

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the Act)**

– AND –

IN THE MATTER OF SHIRLEY A. LOCKE

**DECISION ON A STAY MOTION
(Subsections 30(5) and (5A) and 6(4))**

Hearing	August 26, 2020	
Decision	September 16, 2020	
Panel	Shirley P. Lee, QC Valerie Seager Heidi Walsh-Sampson	Chair Commissioner Commissioner
Counsel	Brian K. Awad, QC Tom Keeler Kathryn Andrews April Engelberg	Counsel for Shirley A. Locke Counsel for the Investment Industry Regulatory Organization of Canada

I. INTRODUCTION

- [1] This is a proceeding before the Nova Scotia Securities Commission (the Commission) pursuant to subsections 30(5) and (5A) and 6(4) of the Act to hear a motion brought by Shirley A. Locke (Locke) for a stay of a penalty decision pending a hearing and review before the Commission.
- [2] Locke is employed as a dealing representative with Aligned Capital Partners Inc. (Aligned Capital) and is registered with the Commission and the Investment Industry Regulatory Organization of Canada (IIROC).
- [3] A Hearing Panel (Nova Scotia District) of IIROC (the IIROC Panel) issued a Decision on the Merits dated May 28, 2020 (the Merits Decision) with respect to six allegations relating to the investment accounts of six of Locke's clients. After conducting a disciplinary hearing, the IIROC Panel found that Locke had contravened IIROC Dealer Member Rules as alleged except with respect to an allegation relating to one client.
- [4] After a penalty hearing on July 20, 2020 (the Penalty Hearing), the IIROC Panel issued its Penalty Decision dated August 8, 2020 (the Penalty Decision) setting out the following penalties to be imposed on Locke:
- a) Four penalties resulting in total fines of \$90,000 for the IIROC Dealer Member Rules contraventions;
 - b) Costs of \$30,000;
 - c) A nine-month suspension commencing July 20, 2020;
 - d) Six months of close supervision upon re-registration including trade approvals; and
 - e) Re-write and pass the Conduct and Practices examination within six months of re-registration.
- [5] On June 26, 2020, and August 12, 2020, Locke applied to the Commission for a hearing and review of the Merits Decision and the Penalty Decision, respectively, pursuant to subsections 30(5) and (5A) of the Act (the Hearing and Review) on various grounds, including allegations of errors in law by the IIROC Panel, breach of natural justice, and imposition of penalties that were inappropriate and unjust.
- [6] On August 13, 2020, Locke brought a motion to the Commission to hear an application for a stay of the Penalty Decision pursuant to subsection 6(4) of the Act pending the conclusion of the Hearing and Review.

- [7] By a Notice of Hearing dated August 17, 2020, the Secretary of the Commission gave notice that the Hearing and Review will be held on a date and time to be arranged by the Secretary or as ordered by the Commission.
- [8] The issue before the Commission in this proceeding is whether a stay of the Penalty Decision should be granted pending the conclusion of the Hearing and Review.
- [9] Our decision is that the stay should be denied. Our reasons for reaching this conclusion follow.

II. POSITIONS OF THE PARTIES

A. LOCKE

- [10] Locke submitted that where a professional has been sanctioned by his or her regulator, the question of whether to stay the sanctions pending an appeal or review should be guided by the three-part test in the analysis of the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311. However, each motion for a stay turns on the particular facts, circumstances, context, evidence and order sought in that motion.
- [11] In support of her submissions, Locke filed an affidavit sworn August 11, 2020 (the Locke Affidavit).
- [12] Locke submitted that with respect to the first part of the test, the bar is low when assessing whether the issues or questions raised on the appeal or review are serious and not frivolous or vexatious. She submits that the issues and questions raised in the Hearing and Review are serious.
- [13] Locke submitted that with respect to the second part of the test, she will suffer irreparable harm if the stay is not granted because a suspension will harm her practice and her ability to earn a living.
- [14] Locke submitted that the negative impact of a suspension is not fully recoverable through loss mitigation efforts that she may pursue and that the failure to stay the suspension will render moot the Hearing and Review and do irreparable harm to her statutory right to a review.

