

Re Hackett

IN THE MATTER OF:

**THE DEALER MEMBER RULES OF THE
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA**

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

ALAN FERGUSON HACKETT

2008 IIROC 13

Investment Industry Regulatory Organization of Canada
on behalf of the Investment Dealers Association of Canada
Hearing Panel (Pacific District)

Heard: September 17, 2008 in Vancouver BC

Decision: September 29, 2008

(19 paras.)

Hearing Panel:

John Rogers, Chair, Karen Henderson, Bob Sutherland

Appearances:

Barbara Lohmann, Enforcement Counsel, for the Investment Industry Regulatory Organization of Canada
The Respondent was not represented by Counsel

REASONS FOR DECISION

1. A hearing panel of the Pacific District Council of the Investment Industry Regulatory Organization of Canada (“IIROC”) was convened on September 17, 2008 pursuant to Part 10 of By-law 20 of the by-laws of the Investment Dealers Association of Canada (the “Association”) and pursuant to Section 1.9 of Schedule C.1 to Transition Rule No. 1 made pursuant to By-Law 13.1 of the by-laws of IIROC to determine whether Alan Ferguson Hackett (the “Respondent”) has contravened the by-laws of the Association as alleged by the enforcement division of IIROC. The hearing was designated as being on the Standard Track pursuant to Rule 6.2 of the Association’s Rules of Practice and Procedure.

Preliminary Matter

2. Upon the commencement of the hearing, Counsel for IIROC provided the Hearing Panel with a copy of a letter dated September 4, 2008 from her to the Respondent advising the Respondent of both a matter awaiting the decision of the BC Court of Appeal regarding IIROC’s jurisdiction to discipline former

registrants and a recent decision of the Ontario Divisional Court determining that IIROC did not have jurisdiction to discipline former registrants.

3. The September 4th letter advises the Respondent that it is IIROC's position that in British Columbia IIROC continues to have jurisdiction over former registrants. The letter goes on to recommend that the Respondent obtain independent legal advice before the start of this hearing. Notwithstanding this recommendation, the Respondent was unrepresented by legal counsel at this hearing.
4. Prior to proceeding further with the hearing, with the consent of Counsel for IIROC, the Panel provided the Respondent with a copy of the July 31, 2008 decision of the hearing panel of the Pacific District Council of IIROC in the matter of *John Anastasious Collias*. A short adjournment was taken to permit the Respondent the opportunity to read this decision and to consider his position.
5. Following this adjournment, the Respondent sought a stay of proceeding similar to that granted by the Pacific District Council in *Collias*.

Decision

6. The application by the Respondent is granted.
7. Pursuant to By-law 20.2 of the Association's By-laws we order a temporary stay of this matter until the release of the decision of the British Columbia Court of Appeal in *Charles K. Dass v. Investment Dealers Association of Canada* (May 11, 2007) ("*Dass*") at which point we require the parties to appear before us to determine the next steps in this process.

Reasons

8. The hearing panel in *Collias* in considering a matter similar to the one at hand referred to the decision of the British Columbia Court of Appeal in *Moore v. British Columbia (Securities Commission)* [1996] B.C.J. No. 651 where the Court relying on earlier Supreme Court of Canada decisions in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110 and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 articulated that the test to apply when determining whether or not to grant a stay in a matter involved three parts:
 1. Whether there was a serious question to be tried;
 2. Whether the applicant would suffer irreparable harm if the application was refused; and
 3. Which party would suffer the greater harm from the granting or refusal of the stay.
9. The hearing panel in *Collias* applied the view of the BC Court of Appeal in taking the position that of the three parts, the third part, that of a determination of which party would suffer the greater harm from the granting or refusal of the stay, was operative in the matter before it.
10. We believe that this third part should, as well, be determinative of the matter before us.
11. Counsel for IIROC focused her opposition to a stay on the following arguments:
 1. IIROC has jurisdiction over the Respondent unless and until the British Columbia Court of Appeal determines otherwise;
 2. There will be no further loss of the Respondent's reputation as the Notice of Hearing for this Hearing is a public document and the Notice of Hearing already sets out the allegations against the Respondent;
 3. The hearing panel in *Collias* clearly states that their decision is not to be taken as a precedent and that each application for stay should be decided on its merits;
 4. IIROC's mandate to protect the public would be adversely affected by delaying the determination of this matter; and

5. The greater harm will be suffered by IIROC as IIROC is ready to proceed and it has incurred substantial expense in the matter to date.
12. Having reviewed the submissions of Counsel for IIROC, we determine that when it comes to the question of who would suffer the greater harm if the application is or is not granted we find in favour of the Respondent. If we were to proceed and were to find the Respondent liable for breach of the Association's by-laws as alleged by IIROC, and if the British Columbia Court of Appeal in its decision in *Dass* when that decision is delivered overturns the decision of the British Columbia Securities Commission with the result that we, in law, have no jurisdiction over the Respondent as he is currently a former registrant, we believe that it is clear that the Respondent will have suffered the greater harm as he will have been found liable in a forum lacking any jurisdiction over him. The egg at that point could not be unscrambled.
13. With respect to IIROC's submissions against granting a stay, we believe that there may be some uncertainty at the present time, because of the pending *Dass* decision, as to our jurisdiction over this Respondent. We should therefore not proceed with this matter until that decision is released, and the issue of our jurisdiction relative to this Respondent is made clear.
14. We disagree that the reputation of the Respondent can not be further affected by proceeding. The Notice of Hearing sets out allegations against the Respondent. There is quite a difference between unproven allegations and a finding of liability.
15. We are cognizant of the hearing panel's caution in *Collias* that its decision is not to be taken as a precedent and that each application for a stay be considered on its own merits. We agree with this caution and have considered the Respondent's application for a stay on its own merits and on that basis we have granted it.
16. With respect to IIROC's mandate to protect the public, according to the Notice of Hearing the Respondent is currently neither a registrant nor employed by a Member firm. Should the Respondent seek a renewal of his registration, no doubt the allegations contained in the Notice of Hearing will be raised at that time. Therefore, we do not believe that protection of the public is a factor in our decision.
17. Finally, and most compelling, when we are asked to determine between the greater harm to be suffered by IIROC as opposed to the harm to the Respondent, we have come down in favour of the Respondent. There was not evidence before us that IIROC's case against the Respondent would be unduly prejudiced by delay. Rather it is more a matter that IIROC will be inconvenienced and will suffer additional cost. As outlined above, we believe that Respondent will suffer the greater harm if we proceed.
18. However, with respect to the issue of the costs incurred by IIROC, we are concerned that although he was advised of the issue before the British Columbia Court of Appeal by the September 4th letter, the Respondent chose not to take the advice included in this letter and to be represented at this hearing by legal counsel. This meant that the Respondent came forward with his application to stay this matter after IIROC had incurred substantial effort and costs to initiate the hearing only to have it stayed. If the Respondent had taken the advice proffered in the September 4th letter, IIROC and the Respondent might have proceeded by agreement in advance of the hearing and IIROC might therefore have saved certain costs.
19. We raise this concern, as we intend to readdress it at a later date when this matter comes back before us following the decision of the British Columbia Court of Appeal.

Dated at Vancouver, British Columbia, this 29th day of September, 2008.

John Rogers, Chair
Karen Henderson
Bob Sutherland

