Re Peters

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Brian Anthony Peters

2020 IIROC 08

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

Heard: July 30, 2019 in Vancouver, BC
Decision: March 9, 2020

Hearing Panel:
Alison Narod, Chair, Brian Field and Barbara E. Fraser
Appearance:
Paul Smith, Enforcement Counsel
Stacy Robertson, Enforcement Counsel
Owais Ahmed, for Brian Peters
Kirsten Rogerson, for Brian Peters
Brian Anthony Peters

DECISION ON MOTION

¶ 1 This is an application for a preliminary decision about the applicability of various statutory limitation periods to the alleged contraventions in the matter before the Hearing Panel. It also raises the issue of whether and if so which of the alleged contraventions fall within the applicable limitation period either as single, distinct contravention or as part of a continuing contravention or course of conduct.

¶ 2 The Notice of Hearing and Statement of Allegations was issued on November 20, 2018. The particulars describe a number of transactions and activities that span over the period of October 26, 2010 to November 27, 2012.

¶ 3 The Applicant, Brian Peters, who is the Respondent in these proceedings (the "Respondent") , seeks three orders:

i. That all of the alleged contraventions contained in the Statement of Allegations be struck as being statute-barred under the two year limitation period pursuant to section 27(2) the *Limitation Act*, S.B.C. 2012, c. 13 (the "*New Limitation Act*");

ii. Alternatively, that the allegations relating to conduct occurring on or before November 20, 2012 be struck as being statute-barred under the six year limitation period pursuant to section 3(5) of the *Limitation Act*, R.S.B.C. 1996, c. 266 (the "*Former Limitation Act*"); and

iii. In the further alternative, that the allegations relating to conduct occurring on or before November 20, 2012 be struck as being statute-barred under the six year limitation period pursuant to section 159 of the *Securities Act*, R.S.B.C. 1996, c. 418.

¶ 4 IIROC Staff seek an order that the application be dismissed and that the costs of the application be included in any future order for costs that may be made against the Respondent under Rule 8214 of IIROC's Consolidated Enforcement, Examination and Approval Rules ("Consolidated Rules").

¶ 5 The Respondent is a Registered Representative currently employed at the Vancouver office of Canaccord Genuity Group. He became a Registered Representative of the Investment Dealers Association of Canada ("IDA") in 2006. He admits that at that time he contractually submitted to the jurisdiction of the IDA, a predecessor of IIROC and that he continues to be subject to the jurisdiction of IIROC as the IDA's successor.

¶ 6 IIROC Staff's allegations raise questions of "knowing your client" and suitability, as well as unauthorized or discretionary trading. It is alleged that the Respondent engaged in continuing contravention of the relevant Rules: a strategy involving the purchase and holding of shares of a single company in the accounts of a single client over a period of approximately two years, without proper authorization. This resulted in an undue concentration that caused the client significant loss.

¶ 7 The Respondent denies the allegations, saying that he used due diligence to learn and remain informed about his client and to ensure his recommendations were suitable. He denies that he executed transactions in his client's account without proper instructions or directions. He denies the allegations of concentration. He denies that he engaged in a continued contravention of any of the relevant Rules, saying those Rules can only be breached by single, discrete contraventions. Moreover, he says these proceedings are statute-barred because some or all of the trades occurred outside the applicable statutory limitation period. He and IIROC Staff take different positions about the applicable statutory limitation period.

¶ 8 On this application, the Panel is restricted to the preliminary issues relating to the Respondent's limitation defence and to IIROC Staff's argument that the alleged defaults amount to an alleged continuing course of conduct or continuing contravention that overcomes the limitation defence.

¶ 9 The Respondent says the Panel must address the following issues:

a) Is the *New Limitation Act* (applicable to this proceeding?

b) If the *New Limitation Act* is applicable, when did IIROC Staff discover its claims against Peters?

c) If the *New Limitation Act* is not applicable, is the *Former Limitation Act* applicable to this proceeding?

d) If instead, as conceded by IIROC Staff, the six-year limitation period in the *Securities Act* is applicable to this proceeding:

(i) Is the continuing contravention concept applicable to the types of allegations made against Peters (i.e. unauthorized discretionary trading, suitability, and a failure to remain informed) in this proceeding?

(ii) If the continuing contravention concept is applicable, then can it operate to save any of the impugned conduct that is otherwise statute barred by the effluxion of time?

¶ 10 Briefly, the Panel's decision is that neither *Limitation Act* applies to these proceedings.

¶ 11 The following questions are left for further argument at the hearing on the merits:

1) whether the limitation period in the *Securities Act* applies to these proceedings;

2) whether a purposive interpretation of the relevant Rules results in a conclusion that the alleged contraventions ought to be treated as single, discrete contraventions or as a continuing

contravention;

3) whether the answer to Question 2 above determines how the allegations should be treated for the purpose of any applicable statutory limitation period;

4) depending on the outcome of Question 2, whether any of the facts on which the allegations are based fall outside any applicable limitation period;

5) if the alleged contraventions are to be treated as a continuing contravention, whether the continuity of those contraventions have been severed by any relevant circumstance, such as a gap in in their timing or a change in their purpose, and if so, when;

6) If no statutory limitation period applies, is there any basis on which the proceeding should be terminated, e.g., by a stay of proceedings or otherwise.

¶ 12 The Panel's reasons are set out below. Before proceeding further, the Panel wishes to note that it has carefully considered all of the parties' submissions. The fact that they are not all addressed in this decision does not mean they were not taken into consideration.