- [15] Locke submitted that with respect to the third part of the test, the harm to Locke, and the negative impact on Locke's clients, which may harm the reputation of the profession, are matters to weigh in balancing the convenience to the parties and the public.
- [16] After noting that the breaches found by the IROC Panel primarily concerned the time from 2010 to 2014, and that she has been registered to practice without restriction following that time, Locke submitted that it would be unfair to find that the public will be at undue risk if the implementation of the Penalty Decision is delayed for the Hearing and Review.
- [17] Locke submitted that it does not help confidence in the capital markets for staff of self-regulatory organizations to be immoderate in the position they take throughout the disciplinary process or on appeals and that a deferment of the implementation of sanctions pending the Hearing and Review will not harm the public's confidence in, and the regulation of, the capital markets.
- [18] Locke submitted that this analysis should lead the Commission to stay the Penalty Decision or, alternatively, order a stay conditional on Locke being subject to close supervision by Aligned Capital.

B. IROC STAFF

- [19] Staff of IROC (IROC Staff) oppose Locke's motion on the basis that she has not met the second and third parts of the three-part test set out in *RJR, supra*.
- [20] In support of its submissions, IROC Staff filed a Book of Documents which included the transcript from the Penalty Hearing (the Penalty Transcript).
- [21] IROC Staff stated that the threshold to show a serious issue to be tried is a low one and conceded that Locke's appeal of the Merits Decision does not appear to be frivolous or vexatious.
- [22] IROC Staff submitted that Locke bears the burden to demonstrate that she will suffer irreparable harm if the stay is not granted.
- [23] IROC Staff submitted that there must be sufficient evidence to establish the nature of the harm to Locke and that the party seeking the stay must establish a "real risk of disastrous consequences" if the stay is not granted.

- [24] IIROC Staff submitted that Locke does not provide sufficient evidence to support her statements in the Locke Affidavit that she believes a suspension would force her retirement from the industry or she would be unable to maintain a self-sustaining practice following a return from suspension. Also, Locke does not provide evidence from any current client that they will leave if she is suspended. The Locke Affidavit does not demonstrate irreparable harm and she has not satisfied the second part of the test.
- [25] IIROC Staff submitted that in the balance of convenience, the impact on Locke must be weighed against IIROC's public interest mandate. A stay would prohibit IIROC from fulfilling its mandate to foster fair and efficient capital markets and protect the public interest. This includes enforcement proceedings to deter others from engaging in similar misconduct.
- [26] IIROC Staff submitted that in the balancing exercise, the interest of the public must be given extra weight. The public interest weighs heavily in favour of allowing IIROC to carry out its disciplinary function.
- [27] IIROC Staff submitted that there is no evidence that Locke's clients are at risk, that she has not shown that her interests outweigh those of the public interest, and that her stay motion should be dismissed.

III. LAW AND ANALYSIS

- [28] The Commission has the authority to review a decision, order, or ruling of a self-regulatory organization, in this case IIROC, under subsections 30(5) and (5A) of the Act which provide as follows:

30(5) The Director or any person or company which is a registrant and directly affected by a decision, order or ruling of a self-regulatory organization is entitled to a hearing and review of the decision, order or ruling by the Commission to the same extent as if the decision, order or ruling had been a decision of the Director.

30(5A) Section 6 applies to the hearing and review of a decision, order or ruling under subsection (5) in the same manner as that Section applies to a hearing and review of a decision of the Director.

- [29] Subsection 6(4) of the Act states that "[n]otwithstanding that a person or company requests a hearing and review pursuant to subsection [6](2), the decision under review takes effect immediately, but the Commission may grant a stay until disposition of the hearing and review."
- [30] As both parties have submitted, the appropriate legal test to be applied in this proceeding is the three-part test set out in *RJR, supra*.

