

Re Malley

IN THE MATTER OF:

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

and

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

and

Brian Andrew Malley

and

Christine Marie Malley

2014 IIROC 10

Investment Industry Regulatory Organization of Canada
Hearing Panel (Alberta District)

Heard: January 30, 2014 in Edmonton, Alberta
Reasons for Decision: February 24, 2014

Hearing Panel:

Alan V.M. Beattie, Q.C. – Chair, Neil Murphy and William Welton

Appearances:

David McLellan - Senior Enforcement Counsel for IIROC

Julie Gagnon - Counsel for the Respondents Malley

Brian Andrew Malley and Christine Marie Malley (the Respondents did not attend)

REASONS FOR DECISION ON APPLICATION FOR STAY OF PROCEEDINGS

1. INTRODUCTION

¶ 1 Brian Andrew Malley and Christine Marie Malley (“the Respondents”), by Notice of Motion, supported by an Affidavit, both dated January 15, 2014, seek a stay of the IIROC disciplinary proceedings pending the final determination of criminal proceedings against Brian Malley. Counsel for the Respondents forwarded to IIROC and to the Panel members written submissions with attachments and case authorities. Counsel for IIROC forwarded to Counsel for the Respondents and to the Panel members written submissions with attachments and case authorities.

¶ 2 A Hearing was conducted in Edmonton on January 30, 2014 with oral arguments made by both Counsels to the Panel, based on the written submissions. At the conclusion of the arguments, after a caucus, the Panel advised that, by unanimous decision, the application for a stay of proceedings was dismissed, with written reasons to follow.

¶ 3 The Hearing regarding the alleged misconduct by the Respondents is scheduled for March 3, 4 and 5,

2014, in Edmonton, and the criminal proceedings are scheduled to take place from January 26 to March 6, 2015.

¶ 4 Brian Malley was charged, on May 26, 2012 with first degree murder and two related charges, in relation to the death of VS who had been a client of Brian Malley at the Red Deer, Alberta branch office of Assante Capital Management Inc. (“Assante”).

¶ 5 On May 30, 2012, staff of IIROC (“Staff”) commenced an investigation into the conduct of Brian Malley as a Registered Representative and of Christine Malley, his supervisor and Branch Manager. Christine Malley is the wife of Brian Malley. Staff issued a Notice of Hearing dated November 6, 2013, alleging misconduct against the Respondents. The Notice of Hearing alleged that the Respondents had failed to cooperate with IIROC in its investigation. The allegations of misconduct against Brian Malley (summarized) were failure to know your client (12 clients), unsuitable trading recommendations (10 clients) and improper discretionary trading (7 clients). The allegation of misconduct against Christine Malley was that she failed to exercise her supervisory responsibilities with respect to the accounts of 12 clients. The Notice of Hearing does not contain allegations of misconduct concerning the handling by Brian Malley of the accounts of VS.

¶ 6 The Respondents refused to attend interviews arranged by IIROC and advised, through Counsel, that they intended to seek a stay of the IIROC proceedings against them pending the conclusion of the criminal proceedings against Brian Malley. Counsel for the Respondents advised at this Hearing on the issue of a stay that the Respondents are prepared to cooperate with IIROC once the criminal proceedings are finalized. IIROC Counsel advised, at this Hearing, that Staff had offered to not ask the Respondents, in the interviews, any questions regarding VS but the Respondents rejected the offer and refused to attend interviews.

¶ 7 Some of all of the investors who are the persons to which the allegations of misconduct against the Respondents relate, and others, have commenced civil claims against the Respondents and Assante (Court of Queen’s Bench of Alberta file number 1210 001029); there is an application to have those proceedings certified as a class action. An application was made in that action by the Malleys to have those actions stayed pending disposition of the criminal proceedings. The application was dismissed, apparently without written reasons, in an Order of Associate Chief Justice Rooke dated June 4, 2013, which also dealt with confidentiality issues.

2. SUBMISSIONS OF THE RESPONDENTS

¶ 8 The pending criminal proceedings and the prosecution’s theory as to Brian Malley’s liability are interrelated to a major degree with issues apparent on the face of the IIROC Notice of Hearing. A stay of the IIROC proceedings against the Respondents pending the final determination of the criminal proceedings is necessary for the interests of justice. (At this Hearing, in her rebuttal submissions, Counsel submitted that if the Panel is concerned about the criminal proceedings being further extended by an Appeal, the Panel could consider granting a stay to be in effect only to the end of the criminal trial.)