THE LIMITATION PERIODS

¶ 13 IIROC is a self-regulatory, voluntary organization. It does not draw its jurisdiction from a statute, but from a contract. IIROC's purpose is to regulate the operations, standards of practice and business conduct of its members and their representatives in the securities industry with a view to promoting the protection of investors and the public interest: *Investment Industry v. Julius C.p. Vitug*, 2013 ONSC 5983, para 4. In 2008, the BC Court of Appeal ruled that the B.C. Securities Commission did not make IIROC's predecessor, the Investment Dealers Association (the "IDA"), subject to the limitations and obligations of the *Securities Act*: *Investment Dealers Association of Canada v. Dass*, 2008 BCCA 413 ("*Dass*"). Those findings apply to IIROC as well. All of this is relevant to the question of which, if any, limitation period applies to these proceedings.

¶ 14 As mentioned, the Respondent raises a limitation defence. He argues that some or all of the transactions relied on by IIROC Staff cannot be taken into consideration by this Panel, because they are time-barred, since they occurred outside one of three possible statutory limitation periods: the two year period in the *New Limitation Act,* the six year period in the *Former Limitation Act* or the six year period in section 159 of the *Securities Act*.

¶ 15 It is common ground that IIROC's current six-year limitation period does not apply to this matter, as it was not in place prior to September 1, 2016, after the last of the alleged facts arose.

The *New Limitation Act*

¶ 16 The *New Limitation Act* defines the type of "claim" that is subject to a two-year "limitation period" and extends that period to a "non-judicial remedy" relating to such a claim. The terms "claim" and "limitation period" are defined in section 1, as follows:

> 1 In this Act:**…**
>
> **"claim"** means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission; **…**
>
> **"limitation period"**, in relation to a claim, means the period after which a court proceeding must not be brought with respect to the claim;….

¶ 17 Additionally, it establishes a basic two-year limitation period that turns on when the claim is discovered:

> 6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.

¶ 18 Section 27 is of note in this application. It states:

> 27
>
> 1) In this section, "**non-judicial remedy**" means a remedy that a person is entitled, by law or by contract, to exercise in respect of a claim without court proceedings.
>
> 2) If a claimant is prevented from commencing a court proceeding in relation to a claim as a result of the expiry of a limitation period under this Act, the claimant is not entitled to exercise against the person against whom the claim is or may be made, or against any other person, any non-judicial remedy that the claimant would, but for this section, be entitled to exercise in relation to the claim.
>
> [underlining added]

The *Former Limitation Act*

¶ 19 The *Former Limitation Act* defined the types of "actions" that were subject to specific limitation periods and contained a default clause applying a six-year limitation period to other actions not specifically addressed elsewhere in that Act or another Act. The term "action" was defined in section 1 as follows:

> 1 In this Act:
>
> **"action"** includes any proceeding in a court and any exercise of a self help remedy;

¶ 20 The default clause at section 3(5) stated:

> 3(5) Any other action not specifically provided for in this Act or any other Act may not be brought after the expiration of 6 years after the date on which the right to do so arose.
>
> [underlining added]

The *Securities Act*

¶ 21 The limitation provision under the *Securities Act* states at section 159:

> 159 Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.
>
> [underlining added]

THE *NEW LIMITATION ACT*

¶ 22 The Respondent argues, first, that the *New Limitation Act* applies. IIROC Staff disagree.

(a) Contractual relationship

¶ 23 The Respondent relies primarily on an IDA panel's decision in *Global Securities Corp. (Re),* [2007] I.D.A.C.D. No. 42, where that panel found that the *Former Limitation Act* applied to an IDA disciplinary proceeding. The Respondent's analysis flows from another aspect of that panel's decision: that the relationship between IIROC, on the one hand, and its Members and their employees, who are Approved Persons, on the other hand, is contractual and that a contravention of its Rules is a breach of contract.

¶ 24 The Respondent acknowledges that the contract confers on IIROC the right to discipline a defaulting party and subject them to certain remedies. In particular, the Respondent says the right to discipline is enforceable in court. This analysis, the Respondent says, leads to a conclusion that the *New Limitation Act* applies to this case, since that legislation applies to contractual disputes.

¶ 25 Counsel for IIROC Staff, who was counsel for the IDA in *Global Securities, supra*, says that he argued in that case that no limitation period applied at all. However, he says, the IDA panel decided on faulty reasoning that there must be a limitation period. It found one in section 3(5) of the *Former Limitation Act*. IIROC Staff

now argue that *Global Securities* was wrongly decided and should not be followed in this case. Additionally, IIROC Staff now argue that section 159 of the *Securities Act* applies to the instant case.

¶ 26 In *Global Securities,* the IDA panel addressed the issue of whether there was an absolute time after which a Member or Approved Person cannot be prosecuted for a breach of the IDA's by-laws, rules and policies. Despite IDA Staff's argument that there was no applicable limitation period, the panel responded that "in the interest of certainty and in keeping with the principles of natural justice there must be such a time limit" (para. 4, underlining added). However, the IDA panel did not explain why it rejected the IDA's argument that there was no applicable time limitation. Nor did it consider whether alternative restrictions on timing, such as the doctrine of laches or acquiescence, would suffice to meet its concerns, as in other regulatory disciplinary proceedings.

¶ 27 Instead, the IDA panel decided that the time limit was six years from the date the alleged violation occurred. The panel found that the IDA was statute-barred from continuing the proceeding and stayed it.