- [31] Although the decision in *RJR, supra*, did not relate to a stay of an enforcement decision, its significance is the introduction of the three-part test which was applied in the stay applications considered in the legal authorities submitted by both parties.
- [32] The onus is on the applicant to establish that all three parts of the test have been met (*Li v. College of Physicians and Surgeons*, (2004) CanLII 18528 (Ont. Div. Ct.), para. 14; *Re Azeff and Bobrow*, stay motion endorsement (October 19, 2015), pg. 2).
- [33] Locke has the burden of satisfying the Commission that:
- a) There is a serious issue to be tried in the Hearing and Review;
 - b) Locke will suffer irreparable harm if the stay of the Penalty Decision is refused; and
 - c) The balance of convenience favors granting the stay.

A. SERIOUS ISSUE TO BE TRIED

- [34] For the first part of the test, the threshold for an applicant to establish that there is a serious issue to be tried is a low one. The adjudicator is to make a preliminary assessment, not a prolonged examination, of the merits of the case and be satisfied that the application is "neither vexatious nor frivolous" (*O'Brien, Re*, 2020 ABASC 54, para. 34).
- [35] Based on a preliminary assessment of the issues raised in the Hearing and Review, we are satisfied that the Hearing and Review is neither vexatious nor frivolous and that Locke has met the low threshold for establishing that there is a serious issue to be tried.

B. IRREPARABLE HARM TO LOCKE

- [36] For the second part of the test, Locke has the onus of establishing that she will personally suffer irreparable harm if the stay is not granted. Locke submitted that she will suffer harm to her ability to earn a living, harm to her practice, and harm to her statutory right to a review.
- [37] IIROC Staff submitted that the Locke Affidavit does not provide sufficient evidence to support Locke's assertions of irreparable harm.
- [38] In *O'Brien, Re, supra*, the Alberta Securities Commission (ASC) considered an application by Michael O'Brien (O'Brien) for a stay pending appeal to the ASC of a liability decision and a penalty decision of IIROC. The penalty decision included an order that prohibited his registration with an IIROC Dealer Member firm for two years.

[39] The ASC discussed irreparable harm in paragraphs 36 and 37 of its decision as follows:

[36] The *RJR* decision explains that at the second stage of the RJR Test, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied" (at para. 63). We are reminded that, "[i]rreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (at para. 64).

[37] We agree that O'Brien faces the prospect of irreparable harm to his career as a financial advisor as a result of a lengthy period of suspension. It is possible that during his suspension, he will lose his book of business as his clients seek other financial advisors. While it is true that if successful on appeal he can seek another job with another Dealer Member, this is small comfort if he has no clients left to bring to that job. We agree with the comments of the British Columbia Securities Commission in *Re Steinhoff*, 2013 BCSECCOM 308 at para. 90:

- Suspension of any length beyond the range of a normal vacation is, for a registered representative, an extremely serious matter. A suspension of one year . . . is tantamount to the termination of the registrant's career. At a minimum, it requires the registrant to build a book from scratch, a process that takes years and enormous effort.

[40] Evidence of irreparable harm must be clear, not speculative, and it must be supported by evidence that demonstrates that the applicant would suffer it (*Mason (Re)*, 2018 ONSEC 16, para 15; *Re Azeff and Bobrow*, *supra*, pg. 2; *Yazdanfar v College of Physicians and Surgeons*, (2012) OJ No. 2392 (Ont. Div. Ct.), para. 61).

[41] In paragraph 17 of the Locke Affidavit, Locke states that if she is suspended pending the Hearing and Review, she "...would be unable to earn an income of any kind as a Registered Representative" as this is her sole source of employment income.

