

# Re Schoer

IN THE MATTER OF:

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

**and**

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

**and**

**Roger Carl Schoer**

2011 IIROC 21

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

Heard: March 16 and April 5, 2011 in Toronto, ON  
Oral Decision: April 11, 2011  
(17 paras.)

**Hearing Panel:**

Terrance Sweeney (Chair), D. W. (Sandy) Grant, Ronald Smith

**Appearances:**

Susan Kushneryk, Senior Enforcement Counsel, Investment Industry Regulatory Authority of Canada (IIROC)  
Milton Chan, Enforcement Counsel, IIROC  
Roger Carl Schoer (Respondent), Self-represented

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## DECISION & REASONS

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- ¶ 1 By Notice of Hearing, dated January 6, 2011, Staff of IIROC alleged business misconduct against the Respondent contrary to Investment Dealers Association By-Law 29.1.
- ¶ 2 We were constituted a Hearing Panel of the Ontario District Council of IIROC to consider the case.
- ¶ 3 By Notice of Motion, dated March 7, 2011, the Respondent indicated that he would request an adjournment of this matter until after his criminal trial on the same or similar facts.
- ¶ 4 On the return of the Motion on March 16, 2011, counsel for IIROC filed a responding Motion Record in which counsel strenuously opposed any adjournment of the matter beyond May 16, 2011, the date fixed by the Hearing Panel for the case.
- ¶ 5 During the hearing on the Motion on March 16, 2011, a question arose as to whether all or a part of the hearing on May 16, 2011 should be held in camera in order to protect the Respondent in respect of his criminal trial.
- ¶ 6 The Hearing Panel granted a request from counsel for IIROC to adjourn the matter to April 5, 2011 to allow counsel to consider the law on the subject of confidential hearings.

¶ 7 In this Decision, we conflate the submissions of the Respondent and counsel for IIROC made at the hearings on March 16 and April 5, 2011.

¶ 8 The Respondent argued that it would be unfair to him to proceed with this Hearing prior to his criminal trial. He said that this 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. In essence, he does not want to "tip his hand" to the prosecutor which would give him/her a decided advantage in prosecuting him.

¶ 9 If an adjournment were not to be granted, then the hearing should be "in camera" to protect his constitutional rights.

¶ 10 Counsel for IIROC submitted the following arguments to support their position that no adjournment should be granted:

- a. IIROC started investigating the Respondent in 2008. His criminal trial likely will take place in the spring or summer of 2012. A decision in his trial might not be released until 2013. In these circumstances, the Respondent's request amounts to a request for an adjournment sine die. This would be intolerable as it is necessary that cases of this kind be heard expeditiously in order to foster public confidence in the securities market.
- b. The Respondent has not shown any exceptional or extraordinary circumstances which would justify an adjournment.
- c. It is up to the trial judge in the criminal trial, and not this Hearing Panel, to protect the Respondent and ensure that he receives a fair trial.
- d. The Hearing should be held entirely in public as this accords with the fundamental principle that justice be done and seen to be done.
- e. There is a strong presumption against any order that restricts public access to court or administrative proceedings.

### **The Adjournment Request**

¶ 11 The jurisprudence has established that a regulatory proceeding should not be stayed except in extraordinary and exceptional cases. See: Zuber J. in *Stickney v. Trusz*<sup>1</sup> where he said:

The weight of authority is that discretion to stay an action should be exercised in extraordinary or exceptional cases ... It is incumbent upon the applicant to show some reason why the discretion should be exercised ....

¶ 12 He went on to observe that there is no general right against self incrimination which would be violated by one being obliged to disclose the nature of his defence in a civil proceeding.<sup>2</sup> Finally, he opined:

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 civil proceedings should be stayed.

¶ 13 The Hearing Panel notes that Zuber's decision was upheld by the Ontario Divisional Court<sup>3</sup> and the Ontario Court of Appeal<sup>4</sup> and that leave to appeal to the Supreme Court of Canada was refused. See: also *Robinson*<sup>5</sup> where, in the context of an Ontario Securities Commission proceeding, the Ontario Divisional Court followed and applied *Stickney*. Accordingly, and given that the argument of the Respondent for a stay has been

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<sup>1</sup> [1973] O.J. No. 2279 (H.C.J.)

<sup>2</sup> *Ibid.*, para. 11

<sup>3</sup> [1974] 46 D.L.R. (3d) 80

<sup>4</sup> [1974] O.J. No. 584 (C.A.)

<sup>5</sup> [1993] O.J. No. 3042 (Div. Ct.)

expressly rejected by the Courts of Ontario, we have no choice but to dismiss the adjournment request of the Respondent.

### **In Camera Hearing**

¶ 14 The Hearing Panel accepts that disciplinary hearings should be open to the public. It notes the Ontario Securities Commission Recognition Order for IIROC, dated May 30 2008,<sup>6</sup> in this regard. It also notes that the Recognition Order provides that we may conduct a closed door hearing if we determine that it is required for the protection of confidential matters.

¶ 15 The Notice of Hearing, which chronicles the allegations against the Respondent, is in the public domain as well as the Response which the Respondent filed setting out, at least in part, his defence. Nevertheless, as he is not represented by counsel, we are very concerned to do all that we can do to ensure his right to a fair criminal trial.

¶ 16 We will, therefore, reserve to the Hearing any ruling as to what parts, if any, of the testimony will be taken in camera.

### **ORDER**

¶ 17 The Hearing will commence on Monday, May 16, 2011, in Toronto, and continue on the following days as necessary to complete the Hearing. The Hearing will be in public except as the Hearing Panel might rule during the Hearing on individual parts of the evidence.

Given at Toronto, Ontario, this 11<sup>th</sup> day of April 2011.

Terrance Sweeney, Chair

D.W. (Sandy) Grant

Ronald Smith

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<sup>6</sup> *Re Investment Industry Regulatory Organization of Canada*, [2008] 31 OSCB 5615