¶ 28 In so finding, it concluded that the IDA disciplinary proceeding fell within the scope of the definition of "action" in section 3(5) of the *Former Limitation Act*. That definition was inclusive and was to be broadly interpreted. It therefore included similar proceedings, such as the one before this panel. The IDA panel also found that the phrase "self-help remedy", interpreted broadly, included any action by a person, including a public body, to obtain a remedy other than through a court. Further, it found that there was no other applicable limitation provision in the *Former Limitation Act* or any other Act. We note that this finding would rule out section 159 of the *Securities Act* as an applicable statutory time limit on IDA proceedings.

¶ 29 The Respondent points out that *Global Securities* was not appealed or reviewed. Nor has it been applied or otherwise criticized. IIROC Staff say there may be other reasons for this. They note that the IDA merged into IIROC shortly after *Global Securities* was issued and then IIROC implemented its own limitation period. There would not likely be much reason to appeal or review that case. IIROC Staff point out that *Global Securities* was distinguished in *Brown (Re)*, 2010 LNCMFDA 18 ("*Brown*"), a decision of a disciplinary panel of the Mutual Fund Dealers Association ("MFDA"). There, the MFDA panel interpreted a limitation provision in the Ontario *Limitations Act*, which is substantially similar to the *New Limitation Act* and found that it applied to the MFDA's disciplinary proceedings. We address this below.

¶ 30 We pause to note that the fact that the basis of the relationship between IIROC and its Members and Approved Persons is contractual, is not a complete answer to the question of whether a statutory limitation period applies to IIROC disciplinary proceedings, where there is nothing in the statute expressly extending the limitation period to such proceedings. Part of the IIROC contract provides for internal disciplinary proceedings, which arguably might be breached, if IIROC ignored them in favour of seeking enforcement of disciplinary obligations in court. Moreover, there are statutory avenues for review and appeal of IIROC decisions to the BC Securities Commission that the courts may decide must be exhausted before taking action in court. Finally, the nature of the proceeding as a regulatory, disciplinary one, may impact the applicability of any statutory limitation period to the proceeding. We discuss this latter point further, under the next heading.

(b) Statutory language

¶ 31 The Respondent argues that a broad interpretation of the *New Limitation Act* shows that it applies to this disciplinary proceeding. He says although the disciplinary proceeding is not a "court proceeding" and IIROC is not a "court", the disciplinary proceeding is a "non-judicial remedy". As such, the limitation period started two years before the date of the Notice of Hearing, which was issued on November 20, 2018. Therefore, the proceedings are statute-barred in their entirety, because the latest transaction relied on by IIROC predated November 20, 2016.

¶ 32 That argument fails on a closer examination of the *New Limitation Act*, which shows that its application turns on the word "claim". In particular, when the phrase "non-judicial remedy" is examined in context, it is

clear that the “non-judicial remedy” at issue must relate to a “claim” as defined in section 27(1) of the *New Limitation Act*, reproduced for convenience below:

> 27 (1) In this section, "**non-judicial remedy**" means a remedy that a person is entitled, by law or by contract, to exercise in respect of a claim without court proceedings.
>
> [underlining added]

¶ 33 Accordingly, if the remedy does not relate to a “claim”, it cannot be a “non-judicial remedy” within the meaning of that definition. As a result, the Panel concludes that the *New Limitation Act* does not apply to these proceedings.

¶ 34 There is another reason for reaching the same conclusion, which relates to the purpose of general civil litigation legislation, like the *New Limitation Act* (as well as the *Former Limitation Act*). The decision in *Brown, supra,* provides the Panel with assistance in this regard. In that case, the MFDA panel considered the meaning of the word “claim” in section 2 of the Ontario *Limitations Act*, which stated that the legislation applies to “claims pursued in court proceedings”. The word “claim” was defined in the Ontario *Interpretation Act* in a manner similar to the definition of that word in the B.C. *Limitation Act* as follows:

> In this Act, “claim” means a claim to remedy an injury, loss or damage that occurred as a result of an act or omission.

¶ 35 The MFDA panel decided that it was not a “court”. In so doing, it agreed with the IDA panel that decided *Derivative Services Inc. (Re)*, [1999] I.D.A.C.D. No. 29, which stated that “an internal disciplinary body of a voluntary association created by contract is not a “court” (at paras 24 and 34). It went on to state at para 35:

> In our view, MFDA disciplinary proceedings are not Court proceedings. They are intended to address regulatory contraventions referenced in sections 24.1.1 and 24.1.2 of MFDA By-law No. 1 and do not assert “claims to remedy an injury, loss or damage that occurred as a result of an act or omission.” Accordingly, the *Limitations Act* does not apply to MFDA proceeding.
>
> [underlining added]

¶ 36 The MFDA panel went on to distinguish the case of *Global Securities, supra,* on the basis of the very different language of section 3(5) of the *Former Limitation Act*.

¶ 37 This Panel observes that the application of the *New Limitation Act* turns on the new definition of “claim” in section 1. The MFDA panel’s interpretation quoted above supports the view that this Panel is not a court, these proceedings are not court proceedings, and IIROC is not asserting a “claim” within the meaning of the *New Limitation Act*. As in *Brown (Re)*, *supra,* this is an internal disciplinary proceeding intended to address regulatory contraventions. It does not assert a claim to which the *New Limitation Act* applies.