¶ 9 The Respondents will be required to give evidence at the IIROC Hearing in order to properly respond to the alleged contraventions. In doing so the Respondents may disclose information that may assist or be relied upon in the prosecution of the criminal proceedings against Brian Malley. That evidence will prejudice Brian Malley’s ability to make a full and complete answer in defence to the criminal proceedings against him. The protections available to Brian Malley in the criminal proceedings will not adequately remedy or protect against such prejudice. The recent Supreme Court of Canada decision in *R. v. Nedelcu*, 2012, S.C.J. No. 59 offers no protection to individual’s in these particular circumstances, hence there are increased concerns about the Respondents testifying in the IIROC proceedings in advance of the criminal trial.

- (a) Non-incriminatory evidence given by Brian Malley in the IIROC proceedings may be used against him in the criminal proceedings for the purposes of impeaching his credibility;
- (b) Voluntary evidence given by Brian Malley in the IIROC proceedings may be used against him in the criminal proceedings.

¶ 10 There is sufficient media and public interest in the IIROC proceedings and the criminal proceedings to raise a reasonable apprehension of prejudice to Brian Malley given that the IIROC proceedings are open to the public.

¶ 11 Situations have arisen which heighten the concern of the Respondents about testifying in the IIROC proceedings prior to the criminal proceedings being finalized:

- (a) The Crown has tried to obtain information from civil proceedings that have been commenced against the Respondents. Documents were inadvertently disclosed by the Clerk of the Court to the RCMP who had made the request for documents on behalf of the Crown during the Preliminary Inquiry. [*Panel's Note: Although the application for a stay of proceedings in the civil action was dismissed, Associate Chief Justice Rooke, on June 14, 2013, issued an Order (above) regarding confidentiality of information obtained from the Malleys in the civil proceedings, either as a full non-disclosure direction or "without prior authorization of a judge of the Court of Queen's Bench of Alberta".*]
- (b) During the Preliminary Inquiry, the Crown called an expert witness, who is a member of the IIROC Hearing Committee (not a member of this Hearing Panel). There is a publication ban with respect to the Preliminary Inquiry but it can be stated that the expert witness prepared a written Expert Opinion for the Crown and has expressed opinions about the conduct of the Malleys. There is a concern that the witness will use additional information available from the IIROC proceedings in preparing a further opinion or to give her evidence at the criminal trial.

¶ 12 The test for a stay is:

- (i) Whether there is a serious question to be tried;
- (ii) Whether the applicant would suffer irreparable harm if the application is refused; and
- (iii) Which party will suffer the greater harm from the granting or refusal of the stay.

IIROC re John Anastasious Collias (2008) IIROC No. 9, para 10 (based on cases including the decision of the Supreme Court of Canada in *RJR MacDonald Inc. v. Canada (Attorney General)* (1994) S.C.R. 311.

i. Whether there is a serious question to be tried

¶ 13 There can be no doubt that there are serious questions to be tried in both the criminal proceedings and the IIROC proceedings.

ii. Whether the applicant would suffer irreparable harm if the application is refused

¶ 14 There is a very real risk Brian Malley will suffer irreparable harm if the application is refused. The evidence the Respondents will give in the IIROC proceedings could be used by the Crown in the criminal proceedings. This is in direct contradiction of an accused's right against self-incrimination, protected in the *Charter*. There is a real concern about the protection available to Brian Malley in the criminal proceedings as a result of the *R. v. Nedelcu* decision (above). That decision brings into question whether the extent of protection under the *Charter* (s. 13) against incrimination, which was affirmed in *R. v. Dubois* (1985) 2 S.C.R. 350 (SCC), still exists.