[42] We do not dispute that an immediate nine-month suspension would have an impact on Locke's ability to earn a living. However, paragraph 33 of *Yazdanfar*, *supra*, applies equally to a suspension of a dealing representative's registration:

33The party seeking the stay must establish a "real risk of disastrous consequences" if the stay is not granted: *Sazant v. College of Physicians and Surgeons* at para 11; *Noble v. Noble*, [2002] O.J. No. 4997 (SCJ) at para.16. **Irreparable harm, in this context, means more than financial loss or inconvenience. Otherwise, this threshold would always be met when a physician's licence is revoked or suspended** (emphasis added).

- [43] With respect to harm to her practice, Locke states in paragraphs 18 and 19 of the Locke Affidavit that she believes that the effect of a suspension would force her retirement from the industry, that many of her clients will not return and that she would be unable to maintain a self-sustaining practice following a return from suspension.
- [44] In the discussion in *O'Brien, Re, supra*, above, factors considered in determining whether there would be irreparable harm were the loss of a registrant's book of business and the ability to rebuild that book upon return from the suspension. In that case, there was affidavit evidence that O'Brien's employer terminated his registration several weeks after IIROC issued its penalty decision against him.
- [45] IIROC Staff referred to testimony provided at the Penalty Hearing by Chris Enright (Enright), President and Ultimate Designated Person for Aligned Capital, that they continue to support Locke and that "... in the event that she's suspended or she comes back, we will continue to support her." (Penalty Transcript pg. 32, lines 17 – 21).
- [46] In addition, IIROC Staff referred to reference letters provided at the Penalty Hearing from two of Locke's clients who indicated their continuing confidence in Locke (IIROC Staff Book of Documents pg. 70 and pg. 72).
- [47] Locke has not provided any evidence to indicate that Aligned Capital no longer supports her return to the firm and her clients.
- [48] Locke submitted that a deferment of the sanctions pending the Hearing and Review is consistent with the right of review that exists in subsection 30(5) of the Act and that failure to grant a stay of the Penalty Decision in this instance would render Locke's appeal rights under the Act moot.
- [49] IIROC Staff submitted that rendering an appeal moot can happen in every case of a request for a stay and there would never be denial of a stay if this was the only factor.
- [50] Locke cited *Alementary Services Ltd. v. Nova Scotia (Attorney General)*, 2009 NSCA 61 in support of her submission. In that decision, the Nova Scotia Court of Appeal granted the motion by a pub for stay of an order suspending the pub's liquor license for two days pending its appeal. In deciding that irreparable harm would result without a stay, the Court stated in paragraph 9 of its decision that "...without the stay, the suspension will have been served by the time the appeal is heard. This would effectively deny the Pub its right to appeal."
- [51] The decision in *Alementary Services Ltd., supra*, can be distinguished on the basis that the only penalty was the two-day suspension of the pub's liquor license. The Penalty Decision sets out eight penalties, one of which is the nine-month suspension. Without a stay, Locke's suspension will likely have been served by the

time the Hearing and Review is heard but her appeal rights would still apply to the other seven penalties.

- [52] IIROC Staff noted that Locke had proposed a six-month suspension at the Penalty Hearing and found it unusual that she was now arguing that a nine-month suspension would cause her irreparable harm. We did not give any weight to this information. Locke's proposal was provided in the context of the Penalty Hearing where IIROC Staff were proposing a two-year suspension.
- [53] We accept that Locke will suffer consequences if the stay is not granted. However, there is no clear evidence that she will suffer irreparable harm. We are not satisfied that she has met the burden of establishing that she meets the second part of the test.

C. BALANCE OF CONVENIENCE

- [54] The ASC discussed the balance of convenience in paragraph 41 of *O'Brien, Re, supra*, as follows, after noting at paragraph 40 that the significance of the harm to the applicant is to be considered at this stage:

[41] The third stage of the RJR Test requires "a determination of which of the two parties will suffer the greater harm from the granting or refusal" of the remedy sought (*RJR* at para. 67). The Supreme Court of Canada observed that the factors to be considered at this stage will vary from case to case, and include the public interest - that is, the interest of society in general as well as "the particular interests of identifiable groups" (at paras. 68 and 71-72).