¶ 38 We find further support in *Grant v. Equifax,* 2015 ONSC 6745, appeal dismissed 2016 ONCA 500, for the view that the applicability of civil litigation limitation legislation depends on its purpose, and that its purpose differs from that of regulatory legislation. There, the issue was whether the Ontario *Limitations Act* applies to the Ontario *Consumer Reporting Act* (“CRA”). The Court of Appeal held it did not. Those enactments had different purposes. The *Limitations Act* governed the enforcement of debts and civil proceedings. The *CRA* established a regulatory framework governing the reporting of debts on consumer reports (paras 5 and 24). Had the court intended *the Limitation Act* to apply to the *CRA,* it would have expressly stated so.

¶ 39 The inference to be drawn is that limitations legislation such as the *New Limitation Act* generally apply to legal problems that can be the subject of civil proceedings between private parties. They do not apply to regulatory proceedings, such as IIROC’s disciplinary proceedings, unless the legislature specifically mandates that result in the limitations legislation or other applicable legislation. The *New Limitation Act* does not

specifically mandate that it apply to IIROC proceedings.

¶ 40 In short, the *New Limitation Act* does not apply to IIROC disciplinary proceedings.

THE *FORMER LIMITATION ACT*

¶ 41 In the alternative, the Respondent argues that if the *New Limitation Act* does not apply to these proceedings, the *Former Limitation Act* applies. IIROC Staff disagree.

¶ 42 The application of the *Former Limitation Act* turns on the definition of "action", which is defined as including "any proceeding in a court and any exercise of a self-help remedy". The issue that arises is whether IIROC's regulatory disciplinary proceedings fall within the inclusive definition of "action" in the *Former Limitation Act*.

¶ 43 The Respondent again relies on the IDA panel's decision in *Global Securities, supra*, this time for the proposition that section 3(5) of the *Former Limitation Act* applies to IIROC's disciplinary proceedings. There, the IDA panel interpreted the definition of "action" in the *Former Limitation Act* broadly and found that the IDA's disciplinary proceedings were sufficiently similar to a court-like proceeding to be included in the definition of "action" or "self-help remedy" in that *Act*. As mentioned above, IIROC Staff say *Global Securities* was wrongly decided.

¶ 44 The parties hold different views about whether this Panel is bound to apply *Global Securities* to the instant case, on the basis that IIROC is the IDA's successor. It is common ground that the doctrine of *stare decisis* does not apply to this tribunal. *Stare decisis* is the Latin term for the principle that a court is bound by its previous judgments and those of higher courts. However, inferior tribunals, such as this Panel, are not bound by *stare decisis*; that is, they are not bound by decisions of other panels of the same tribunal. That said, it is recommended that a later panel that departs from the reasoning of an earlier panel provide justification for doing so.

¶ 45 This Panel finds that *Global Securities* is distinguishable and will not be followed in the instant case. The IDA panel does not appear to have considered the distinction between civil proceedings and regulatory disciplinary proceedings, and the limited purpose of civil litigation limitation legislation, discussed above.

¶ 46 Further, the IDA panel did not conduct an analysis using the principles of statutory interpretation in determining whether it was the Legislature's intention that the *Former Limitation Act* apply to any type of proceeding merely because it resembled a court-like proceeding. Moreover, the panel failed to consider that there exist other court proceedings and court-like proceedings that are not subject to civil litigation limitation legislation, such as the *Former* (or the *New*) *Limitation Act*. In this regard, we take judicial notice of the fact that there exist judicial review proceedings covered by the *Judicial Review Procedures Act* that are not subject to statutory limitation legislation. These include internal regulatory disciplinary proceedings conducted by various professional organizations.

¶ 47 We also take judicial notice of the fact that civil litigation limitations legislation does not generally apply to criminal or regulatory proceedings taken by regulatory bodies acting in the public interest, unless there is express provision in the limitation legislation for that result. In this regard, we refer to the limitation provision in the *Civil Resolution Tribunal Act*, SBC 2012, c. 25, which was enacted after *Global Securities*, but incorporates the *New Limitation Act*, by express reference, at section 13. Had the *Limitation Act* implicitly applied to any court-like proceeding at all, there would be no need to incorporate its application to the *Civil Resolution Tribunal* by express reference.

¶ 48 Accordingly, we find that the *Former Limitation Act* does not apply to the instant proceedings.

SECTION 159 OF THE SECURITIES ACT

¶ 49 The question of the applicability of section 159 of the *Securities Act* is more difficult.

¶ 50 The Respondent says that if the *Limitation Act* does not apply, then the six-year limitation period in section 159 of the *Securities Act* applies, for reasons similar to those espoused by IIROC Staff, as well as for reasons of fairness and equity. The Respondent points to the IDA panel's comments in *Global Securities, supra,* that it would be "somewhat incongruous" if the IDA was able to prosecute a Member for an alleged infraction that occurred more than six years after the event, when the Security Commission, which is the appellate body, was statute-barred from doing so.

¶ 51 IIROC Staff maintain that the only limitations provision that applies is section 159. IIROC Staff argue that the relevant factors for determining whether section 159 applies are essentially the same factors that were relied on by the panel in *Brown (Re), supra*. IIROC Staff describe them as follows:

- In order to exercise its regulatory authority within British Columbia, IIROC must be recognized by the BC [Securities] Commission as an SRO pursuant to the BC *Securities Act.*
- The BC Commission has overreaching authority to make any decision with respect to a rule or practice of the SRO.