¶ 15 The case in the criminal proceedings against Brian Malley is based on circumstantial evidence. Any evidence given by the Respondents in the IIROC proceedings may result in the disclosure to the Crown of certain aspects of Brian Malley's defence in the criminal proceedings. It is clear that the Crown in the criminal proceedings is attempting to establish a link between the investment advice given by Brian Malley to VS and her ultimate death. Any evidence given by Brian Malley in relation to either VS or any of the other investors will reveal valuable information to the Crown in the criminal proceedings. Having knowledge of the evidence given by the Respondents the Crown could then conduct investigations to test the veracity of the evidence as well as the theory of the defence itself.

iii. Which party will suffer the greater harm from the granting or refusal of the stay

¶ 16 This test involves a balancing act as to who will suffer greater harm from the granting or refusal of the stay. It is submitted that the complainants (i.e. the investors) in this case will not suffer irreparable harm. First, they are merely witnesses in this matter and not parties. While there is some inconvenience to adjourning a

hearing, this is much more minor than the potential for irreparable harm faced by Brian Malley in the criminal proceedings. Further, any complainants who have suffered financial damages, have recourse through the civil proceedings. Although an application for a stay was made in the civil proceedings, it was denied by the Court. The test for a stay in a civil proceeding is more onerous than in this case. In disciplinary proceedings, the appropriate test for a stay includes whether or not there may be a harm to the public.

¶ 17 There is no irreparable harm to IIROC or to the public. At most, the proceedings will be delayed. The criminal proceedings are scheduled for January - March, 2015. While IIROC was aware of the issues in June 2012, no charges were laid against the Respondents until November 2013, and as such, even by the standards of IIROC, it is submitted that there is no urgency to having this matter heard.

¶ 18 The Respondents are not registered as members. There is no threat to the public with respect to any ongoing registration of the Respondents.

¶ 19 The IIROC Notice of Hearing, although indicating that the hearing is not considering the matter and complaints on behalf of VS, mentions and indicates that IIROC has conducted an investigation in that matter. Further, IIROC publicly advises that it works cooperatively with policing agencies, by sharing information and, in some cases, coordinating investigations.

¶ 20 The rationale for granting a stay of proceedings pending the determination of interrelated criminal proceedings has been described as follows:

25...In cases where protection is clearly required, the discretion will be exercised on the basis that a fair trial of the accused and a just determination of the criminal charges cannot be made unless proceedings are stayed.

Haywood Securities Inc. v. Inter-Tech Resources Group Inc. (1986) 24 D.L.R. (4th) 724 (B.C.C.A.)

¶ 21 Cases in which stays or adjournments have been granted include:

Law Society of Upper Canada v. Legault (2004) LSDD No. 14

Other situations which were relied upon by the Hearings Management Tribunal of the Law Society were *Eagleson and the Law Society* (no citation was provided) and *Amourgis and Law Society of Upper Canada* (1984), 12 D.L.R. (4th) 759 (Ont. H.C.).

SJS and Discipline Hearing Committee of the College of Physicians and Surgeons of Saskatchewan (1998), 162 D.L.R. (4th) 759 (Sask Q.B.)

The Court followed *Laxton Holdings Ltd. et al v. Non-Marine Underwriters, Lloyd's, London* (1987), 56 Sask R. 152 (C.A.)

Howatt v. College of Physicians and Surgeons of Ontario, (2003-01-21) ONSCDC File No. 720-2000 (Ont. Div. Crt.)

Terry James Minnie and Raymond Patrick Shaw, Hearing Notice - Adjournment (2005) SCSECCOM 238 (British Columbia Securities Commission)

IIROC re Morrison (2008) IIROC No. 18

3. SUBMISSIONS OF IIROC

¶ 22 Public interest demands that allegations of serious securities misconduct such as those alleged against the Respondents should be dealt with expeditiously, and a stay of proceedings in the present case would be contrary to the principles of securities regulation and administrative law.

- (a) The mandate of securities regulators is to protect investors and foster a fair and efficient capital market and public confidence in that market. Persons who carry on the business of trading in securities know or ought to know that the industry is heavily regulated.

British Columbia Securities Commission v. Branch (1995) S.C.J. 32 at para 57 (S.C.C.)

- (b) A regulator's ability to respond efficiently and effectively to non-compliance in a dynamic capital market is a fundamental requirement for a properly functioning industry. An appropriate level of procedural fairness must therefore be balanced against the need to ensure that the administrative efficiency of the system is not compromised. It is in the public interest to maintain a system of securities regulatory enforcement that effectively and expeditiously deals with allegations of capital market misconduct to protect the public.

