respondents’ counsel determined when he might be ready to

proceed with his motion. After a short break, Respondents' counsel advised that he would be ready to proceed with the motion on May 18<sup>th</sup>. This Panel recognized that fair process required not only fairness to the Respondents by allowing them sufficient time to properly prepare and present their case, but also fairness to IIROC and to the public in having disciplinary matters dealt with expeditiously. The Panel decided that the short adjournment requested by the Respondents would not offend any fairness to IIROC or the public interest, and accordingly granted an adjournment from May 15<sup>th</sup> until May 18<sup>th</sup>, at which time the motion would be argued on its merits. Counsel also agreed that The Respondents would deliver their supporting material by 2:00 PM on May 16<sup>th</sup>, IIROC counsel would deliver its materials by 2:00 PM on May 17<sup>th</sup> and the hearing of the motion would proceed on May 18<sup>th</sup> at 10:00 AM. Arrangements were also made to have copies of all materials delivered to the Panel members.

## **7. The Motion**

¶ 18 Before commencing to hear the motion on its merits, IIROC counsel introduced additional counsel, Mr. Brian Greenspan of Greenspan Humphrey Lavine, who would deal with the motion for IIROC. The hearing of the motion then proceeded. Mr. Kaufman advised the panel that the only matters in the motion which the Respondents would argue on the merits were items (b) requesting a stay, and (e)(iv), the need for another panel to hear the motion. Items (a), adjournment, (e)(i) scheduling, and (f) delivering materials, had all been decided on May 15<sup>th</sup>; Mr. Kaufman advised the panel that he would not pursue item(c), jurisdiction to remove counsel or item (d), removal of counsel, but would deal with them on an appeal basis; item (e)(ii) was moot since only the parties and their counsel were present, and Mr. Kaufman advised that they would decide whether to pursue item (e)(iii), sealing order, in another forum.

### **Item (b), Stay of the hearing**

¶ 19 Three grounds for staying the hearing were asserted by the Respondents,

1. procedural unfairness,
2. reasonable apprehension of bias, and/or
3. abuse of process.

### **Breach of Confidentiality**

¶ 20 As a threshold issue, the Respondents asserted that the introduction of the RTR and its conclusion that NSI was a high risk firm into evidence constitutes a breach of confidence which cannot be cured and the proper remedy is a stay of the proceedings. It must be noted that no RTR was ever put into evidence and IIROC has advised the hearing that it did not intend to do so. Consequently this motion only concerns the reference in Ms Jensen's testimony to NSI being rated as a high risk firm. This came in response to a question regarding a reference in an email from a Michael Prior which mentioned high risk ratings. This Panel had already ruled that the RTR and its contents are subject to confidentiality and cannot be evidence in this hearing, but that facts or information which are the same or similar to the information contained in the RTR are not subject to confidentiality and may properly go into evidence. Also relevant to Respondents' position is that they are also subject to confidentiality of the RTR and its contents and therefore cannot refer to it to contradict the evidence given by Ms Jensen.

¶ 21 The issue is whether the breach of confidentiality gives rise to a stay of proceeding as suggested by the Respondents or is merely an evidentiary matter and the improper evidence can be disregarded by the Panel. In its Memorandum of Argument, IIROC has stated that it "does not seek to rely upon any classification of Northern in an RTR as high risk and invites the Panel to expressly disregard any evidence relating to this inference that might be drawn from the evidence of Maureen Jensen or Sasha Latka." Consequently, if the breach of confidence by Ms Jensen (and Mr. Latka, if any) is an evidentiary matter, it will be given no weight by the panel.

### **Procedural Unfairness, and/or Abuse of Process**

¶ 22 In support of its position that the breach of confidence should give rise to a stay of the hearing, the

Respondents cited *Slavutych v. Baker et al* [1976] 1 SCR 254. In *Slavutych*, the appellant, a university professor, was dismissed following the recommendations of an arbitration tribunal. based on some highly derogatory remarks made by the appellant in a confidential form called a “Tenure Form Sheet”; the form was completed by the appellant on the express understanding that it was to be treated confidentially and destroyed after the tenure committee had considered it. It was not destroyed and was the basis on which the arbitration board justified his dismissal.

¶ 23 The court ruled that the confidential tenure form should have been ruled inadmissible and since it was the whole basis for the dismissal, the dismissal should be set aside. In our case, the reference to NSI being rated a high risk firm in an RTR was not “highly prejudicial” as stated by the Respondents in their argument in support of the motion, and was only one of many pieces of evidence to be considered by this panel in deciding the various allegations but will be disregarded by the Panel in any event. It is far from being the basis on which the allegations will be decided.