¶ 52 Additionally, counsel for IIROC Staff now says that the IDA panel in *Global Securities* erred in finding that the *Former Limitation Act* applied to IDA proceedings; it should have found that section 159 of the *Securities Act* applied. In this regard, IIROC Staff rely on *Brown (Re), supra,* where the MFDA panel held that the limitation period in the Ontario *Securities Act* applied to its proceeding.

¶ 53 Both parties' views appear to be contradicted by the BC Court of Appeal's more recent judgment in *Dass*, *supra*. There, the Court of Appeal found the BC Securities Commission made a reasonable decision when it decided that the SRO did not derive its powers and duties from the *Securities Act*, but from its contractual relationship with its members. Moreover, the Securities Commission's recognition of an SRO under the Securities Act did not alter the SRO's character as a private, voluntary organization. Therefore, the SRO in that case – the IDA – was within its jurisdiction under its bylaws to pursue disciplinary proceedings against former members for five years after their membership ceased, even though the Securities Commission's jurisdiction expired when they ceased being current members. The Ontario Court of Appeal later came to a similar view in *Taub v. Investment Dealers Association of Canada,* (2009) 98 O.R. (3d) 169.

¶ 54 In any event, there is nothing in the *Securities Act* that expressly justifies an extension of the statutory limitation period in section 159 to proceedings other than those of the BC Securities Commission. That is not to say that there is no other justification for such a conclusion, on an application of other principles of statutory interpretation. We note that in *Re Wong*, 2016 BCSECCOM 208 (at para 219), the Securities Commission cited the following comments of the Supreme Court of Canada at paragraph 10 of *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54 with approval:

> It has been long established as a matter of statutory interpretation that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see 65302 British Columbia Ltd. v. Canada, 1999 CanLII 639 (SCC), [1999] 3 S.C.R. 804, at para. 50. The interpretation of a statutory provision must be made according to a textual, contextual and purposive analysis to find a meaning that is harmonious with the Act as a whole. When the words of a provision are precise and unequivocal, the ordinary meaning of the words play a dominant role in the interpretive process. On the other hand, where the words can support more than one reasonable meaning, the ordinary meaning of the words plays a lesser role. The relative effects of ordinary meaning, context and purpose on the interpretive process may vary, but in all cases the court must seek to read the provisions of an Act as a harmonious whole.

¶ 55 One issue that has not been addressed in the cases supplied to us is whether the meaning of the word

"proceedings" urged on us by the parties – i.e., that its meaning in section 159 includes IIROC disciplinary proceedings - is harmonious with the *Securities Act* as a whole, and whether a limitation period that truncates a person's rights should be read broadly or narrowly.

¶ 56 For convenience, we reproduce section 159 below:

> **159** Proceedings under this Act, other than an action referred to in section 140, must not be commenced more than 6 years after the date of the events that give rise to the proceedings.

¶ 57 Although the word "proceeding" is not defined in the *Securities Act*, it is used in the phrase "proceedings under this Act". Although this phrase is not used elsewhere in the *Act*, the *Act* refers to hearings and decisions "under this Act", which would arguably form aspects of "proceedings under this Act" (see for example sections 57.5(1), 155, 170(2), 173 and 177).

¶ 58 We ask that the parties address whether on an application of the principles of statutory interpretation, their interpretation of section 159 is harmonious with the *Securities Act* as a whole.

CONTINUING CONTRAVENTION

¶ 59 The question of whether the alleged transactions and activities amount to properly pleaded continuing contraventions of IIROC's Rules is relevant to the question of whether and if so what transactions fall outside any limitation period. For the purpose of addressing this question, the Panel is prepared to assume that this proceeding is a proceeding within the meaning of section 159 of the *Securities Act*. On that assumption, there is a question of whether events older than six years before the proceedings commenced – i.e., before November 20, 2012:

1) are statutorily barred because they comprise single, discrete contraventions of one or more of the relevant Rules; or

2) are not statutorily barred because they are part of "continuing contraventions" of one or more of the relevant Rules, the last of which fell within the statutory limitation period.

The Relevant Rules

¶ 60 We reproduce the text of the relevant Rules below:

> **Rule 1300**
>
> **Supervision of accounts**
>
> 1300.1.
>
> **Identity and Creditworthiness**
>
> (a) Each Dealer Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted.
>
> **Suitability determination required when recommendation provided**
>
> (q) Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such client based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level.
>
> **Rule 29.1**
>
> **Business Conduct**
>
> Dealer Members and each partner, director, officer, sales manager, branch manager, assistant or

co-branch manager, registered representative, investment representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board of Directors.

For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.

¶ 61 The Respondent argues that:

1) The concept of "continuing contravention" cannot apply to the instant case because:

   a) There is a presumption that the section 159 limitation period bars IIROC Staff from proceeding based on conduct that occurred on or before November 20, 2012, unless this presumption is rebutted if the concept of "continuing contravention" applies;

   b) IIROC Staff bear the onus of proving that the continuous contravention concept applies;

   c) By their nature, the continuing contravention concept cannot apply to Dealer Member Rules 1300.1(a) (the obligation to remain informed), 1300.1(q) (suitability of recommendations) or 29.1 (trading without proper instructions) because none of the alleged contraventions can be continuing in nature.

2) Alternatively, the gap between the alleged conduct is too large and the purpose for each trade is too varied to be considered a continuing course of conduct.

¶ 62 IIROC Staff argue that the allegations that fell outside the limitation period are part of a continuing contravention that includes allegations that fell within that period and are therefore not barred.

¶ 63 We will address these questions below.