Arbour Energy Inc. (2009) ABASC 366 at paras 53-57 (Alberta Securities Commission)

- (c) The allegations brought against the Respondents by Staff in this matter allege multiple violations of IIROC's Rules which are central to an RR's role as an advisor to his clients, and to the supervision of his activities. They are serious allegations, reflecting, if proven, conduct that is unbecoming of a registrant.
- (d) To achieve the regulatory mandate of IIROC, it is necessary that these matters be dealt with expeditiously. A lengthy delay in an enforcement proceeding, which could last for a period of years, would be detrimental to the public confidence in the securities market and must therefore be avoided. The need to deal expeditiously with allegations of misconduct is of particular concern in a case such as this where the allegations against the Respondents are serious and involve numerous complainants.

IDA re Allen and Moriarty (2001) I.D.A.C.D. No. 8 at para 11

- (e) For that reason, courts generally find that regulatory proceedings initiated by securities regulators can and should take place prior to the criminal proceedings. A regulatory proceeding should not be stayed except in extraordinary and exceptional circumstances.

Robinson v. Ontario Securities Commission (1993) O.J. No. 3042 (Ont. Div. Ct.)

Stickney v. Trusz (1973) O.J. No. 2279 (Ont. H.C.J.), aff'd (1974) O.J. No. 584 (C.A.), leave to appeal to S.C.C. refused 28 C.R.N.S. at 127n paras 9 and 12

- (f) Staying a disciplinary proceeding in the absence of extraordinary and exceptional circumstances is inconsistent with the protective purpose of securities regulation. It is squarely within IIROC's mandate to regulate and enforce rules applicable in the securities industry.

¶ 23 There are sufficient safeguards available in the criminal justice system to protect Brian Malley's right to a fair trial, and it is incumbent upon the trial judge in a criminal proceeding, and not IIROC, to ensure that he is afforded his right to a fair criminal trial.

- (a) The Respondent has the right not to have incriminating evidence that he was compelled to give in one proceeding used against him in another proceeding, as he would be entitled to claim effective subsequent derivative use immunity with respect to the compelled testimony or other appropriate protection.

British Columbia Securities Commission v. Branch (above) at para 7

- (b) An applicant for a stay of proceedings must show some specific or particular way in which he will be prejudiced in the conduct of the criminal trial.

Saccomanno v. Swanson (1987) CanLII 3304 (AB QB) at para 18

- (c) In **Robinson** (above) the Ontario Divisional Court expressly followed the direction of the Court of Appeal for Ontario and rejected the argument that disclosure of a Respondent's defence strategy in a disciplinary hearing would "tip their hands" to the Crown in a subsequent criminal proceeding. The same approach was adopted by an IDA Hearing Panel in **Allen and Moriarty** (above). The Panel stated, at para 13:

We recognize the Respondents' rights under the Charter. But, as was said by the Divisional Court in *Robinson*, "[t]he arguments relevant to the Charter can be considered and dealt with if, as and when they arise during the course of the criminal proceedings."

The Alberta Securities Commission dealt with a similar argument in *Re Hennig* 2006 LNABASC 479 at para 67. The Commission noted that the possibility of revealing possible defenses in a criminal trial is an insufficient ground to halt all other proceedings, as such concern neither amounts to extraordinary and exceptional circumstances nor establishes irreparable harm to the Respondent. It further noted that the trial judge in a criminal proceeding has the ability and responsibility to address such concerns to ensure that defendants are afforded their rights to a fair trial. (See also *Stickney*, above at para 11.)

(d) Previous IIROC Hearing Panels have considered applications for stays of proceedings / adjournments pending finalization of criminal proceedings. In *Re Schoer* 2011 IIROC 21 certain business misconduct was alleged against the Respondent, contrary to Dealer Member Rule 29.1. The Respondent argued that it would be unfair to proceed against him prior to his criminal trial as the disciplinary hearing would prejudice his right to a fair criminal trial, in that "he would be forced to disclose sensitive information which, he said, would inevitably reach the prosecutor in his criminal trial and, thus, redound to his detriment". The Panel rejected this argument and ordered the IIROC Hearing to proceed.