¶ 24 Consequently *Slavutych* does not support the Respondents’ request for a stay.

¶ 25 The Respondents go on to state that the inclusion of the confidential evidence before the Panel constitutes an abuse of process. The necessary remedy for such abuse is a stay. There is a general duty of fairness on all public decision makers and it is “trite that the Panel must accord the Member procedural fairness”, citing *Deeb v. IIROC*, 2012 ONSC1014 (CanLii) and *Blencoe V. B.C.*, [2000]2 S.C.R. 307 at paras 107-109. The requirement of procedural fairness is trite law and does not require any further review here. In *Blencoe* the issue was whether a delay in a human rights proceeding amounted to an abuse of process and whether a stay of proceedings was the appropriate remedy. *Blencoe* is factually distinguishable from our case, but *Blencoe* is instructive on the doctrine of abuse of process and when the remedy of a stay of proceedings should apply. For example at paragraph 180, LeBel J. states:

“Whoever asks for a stay of proceedings carries a heavy burden....The stay of proceedings should not generally appear as the sole or even the preferred form of redress.... A more prudent approach would limit it to those situations that compromise the very fairness of the hearing and to those cases where the delay in the conduct of the process leading to it would amount to a gross or shocking abuse of the process.... For a stay to be appropriate as a remedy for an abuse that has already occurred, the abuse must rise to a level such that the mere carrying forward of the case will offend society’s sense of justice...”

¶ 26 In our case, the admission of the reference to the high risk rating in the RTR (which is merely IIROC’s rating of NSI, and does not establish as a fact that NSI is high risk), in the context of the large volume of evidence to be considered, particularly where it can and will be ignored, does not in any way “compromise the very fairness of the process”, “amount to a gross or shocking abuse of the process”, or “offend society’s sense of justice”. This breach of confidentiality should be treated as an evidentiary matter and will be ignored by this panel. Granting a stay of proceedings is not warranted.

¶ 27 The Respondents also cite *R. v. Jewitt* [1985] 2 S.C.R. 128, and *Chyz v. Appraisal Institute of Canada* [1985] S.J. No. 820 in support of their motion. We have reviewed those cases which do not express any principles which are different from those in *Blencoe* and do not change the application of those principles to our case.

¶ 28 The Respondents also stated that the” inclusion of irrelevant and inadmissible evidence, as in this case, amounts to a breach of jurisdiction by the Panel and an abuse of the Panel’s process”, citing *Dallinga v. Calgary*, [1976] 1 W.W.R. 319; 1975 CarswellsAlta 93. *Dallinga* is distinguishable from our case in that the Board in *Dallinga* admitted and took into account irrelevant evidence which it was not entitled to do under its statute. The headnote summarizes the findings as follows:

“... The admission of irrelevant evidence which was highly prejudicial, coupled with the fact that the Board did not have to supply reasons for its decision so it was impossible to determine what weight was given to the irrelevant evidence, resulted in the Board exceeding its jurisdiction. It is not the admission of any irrelevant evidence that will result in an excess of jurisdiction but where the court can reasonably

conclude that the irrelevant evidence was admitted and taken into account in reaching its decision an excess of jurisdiction has taken place and the Board's decision must be set aside."

¶ 29 In our case the RTR evidence is one piece among many and will not be taken into account by this panel. Consequently, *Dallinga* does not support the Respondents' position.

¶ 30 The Respondents next take the position that "...the self-determined conclusionary findings in the RTRs prejudice the very findings this hearing panel is being asked by IIROC to determine as against the Dealer Member, in circumstances where the Dealer Member is unable to rebut those findings."

¶ 31 That is simply factually incorrect. None of the Counts in the NOH ask or require the panel to find that the Dealer Member was a high risk firm. If that conclusion contained in an RTR were to be considered by the panel, it would merely be one of a number of pieces of evidence which the panel would consider. But it is not even going to be taken into account at all and so there is nothing for the Respondents to rebut, and no abuse of process has occurred as a result of the testimony by Ms Jensen or Mr. Latka.

#### Reasonable Apprehension of Bias

¶ 32 The last argument of the Respondents is that "...the inclusion of irrelevant and prejudicial evidence also creates irreparable bias. The only remedy for such bias is a stay." The Respondents Argument then quotes from de Grandpre J. in *Committee for Justice v. National Energy Board* [1978] 1 S.C.R. 369 at p. 394 as the proper test for determining whether there exists a reasonable apprehension of bias:

"the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information...the test is what would an informed person, viewing the matter realistically and practically- and having thought the matter through- conclude. Would he think that it is more likely than not that the adjudicator, whether consciously or unconsciously, would not decide fairly."