Question 1: Whether the Continuing Contravention Concept Can Apply

A. Rebuttal of Presumption that Section 159 Applies to Bar these Proceedings

¶ 64 The Respondent argues that there is a presumption that this proceeding cannot be based on conduct that occurred outside the six year limitation period in section 159 unless that presumption is rebutted by a conclusion that the concept of "continuing contravention" applies. In this case, the presumption is rebutted because that concept cannot apply to the Rules allegedly breached.

¶ 65 Since this argument is closely connected with the Respondent's argument under heading *C. Applicability of the Concept of Continuing Contravention* below, we will address it there.

B. Onus of Pleading Continuing Contraventions and Adducing Evidence in Support

¶ 66 The Respondent also argues that the onus is on IIROC Staff to plead a continuing contravention and to lead evidence in support. They failed to do so. IIROC Staff make no mention in either the Notice of Hearing or the Statement of Allegations that specifically claims there have been continuing contraventions. In this regard, the Respondent relies on *Wireless Wizard*, 2015 BCSECCOM 100 at paras 69 to 73.

(i) Onus of Pleading

¶ 67 The Respondent argues, correctly, that no reference is made to "continuing contraventions" or

"concentration" in the Notice of Hearing issued on November 20, 2018. Rather, IIROC Staff pleaded the transactions in four separate groups of time. Therefore, the Respondent says, IIROC Staff cannot rely on that allegation as it has not been properly pleaded.

¶ 68 IIROC Staff say that they met their onus of pleading. They acknowledge that some of the transactions are separated in time, but reject the suggestion that the transactions have been separated into different tranches.

¶ 69 The Panel observes that the Notice of Hearing was issued on the same day as the Statement of Allegations and expressly refers to that Statement in a manner that incorporates that Statement into the Notice of Hearing by reference. The purpose of the Notice of Hearing is to give a respondent notice of the nature of the allegations and the case he or she will have to meet.

¶ 70 The Statement of Allegations provides particulars that specifically allege there was an undue "concentration" comprised of a series of purchases of a single security, but no sales. It is arguable that an undue "concentration" can be manifested in a single transaction or in a continuing course of conduct that amounts to a continuing contravention. The allegations of fact made and the particulars given thus far are capable of being characterized as a continuing offence.

(ii) Onus of Proof on the Evidence

¶ 71 The Respondent also argues that IIROC Staff have failed to discharge their onus of proof on the evidence. IIROC Staff disagree.

¶ 72 The Panel observes that this is a preliminary hearing. There has not yet been a full hearing on the merits. *Wireless Wizard, supra,* which the Respondent relies on in his argument about the onus, was decided after a hearing on the merits.

¶ 73 It is premature to decide the issue of whether IIROC Staff have met their onus to prove their case with evidence based on the state of the evidence submitted in this preliminary proceeding. In the circumstances, that decision must be made after a hearing on the merits.

C. Applicability of the Concept of Continuing Contravention

¶ 74 After carefully considering the parties' arguments, it is our view, at this preliminary point, that there does not appear to be a significant difference between the parties about what is a continuing contravention. They differ on how, if at all, the concept of a continuing contravention applies to these proceedings.

¶ 75 The concept of a continuing contravention is a common law one that has been used in the interpretation of the limitation period in section 159 of the *Securities Act*: *Re Wong, supra* at para 212. Both parties refer to *British Columbia Securities Commission Re: Roger F. Bapty et al,* 2006 BCSC 638 ("*Bapty*"), where Burnyeat J. described a continuing contravention and its impact on the interpretation of section 159, at paragraph 36, as follows:

> A "continuing contravention", a "continuing violation", a "continuing offence", or a "continuing course of conduct" results in the commission of such an offence not being complete until the conduct has run its course. These terms are most often used to describe a succession of separate illegal acts of the same character which, in their entirety, make up a single, continuing transaction: [citations omitted]…. Where there is a finding that there is a continuing contravention, the limitation period does not begin until the entire "transaction" is complete and discrete activities that occur outside of the limitation period are not statute-barred if they form part of the same transaction as events falling within the limitation period: *Re Dennis*, 2005 BCSECCOM 65 at paras. 23 and 30.

¶ 76 The issue between the parties is how to identify whether a contravention is or is not a continuing one

in the context of a statutory limitation period.

¶ 77 The Respondent says that the determination of whether a contravention should be treated as a single, discrete one or a continuing one is an exercise of statutory interpretation of the Rules. In a regulatory proceeding such as this, a purposive approach must be taken in determining what is the purpose of the Rules allegedly contravened and whether that purpose will be better effectuated by treating the alleged contraventions as single, discrete contraventions or by treating them as continuing contraventions.

¶ 78 The Respondent contends that the alleged contraventions of the particular Rules in this case should be treated as single, discrete contraventions. As a result, the transactions should be analyzed on a trade by trade basis and the statutory limitation provision, section 159 of the *Securities Act*, bars IIROC Staff from relying on transactions that fall outside that six year limitation period.

¶ 79 IIROC Staff start from the position that the allegations comprise a continuing contravention in the form of an undue concentration in breach of the relevant Rules. The issue is whether any part of the continuing contravention is statute barred. On the well-established interpretation of section 159 of the *Securities Act*, the applicable statutory limitation period includes all transactions and activities material to the continuing contravention, up to the date of the last events. Since that date falls within the limitation period, none is statute barred.

¶ 80 The Respondent replies that IIROC Staff's analysis is inconsistent with the purposive analysis.