¶ 24 The law is clear that even where IIROC disciplinary proceedings and criminal proceedings are based on the same facts, a stay is only granted in very extraordinary and exceptional circumstances. The Respondents have not put forward any evidence that the proceedings here are based on the same facts, let alone that the extraordinary and exceptional remedy of a stay of proceedings is warranted. The Respondents have only made a bald assertion that the criminal proceedings are "interrelated to a major degree with issues" in the Notice of Hearing. They have not provided any particulars of the alleged interrelation. In contrast, IIROC Staff have provided sworn evidence that the Notice of Hearing and the criminal information concern the affairs of different clients of the Respondent. The alleged victim in the criminal proceeding, VS, does not form any part of IIROC's case against the Respondent. It is difficult to see how the Respondent could be prejudiced by the IIROC proceeding given that he is not compelled to testify in it, and the Hearing does not involve his dealings with the alleged victim, VS.

¶ 25 Staff respectfully request that the Respondent's motion be dismissed.

4. REASONS FOR DECISION

¶ 26 We confirm our oral decision, given at the conclusion of the January 30 Hearing, that the application by the Respondents for a stay of the IIROC proceedings pending finalization of the criminal proceedings is dismissed. We stated that we are not persuaded that the Respondents have established that the tests have been met of showing the same facts exist or that extraordinary or exceptional circumstances exist. Following are our formal Reasons for Decision.

¶ 27 It was agreed by Counsel that the Panel has jurisdiction to hear argument and decide on whether to grant a stay of proceedings, pursuant to Rule 1.5 of the IIROC Rules of Practice and Procedure, and IIROC decisions in which the issue has been considered (e.g. *IIROC re Morrison*, above).

¶ 28 We accept, and adopt, virtually in their entirety, the submissions of Counsel for IIROC (above). In our view the Respondents have failed to establish the basic premise that the facts in the IIROC proceedings and the facts in the criminal proceedings are the same, or similar. The fact that IIROC has not alleged any misconduct by the Respondents with respect to VS, virtually means that the Respondents have been given a stay of proceedings by IIROC insofar as VS is concerned. The obvious defence which the Respondents can be expected to mount with respect to the overall failure to cooperate allegation is that they were acting on the advice of Counsel due to the criminal proceedings. The merit of that defence will have to be assessed at the IIROC hearing on the merits on March 3-5, 2014, but any evidence to that effect given by Brian Malley can certainly not prejudice his possible defence, or theory of defence, in the criminal proceedings.

¶ 29 We reject the argument of the Respondents that the IIROC proceedings and the criminal proceedings are based on the same facts. The IIROC allegations of misconduct against the Respondents relate to clients other than VS. It is very difficult to imagine how any evidence which the Respondents may give in the IIROC proceedings regarding Brian Malley’s business with those clients, even if there is an admission of some or all of the IIROC allegations against him, could possibly prejudice his defence in the criminal proceedings which alleges first degree murder of VS. The facts in the IIROC proceedings and the criminal proceedings not being the same, or even similar, clearly removes this case from the threshold of “extraordinary and exceptional circumstances” being required in order to warrant the granting of a stay of proceedings.

¶ 30 The cases relied upon by IIROC (above) contain many statements which are pertinent in the present case.

- (a) In *IDA re Allen* (above) the panel stated, in dismissing an application to adjourn the hearings until the criminal charges had been dealt with, stated at paras 11-13:

11 These are serious allegations, reflecting, if proven, practices contrary to the interests of the public. In our view, in order to achieve the objects of the Constitution cited above, it is necessary that these matters be inquired into by the District Council with dispatch. A lengthy delay - and we are talking about many months, if not years - is potentially harmful and must, therefore, be avoided. The O.S.C., in *Robinson*, took the same point of view: “The public expects and requires that this Commission will move expeditiously to deal with market participants who are alleged to have engaged in conduct which is abusive of the capital markets. The need to deal expeditiously with allegations of misconduct is of particular concern in a case such as this where the allegations against the Respondents, if proved, are serious.”

12 So, too, in this case, and in so holding we are not unmindful of the fact that neither Respondent currently works in the industry. The IDA is ready to proceed; its witnesses are ready to appear. Unlike the courts, the IDA cannot compel persons to appear before the District Council. Will these same witnesses still be willing to do so voluntarily a year or two hence?