¶ 33 This is a correct expression of the test to be applied in our case. While de Grandpre J.'s judgment was a dissent, it is a clearer expression of the test than that of the majority, delivered by Laskin C.J., which also stated that the test is "grounded in a firm concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and I think that emphasis is lent to this concern in the present case by the fact that the National Energy Board is enjoined to have regard for the public interest." Both the test and the basis for the test are applicable to this hearing.

¶ 34 This test for a reasonable apprehension of bias is an objective one, as noted by the Respondents, and it is on this objective basis that this Panel has the test in our case.

¶ 35 The Respondents then assert that, applying this test, there exists in these proceedings a reasonable apprehension of bias, citing *Slavutych* (supra) and *Kaburda v. College of Dental Surgeons of British Columbia*, [1979] B.C.J. No. 488 (B.C.C.A.) and *Lee v. Canadian Kennel Club Appeal Committee*, 2003ABQB 51.

¶ 36 Typically reasonable apprehension of bias cases fall into four categories, (1) financial interest in the outcome, (2) relationships with persons involved in the case, (3) outside knowledge or involvement with matters in dispute, and (4) inappropriate comments or behavior. The Respondents do not allege that this case falls within any of those categories and none appear to be applicable. In the Panel's view, the cases cited by the Respondents do not support their position. *Slavutych* did not deal with reasonable apprehension of bias. It dealt only with the consequences of admitting confidential information into evidence, and is otherwise inapplicable to our case as stated above.

¶ 37 Respondents' Argument states that, "pursuant to... *Slavutych*, the inadmissible evidence may not inform the Panel's decision; yet the evidence is now part of the record. In as much as one cannot unscramble an egg, the Panel cannot un-hear the prejudicial evidence." As already noted, in *Slavutych* the impuned evidence was the whole basis for the decision in contrast to our case where, if the impuned evidence were to be considered which it is not, it would be merely one piece of evidence among many; and there are numerous situations where a court or tribunal hears evidence which it is required to ignore and is quite capable of doing so. In these cases

the impuned evidence does not give rise to a stay of proceedings but is treated as an evidentiary matter which the tribunal can choose to ignore. The IIROC Memorandum of Argument and Book of Authorities refer to several authorities supporting this position which need not be further reviewed here. The Panel can and will ignore the high risk rating of NSI referred to in Ms Jensen's (and Mr. Latka's) testimony; it will have no affect on our decision.

¶ 38 *Kaburda* is of no help to the Respondents. It concluded that there was a reasonable apprehension of bias based on the participation of a law firm in the disciplinary proceedings in a situation where there was an apparent conflict of interest in that the law firm was acting for a party contrary in interest to the party against whom complaints had been brought. *Kaburda* appears to fit into one or both of categories (2) and (3) above and is so substantially different from our case as to be inapplicable. Similarly *Lee* is not applicable to our case in that it involved irrelevant and improper evidence solicited by the committee, which the court concluded influenced the committee.

¶ 39 It is this Panel's decision that no reasonable person could conclude that this Panel, whether consciously or unconsciously, would not decide fairly. There is no reasonable apprehension of bias and no basis for a stay of these proceedings.

¶ 40 It is the decision of this Panel that the evidence of Ms Jensen, that NSI was rated as a high risk firm, contained in an RTR (and any such evidence in Mr. Latka's testimony) does not give rise to a stay of proceedings on any of the grounds invoked by the Respondents, procedural unfairness, reasonable apprehension of bias and/or abuse of process. Rather it is to be treated as an evidentiary matter. If the Panel had known about its confidentiality prior to it being referenced in Ms Jensen's testimony, it would have been ruled inadmissible; since its confidential nature was disclosed after going into evidence it will be given no weight by the Panel. Similarly, any such reference in Mr. Latka's testimony will be ignored by this Panel.

#### **Item (e)(iv), Jurisdiction of this panel re confidentiality**

¶ 41 Although this Panel has already ruled that it has jurisdiction hear this motion, Mr. Kaufman said he wished to readdress the matter. The last paragraph of the Respondents' Argument states that:

“A regulatory body does not have the jurisdiction to determine whether or not privilege or confidentiality exists with respect to information. Accordingly, any such determination must be made by the court. The only way to determine the issue is to review the confidential document, which in this case cannot be done by the Hearing Panel.”