(i) Identifying Whether the Contravention is a Single, Discrete or a Continuing One

¶ 81 The Respondent relies primarily on *R. v. Sadolims Enterprises Ltd.*, 2014 BCCA 389 ("*Sadolims*"), saying that it establishes a purposive approach to identifying whether a contravention is or is not a continuing one. There, the BC Court of Appeal adopted a purposive approach to determining whether a builder's failure to comply with a regulatory offence under a municipal bylaw by a stipulated deadline was a single as opposed to a continuing contravention. That purposive approach entailed identifying the objectives of the relevant enactment and asking what better advanced those objectives: (a) treating the contravention as a single discrete event leaving the respondent with nothing left to do or (b) treating the contravention as the commencement of a "forbidden state of affairs" that the respondent was under a continuing duty to bring to an end (paras 9 to 10).

¶ 82 The Court of Appeal in *Sadolims* found that the offence triggered an unlawful state of affairs that the appellant continued to neglect despite the obligation imposed on him by the bylaw (at para 10). The Court of Appeal characterized the municipal bylaw at issue as public welfare legislation. It ascertained the objectives of the bylaw, which concerned such matters as protection of health, safety and environment during construction. It found that the order was issued under a scheme with those objectives. The allegation, as reframed by the court, was that the appellant engaged in "passive conduct that <u>failed to put an end</u> to a forbidden state of affairs" (paras 15 to 16, underlining added).

¶ 83 The Court of Appeal then concluded that it was more efficacious in achieving the objectives of the by-law to treat the non-compliant conduct as a continuing offence than as a single offence. It wrote: "[t]he timeliness of the compliance is of much less significance to the overall scheme than addressing the directions in the order" (para 17). Accordingly, the appellant remained in breach of the order after the deadline it contained. The alleged contravention was a continuing one and it was within the building owner's power to comply with the order at any time.

¶ 84 The Respondent in the instant case contends that the alleged contraventions in this case cannot amount to continuing ones under the relevant Rules. There is no ongoing obligation to meet. There is no requirement that he take action to put an end to a forbidden state of affairs. Nor can he take any steps to cure or remedy the misconduct after the fact. Accordingly, the alleged contraventions are single, discrete ones that

must be assessed on a trade-by-trade basis.

¶ 85 As mentioned, IIROC Staff allege that the Respondent has engaged in offences under the relevant Rules that together amount to a continuing contravention of the relevant Rules. None the events comprising the continuing contravention are barred by the limitation period in section 159 of the *Securities Act*, since the last of the alleged events occurred within the six-year limitation period.

¶ 86 IIROC Staff rely on the Ontario Securities Commission's definition in *Re Boyle,* (2006) 29 OSCB 3365, of a "course of conduct" as including three elements: a pattern of conduct composed of a series of acts; the acts occurred over a period of time; and a continuity of purpose which requires that the subsequent acts be similar to the original act and in line with a person's original intent. Additionally, the events that occur outside the limitation period must relate in a significant way to those that fall within it and be a material element of the allegation of wrongdoing (at paras 48-51).

¶ 87 IIROC Staff contend that those elements are met in this proceeding. The case is about a single broker making a single recommendation to a single client to buy a single security with virtually all of the single client's assets over a period of time. The security was not traded, rather it was accumulated, because none of it was sold. Moreover, it was a combination of the breaches of all of the Rules relied on that led to the unsuitability. It was a concentration of the security in the client's hands. Further, the conduct before and after the limitation period was the same, the only difference being that it became worse over time.

¶ 88 This Panel observes that it is not always readily apparent what is or is not a continuing contravention. Moreover, the terminology used to describe a contravention does not always distinguish between the two. The same term may be applied to single, discrete events as well as to a continuing course of events. For example, an illegal financing may be a single event, while distributions made in the course of that financing may be a series of events that constitute the financing: *Re Wong, supra* at paras 229 to 233, *Wireless Wizard, supra* at para. 70. Additionally, a "fraud" may involve a single, discrete act or an ongoing series of acts that amount to a continuing contravention: *Re Wong, supra* at para 213 and *Re Dennis, supra* at para. 9.

¶ 89 The question raised by the Respondent has the merit of focussing the inquiry on the Rule at issue. However, the manner in which the Rule is framed may not yield an "either/or" answer. It may be arguable that a Rule is capable of being breached by both a single, discrete contravention as well as by a continuing one. Moreover, there may be a range within which both parties' analyses coexist and where one does not preclude the other. We leave that for further argument at the hearing on the merits.

(ii) Purpose of the Relevant Rules

¶ 90 The Respondent's view is that purposes of the relevant bylaws support the conclusion that the alleged contraventions are not capable of being treated as continuing contraventions, rather, they can only be treated as single, discrete events.

¶ 91 More particularly, the Respondent says the purpose of Rule 1300.1(a) requires a registrant to "know your client", i.e., to make diligent and business-like efforts to learn and record the essential financial and personal circumstances and the investment objects of each client. IIROC's allegation, which he denies, is that he failed to know that the client lost or was laid off from her job and so had no employment income by failing to fill out NCAFs to record that fact. He says the subject matter of this alleged contravention is not one that continued in substance, because he knew and was aware of this fact. The obligation to record this fact arose in December 2011. It cannot be said that he failed to know or take this fact into consideration when making subsequent trades after December 2011.