13 We recognize the Respondents’ rights under the Charter. But, as was said by the Divisional Court in *Robinson*. “[t]he arguments relevant to the Charter can be considered and dealt with if, as and when they arise during the course of the criminal proceedings.”

- (b) In *Robinson v. Ontario Securities Commission* (above), the Ontario Court of Justice - General Division was dealing with an application for judicial review of the decision of the Ontario Securities Commission which dismissed motions brought by the Robinsons for a stay of the hearing pending the disposition of criminal charges. The O.S.C. said in its reasons:

If we were to grant a stay of this hearing pending completion of the criminal proceedings it would be months or perhaps years before this hearing is complete. We are of the opinion that such delay in hearing this matter would be contrary to the public interest.

....

This protective role (*protect investors...and the efficiency and integrity of the capital markets*), common to all securities commissions, gives a special character to such bodies which must be recognized when assessing the way in which their functions are carried out under their Acts.

The Ontario Court stated, in its conclusions, at p. 4:

A regulatory proceeding should not be stayed except in extraordinary and exceptional circumstances; it is within the tribunal's discretion.

- (c) In *Stickney v. Trusz* (above), the trial judge stated, in dismissing the application for an order staying the proceedings until criminal charges against the defendant were disposed of:

12 Enlarging somewhat on that language, it is my opinion that the mere fact that there are both criminal and civil proceedings pending against a person arising out of the same facts is not a sufficient ground to qualify as an exceptional case in which the civil proceedings should be stayed. It is incumbent upon the applicant to show some specific or particular way in which he will be prejudiced in his criminal trial.

The Ontario Court of Appeal dismissed the appeal [(1974) 46 D.L.R. (3d) 80 at 82].

- (d) Burger, J of the Alberta Court of Queen's Bench, in *Saccomanno v. Swanson*, dismissed an application for a stay of civil proceedings pending the determination of criminal charges arising out of the same facts. Berger, J reviewed several judicial decisions, including the established standard for granting a stay of "protection available on a discretionary basis, in extraordinary or exceptional circumstances". He stated:

[18] In the case at bar, the applicant submits that prejudice in the conduct of the defence of the criminal matter necessarily flows from the requirement that the defendant-accused respond to the civil complaint. There is no specific aspect of prejudice to which the applicant is able to point save that he will be, in the absence of an order directing otherwise, compelled to answer questions at examination for discovery (dealt with above). No other prejudice is alleged, nor is there anything in the evidence that would give rise to a reasonable apprehension of prejudice. In the case at bar, I am satisfied that the pending criminal charges are interrelated to a major degree with the issues apparent on the pleadings in the civil action. In my view, however, the applicant has failed to discharge the onus by establishing a prejudice or reasonable apprehension of prejudice flowing from the failure to stay the civil proceedings. There is nothing in the evidence before me to conclude that a just determination of the criminal charges cannot be made unless proceedings are stayed.

...

[27] It is not enough merely to assert that the answer may head to derivative evidence. The defendant-accused must show some specific ground of prejudice. If this can be established to the satisfaction of a chambers judge, the appropriate direction may be made.

- (e) The decision of the Alberta Securities Commission in *Hennig* (above) is particularly pertinent to the present case. An application by the respondents for a stay of proceedings/adjournment of the balance of the Securities Commission hearing pending the completion of criminal proceedings was dismissed. The same arguments were made in that case as are made by the Respondents in the present case, being:
- (i) The criminal charges and the securities charges are based on the same facts and the investigations are intertwined;
 - (ii) The information that will be elicited in the course of the securities hearing is relevant to the criminal proceedings;
 - (iii) The respondents are already prohibited from trading in securities; the public interest is already well protected and the balance of convenience favours a stay.

- (iv) The respondents are presented with a dilemma: to mount a defence in the securities hearing would expose their criminal defence strategy to their detriment in the criminal proceedings and their testimony could potentially be used against them. This would amount to self-incrimination which is contrary to the principles of natural justice and infringes their *Charter* rights.