¶ 42 In support of their position, the Respondents cited *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574. In *Blood Tribe* an employee who had been terminated requested information from her employer. The request was denied and the employee filed a complaint with the Privacy Commissioner (“PC”) who requested the records from the employer. The employer supplied all the records except those over which it claimed solicitor-client privilege. The PC then ordered production of the privileged documents under S. 12 of the Personal Information Protection and Electronic Documents Act (“PIPEDA”) which confers the power to compel the production of any records “in the same manner and to the same extent as a superior court of record” and to “receive and accept any evidence and other information...whether or not it is or would be admissible in a court of law”.

¶ 43 On judicial review of the PC's decision, the issue, as expressed by Binnie J. is to resolve a conflict between the PC's statutory power to have access to personal information about a target of a complaint, and the right of the target to keep solicitor confidences confidential. The Supreme Court of Canada (SCC) held that, “when the appropriate principles of statutory interpretation are applied to the general language of PIPEDA, the right of ...the target of the complaint to keep solicitor-client confidences confidential must prevail.” The PC did not have power to compel production of documents over which solicitor client privilege was claimed.

¶ 44 The reasons were as follows. First, general words of a statutory grant of authority, including S. 12 of PIPEDA do not confer a right to access solicitor-client documents, even for the limited purpose of deciding whether the privilege is properly claimed. That role is reserved for the courts. Express statutory language is

necessary to pierce the privilege and that does not appear in S.12 of PIPEDA.

¶ 45 Second, adjudication of the privilege claim by the PC, “who is an administrative investigator and not an adjudicator, would be an infringement of the privilege.” In the PC’s view, piercing the privilege would become the norm rather than the exception in her every-day work. Even the courts will decline to review solicitor-client documents to adjudicate the existence of privilege unless it is necessary to fairly decide the issue in dispute.

¶ 46 Third, there are other less intrusive remedies including referral to the Federal Court.

¶ 47 It is the decision of this Panel that *Blood Tribe* is inapplicable to our case for several reasons. First and foremost, our case involves a disclosure of confidential information and not a breach of solicitor-client privilege. As stated by the SCC, “Solicitor-client privilege is fundamental to the proper functioning of our legal system....people who have a legal problem will not make a clean breast of the facts to a lawyer without an assurance of confidentiality ‘as close to absolute as possible’”, citing *R. v. McClure* [2001] 1S.C.R. 445, 2001 SCC14 and *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, [2002] 3 S.C.R. 209, 2002 SCC 61. Information which is subject to solicitor-client privilege is treated as more sacrosanct than confidential information. For example, in *Stevens v. Canada (Prime Minister)* (1998), 161 D.L.R. (4<sup>th</sup>) 85, the court states at para. 16:

“...solicitor-client privilege is not identical with a guarantee of confidentiality. It is more accurate to say that the privilege is a type of confidentiality; the former is narrow and very strong, whereas the latter is broader and more prone to exception...”

and at para. 21:

the protection of solicitor-client privilege “is very strong, as long as the person claiming the privilege is within that framework. If it is merely a claim for confidentiality, the protection, though broader, is not absolute, and must be determined with a different set of criteria.”

¶ 48 Second, the SCC emphasized that the PC was an administrative official not an adjudicator, and determined that as between the courts and an administrative official, the courts should determine the issue of privilege. This Panel is an adjudicative body and therefore our case is distinguishable from *Blood Tribe* in this respect.

¶ 49 Third, the *Blood Tribe* decision was based upon the interpretation of specific statutory powers contained in S. 12 of PIPEDA. This Panel’s powers to deal with disclosure of confidential information are based upon the IIROC rules.

¶ 50 It is possible that a court dealing with a judicial (not an administrative) body such as this Panel, simple breach of confidentiality (not solicitor-client privilege) and the IIROC rules (not S.12 of PIPEDA) would decide that this Panel does not have such jurisdiction. But there is nothing in *Blood Tribe* that persuades this Panel to change its earlier decision that it has the jurisdiction to determine whether or not confidentiality applies to information in issue in our case and the implications of that breach of confidentiality. In fact the distinctions between *Blood Tribe* and our case, plus our reading of the other authorities referred to, lead us to conclude that the courts would affirm our earlier ruling if they were to review it.

## **8. Decision**

¶ 51 It is the decision of this Panel that the motion of the Respondents contained in the NOM is dismissed (including items (c), (d) and (e)(iii) which Respondents’ counsel chose not to deal with), but excluding items (a), (e)(i) and (f) which were decided prior to the hearing of the motion and (e)(ii) which is moot.

Dated as of May 18 2012

Fred Webber- Chair

F. Michael Walsh-Member