¶ 92 The Respondent says the alleged breach of the due diligence obligation in Rule 1300.1(q), which he denies, is that he failed to perform proper due diligence prior to making a recommendation to the client. He argues that this is a past event that forms a single, discrete event, because a registrant cannot rectify the

failure to perform proper due diligence after the contravention occurs. He also says that a contravention of Rule 1300.1(q) is assessed on a trade-by-trade basis and says this is clear from the Statement of Allegations itself, which groups the trades into several phase, by account.

¶ 93 Finally, the Respondent makes a similar argument about Rule 29.1. He says the alleged breach, which he denies, is that he failed to seek authorization from the client prior to each transaction taking place. He contends that there was nothing he could do to cure or remedy this defect after the individual transactions were made. Therefore, the concept of a continuous contravention, as described in *Sadolims*, *supra,* cannot apply.

¶ 94 IIROC Staff say that the obligation under Rule 1300.1(a) is to learn and "remain" informed of essential facts about the client. They point out that the client's job loss occurred in May 2011. It was at that point that she lost stable employment and income. The Respondent ignored the relevant fact that the client's job loss altered her tolerance of risk, which in turn made it unsuitable for him to recommend that all of her assets be put and held in one security.

¶ 95 IIROC Staff say that the obligation under Rule 1300.1(q) is to make recommendations for a client about purchasing or holding securities that are suitable for the client based on factors that include the client's current financial circumstances, the current composition of her investment portfolio, and her risk tolerance. Such recommendations go on over time and are more akin to the fraud allegations made in *Re Dennis, supra*. The recommendation to continue holding the previously purchased securities is in itself a continuing violation of IIROC Rule 1300.1(q), which requires that an Approved Person:

> …when recommending to a client the purchase…or holding of any security, shall use due diligence to ensure that the recommendation is suitable….

¶ 96 IIROC Staff say that the obligation under Rule 29.1 is to obtain properly authorized instructions from the client before making trades in her account. The subject-matter of the alleged Rule 29.1 breach relates to unauthorized discretionary trading, which is more like an illegal distribution, as in *Re Boyle,* 2006 LNONOSC 359.

¶ 97 IIROC Staff submit that each of the alleged contraventions of the Rules are required in order to conclude that there was an undue concentration, which occurred as a result of a continuing course of conduct. This resulted in an unsuitable concentration of securities, used virtually all of the client's financial resources and caused her significant loss.

¶ 98 The Panel observes that the *Sadolims* analysis would require the Panel to consider the nature of each of the relevant Rules, ascertain their objectives and determine which characterization of their contravention would most efficaciously achieve their objectives. However, it is by no means clear that this is a binary analysis.

¶ 99 The Panel observes that Rule 1300(q) and Rule 29.1 are drafted in terms that could be described as general duties. They do not list the legal concepts or examples of the specific conduct that would breach these Rules. The allegations of breaches of these Rules are more specific and relate to what IIROC Staff describe as an undue concentration. However, it is not clear on their face that contraventions of these Rules must be characterized as one of the two kinds of contraventions posited by the parties to the exclusion of the other. Indeed, at this point, we cannot rule out the possibility that one or more of the allegedly breached Rules are capable of being breached by both single, distinct contraventions and continuing ones.

¶ 100 We agree with the Respondent that the relevant IIROC Rules should be interpreted under a purposive approach described in *Sadolims* to determine whether their objectives can be best effectuated by treating the alleged contraventions as single, discrete ones or as continuing ones. Unfortunately, we have not yet heard full argument from both parties on the application of this approach to the relevant Rules. Neither party has

fully addressed the overarching purpose of the relevant Rules in the context of the principles of statutory interpretation.

¶ 101 The Respondent bases his argument primarily on his interpretations of the language of the Rules with reference to allegations of fact, from which varying inferences might be drawn. He also argues that the gap between the alleged conduct, which he says is pled in four phases, is too large and the purpose for each trade too varied to be considered a continuing course of conduct. However, the evidence of conduct and purposes in support of that argument has not been fully adduced and tested in cross-examination. It may yield different explanations and conclusions after a full hearing.

¶ 102 IIROC Staff have focussed on whether the allegations amount to a continuing contravention in the context of the interpretation of section 159 of the *Securities Act*. They have not had an opportunity to address the larger questions raised by the purposive approach espoused in *Sadolims.*

¶ 103 In our view, the evidence and argument is not sufficiently developed at this time to make the decisions sought in this preliminary hearing. Rather, they ought to be addressed after a full hearing.

Question 2: Whether there is a Gap in Timing between the Trades or Change in Purpose of the Trades

¶ 104 As mentioned, the Respondent submits that the gap in timing between the trades at issue is too large and the purpose for each trade is too varied to be considered a continuing course of conduct.

¶ 105 However, in the instant case, we are unable to determine whether any alleged continuing contravention has been severed on the state of the evidence before us. There is no affidavit evidence from the Respondent himself before the Panel in support. Direct evidence of a change of purpose may be in the Respondent's sole knowledge and possession and may best be adduced through his testimony.

¶ 106 A full hearing on the merits will be required to determine if there was a sufficiently significant gap in the continuity of the alleged misconduct or a significantly sufficient change in the purpose of that alleged misconduct to sever its continuity and if so when it was severed.

OTHER MATTERS

¶ 107 The Respondent has reserved his right to argue "abuse of process" based on delay at the hearing on liability. In light of the Panel's decision that it is premature to determine whether there has been a continuing contravention of the Rules, the Respondent may make this argument again at the hearing on liability.

DATED THIS 9 DAY OF MARCH, 2020

Alison Narod

Barbara Fraser

Brian Field