The panel preferred the “exceptional and extraordinary circumstances” test to the three-part test in *RJR MacDonald* cited in the *Collias* decision (above), although the panel observed that “in this case much of the analysis and conclusions are likely to be the same under either test”. The panel stated, at para 28:

...This test (*the “exceptional and extraordinary circumstances” test*), which pre-dates the Charter, still applies, as noted by the Ontario Securities Commission (OSC) in *Re Robinson* (1993), 16 O.S.C.B. 5667 (at 7 (QL), citing the headnote from *Seaway Trust Co. et al v. Kilderkin Investments Ltd. et al.* (1986), 29 D.L.R. (4th) 456 (Ont. H.C.J.)):

...The ordinary rule for stays still applies and the requirement for exceptional and extraordinary circumstances before a stay will be granted has not been changed by the protection against self-incrimination given by ss. 11(c) and 13 of the Charter.

In a well-reasoned, thorough review of the difference between the roles and functions of the Securities Commission and the criminal courts (including the civil standard of proof “balance of probabilities” vs “beyond a reasonable doubt” in criminal proceedings), the Panel concluded that the roles and functions are “very different”. They stated:

38 A finding of “innocence” or “guilt” in one forum neither dictates nor presupposes the same finding in the other forum. Even assuming a purely hypothetical case in which the same parties, facts and charges are before an administrative tribunal and a criminal court, the differences in purpose, process, procedure, protections, evidentiary rules and burdens of proof make it entirely conceivable that different findings might result.

The panel went on to find, at para 43, that “there are apparent similarities but they lie in the underlining particulars, not in the charges”.

Regarding the respondent’s contention that disclosure of their defence strategy would “tip their hands” to the Crown in the criminal proceedings, the panel referred to the *Robinson* decisions of the Ontario Securities Commission and the Ontario Divisional Court and found:

67 ...this concern of the Applicants neither amounts to extraordinary and exceptional circumstances nor establishes irreparable harm to the Applicants from continuing the Hearing. If, in the course of the Criminal Proceedings, the Applicants are of the view that they have been prejudiced by tipping their hand to the Crown, and they believe that their right to fair trial is jeopardized, then (again) they can put their concern to the trial judge for resolution in the context of the Criminal Proceedings.

As to the competing interests of the Respondents and the public, the Panel found that the Interim Orders prohibiting the Respondents from trading in securities was only one of the factors to be considered and that there also needs to be considered:

70 While we agree with the Applicants that the Interim Orders go far to protect the public interest from possible future misconduct in the capital market by the Applicants (as they were designed to do), there are other elements of the public interest affected by Commission enforcement hearings that also need to be considered, including:

- final and public resolution of enforcement matters;
- as part of that resolution, definitive public determination of whether or how securities laws apply to particular fact circumstances; and
- if there is a finding of misconduct, the imposition of sanctions not merely

to prevent a recurrence by a particular respondent (specific deterrence) but also to deter similar misconduct by others (general deterrence), if appropriate.

74 We do not believe that the Interim Orders fully address the public interest in seeing a conclusion to the Hearing. That public interest is considerable. We conclude that it far outweighs any demonstrated potential prejudice to the Applicants. The balance of convenience argues against the requested Stay.

Regarding the possible lengthy duration of the requested stay, the panel stated:

73 We do not know when or even whether the trial will begin, much less when the Criminal Proceeding might conclude. We therefore cannot predict how long the Stay, if granted, would continue, nor the extent to which final resolution of the Hearing would be delayed.

The panel's "Conclusion" was:

75 To summarize, we believe that the Applicants must demonstrate extraordinary or exceptional circumstances justifying the requested Stay. In the circumstances of this case these must involve irreparable harm that outweighs the public interest in seeing the Hearing concluded. The overlap of investigation and particulars between the Hearing and the Criminal Proceeding does not suffice.

76 The Applicants have not persuaded us that continuation of the Hearing would so impair their fundamental rights as to warrant the Stay. We therefore deny the Application.

- (f) The hearing before the IIROC panel in *Schoer* involved the same arguments on behalf of the respondents and the panel applied the same "extraordinary or exceptional circumstances" test. The Hearing Panel noted that the trial judge's decision in *Stickney vs. Trusz* (above) was upheld by the Ontario Divisional Court and the Ontario Court of Appeal and that leave to appeal to the Supreme Court of Canada was refused. They also referred to the decisions of the Ontario Securities Commission and the Ontario Divisional Court in *Robinson* which applied *Stickney*. The panel stated:

13 ...Accordingly, and given that the argument of the Respondent for a stay has been expressly rejected by the Courts of Ontario, we have no choice but to dismiss the adjournment request of the Respondent.

¶ 31 We agree with IIROC Enforcement Counsel that the cases relied upon by the Respondents in support of their application for a stay are clearly distinguishable or relate to professional disciplinary hearings which differ significantly from the IIROC securities regulatory context.

- (a) In *Collias* the primary reason for granting an adjournment was to await a decision of the British Columbia Court of Appeal regarding the issue of the jurisdiction of IDA (now IIROC).
- (b) The decisions in *Howatt* and in *Morrison* (both above) are of no assistance in the present case. In the former, an adjournment was granted on the basis of an illness. In the latter a temporary stay was granted pending the receipt of a British Columbia Court of Appeal decision and with the consent of both parties.
- (c) The two decisions which might be considered as having application in the present case are *Legault* and *S.J.S.* (both above). *Legault*, a lawyer and *S.J.S.*, a physician, both faced disciplinary charges by their governing bodies and criminal charges related to the **same** sets of circumstances. In *S.J.S.*, a 1998 decision of the Saskatchewan Court of Queen's Bench, there was no reference to the pertinent case law (examined above) or any reference to the "extraordinary and exceptional" test. The College had suspended the physician pending the

disposition of disciplinary proceedings. The Court granted the application for a stay, in part on the basis that if the physician was convicted on the criminal charges a disciplinary penalty could be imposed without the need of a hearing and the complainants would not be required to testify. The criminal trial was anticipated to be held within a few months. With minimal analysis, the Court concluded that not granting the stay “would result in a fundamental unfairness”.

- (d) A similar approach was taken by the Law Society of Upper Canada in its hearing regarding Legault. The acts in question occurred six years before the adjournment request and involved the alleged misappropriation of over \$74,000. Legault had undertaken not to practice law. The Law Society’s Hearings Management Tribunal referred to *Stickney* and its findings that the fact that an accused may be compelled in the civil proceedings to incriminate himself (subject to the protection of the *Canada Evidence Act*) is not sufficient reason for staying an action. The Tribunal concluded that *Stickney* (and another Ontario case, *Schreiber v. The Federal Republic of Germany*) which established that “extraordinary or exceptional circumstances” required, “are distinguishable and not applicable to cases where the affected person is regulated by a statutory body”. The Tribunal also referred to other cases involving lawyers and physicians, with decisions going both ways. The Tribunal granted the stay on the basis that:

22 ...the public interest would be protected, the alleged victims would not be unduly prejudiced by the delay, the delay would not be inordinately long such that evidence may be lost or compromised or an irreducible injustice may be done, and the member’s rights to natural justice in the criminal matter could be adversely affected by proceeding without the adjournment.

- (e) In our view the standard now accepted for granting a stay in **securities** cases is certainly different than the “balance of convenience” test which was applied in the *Legault* case and seemingly in the *S.J.S.* case. In any event the cases are clearly distinguishable on the basis that the facts involved in those respective disciplinary proceedings and criminal proceedings were virtually the same, whereas the facts in the present IIROC proceedings and criminal proceedings are not even similar.

¶ 32 There is no doubt in our minds that the circumstances in the present case do not come close to being “extraordinary and exceptional circumstances”. The Respondents have not shown “some specific or particular way in which he will be prejudiced in his criminal trial (*Stickney*, above, para 30), or a “specific aspect to which the applicant is able to point” (*Saccomanno v. Swanson*, above, para 30). Furthermore, the delay which would occur in this case waiting for the criminal proceedings to be concluded will be at least more than a year which, for the reasons set out in the cases, is to be avoided unless there are “extraordinary and exceptional circumstances”. Whether or not the complainants are pursuing civil remedies, they are entitled to know the outcome of the disciplinary proceedings within a reasonable time frame.

¶ 33 We do not agree with the submissions of the Respondents that the decision of the Supreme Court of Canada in *R v. Nedulcu* (above) diminishes the well recognized protection provided in criminal proceedings to accused persons by the *Charter* and the jurisprudence including *R v. Dubois* (above).

¶ 34 Accordingly, we confirm our earlier oral decision that the Respondents’ application for a stay is dismissed.

February 24, 2014

Alan V.M. Beattie, Chair

Neil Murphy, Industry Representative

William Welton, Industry Representative