- [55] The balance of convenience requires a determination of who will suffer the greater harm, Locke, or IIROC and its public interest mandate.
- [56] Locke submitted that the harm to Locke and the impact on her clients must be considered in weighing the balance. She submitted that her clients would be at risk of experiencing delays in service, increased expense, and inconveniences, which may harm the reputation of the profession.
- [57] In IIROC Staff's submissions, they referred to testimony from Enright at the Penalty Hearing that in the event that Locke was suspended, her accounts could be serviced through one of the two other Aligned Capital offices in Halifax or through a registrant at the head office (Penalty Transcript pg. 31, lines 9- 24). Locke has not provided any evidence that this information is no longer accurate.
- [58] Any risks to Locke's clients would be mitigated through the actions proposed to be taken by Aligned Capital.
- [59] Locke stated in her submissions that she respects that IIROC is mandated to protect investors. However, she submitted that since the contraventions in the Penalty Decision primarily concerned the time from 2010 to 2014 and she has been

licensed to practice since that time, it would be unfair to find that the public will be at undue risk if the implementation of the Penalty Decision is delayed for the Hearing and Review.

- [60] We note that some of the contraventions referred to in the Penalty Decision also relate to one client from 2015 to 2017.
- [61] Prior to the IIROC Panel finding that Locke had contravened IIROC rules, there would be no basis for IIROC to restrict Locke's practice. It was not until the Penalty Decision was issued on August 10, 2020, that IIROC could impose restrictions on Locke's practice.
- [62] Locke's interests must be balanced against the interests of IIROC and its public interest mandate. IIROC Staff submitted that the public interest weighs heavily in favor of allowing IIROC to carry out its disciplinary function, particularly when the contraventions in the Penalty Decision involved multiple clients at three member firms over a lengthy period of time. IIROC Staff noted the importance of deterring others from engaging in similar misconduct.
- [63] The ASC discussed IIROC's public interest mandate at paragraphs 44 and 45 of *O'Brien, Re, supra*, as follows:
- [44] This leaves us to balance O'Brien's interests against the considerable weight of the broader public interest in IIROC achieving its mandate to foster fair and efficient capital markets, and to protect the investing public. We agree with IIROC staff that enforcing registrant standards of conduct is a crucial part of IIROC's ability to do so.
- [45] As the ASC stated in the *Lutheran* decision (at para. 96):
- Effective enforcement is timely, efficient and final. Failure to deal with allegations of misconduct expeditiously can undermine public confidence in the securities regulatory system, and is inconsistent with the protective purposes of that system. ...
- [64] On page 3 of *Re Azeff and Bobrow, supra*, Justice A. Kruzick, in considering the Ontario Securities Commission's mandate to protect investors and confidence in capital markets, states "(a)s expressed in **RJR-MacDonald** in the balancing exercise, the interest of the public must be given extra weight."
- [65] With respect to the right of review under subsection 30(5) of the Act, we agree with Locke that in order for that right to have meaning, there must be circumstances where the right can be exercised and the stay available under subsection 6(4) of the Act can be granted. While, in considering which of the two parties will suffer the greatest harm, the public interest weighs heavily in favour of allowing IIROC to carry out its disciplinary function, IIROC's public interest mandate cannot be solely determinative.

- [66] As set out in paragraph 63 of *RJR, supra*, the factors to be considered in determining which of the two parties will suffer the greatest harm are numerous and will vary from case to case. In the context of subsections 30(5) and 6(4) of the Act, the assessment of the public interest harm that would result from a stay of a penalty decision includes, among other things, consideration of the nature of and actions giving rise to the decision, order or ruling of the self-regulatory organization.
- [67] In this case, Locke was found to have contravened various IIROC Dealer Member Rules. In determining the sanctions issued under the Penalty Decision, the IIROC Panel took into consideration all the evidence relating to the contraventions. This evidence included the length of time of the misconduct, the multiple clients involved, the vulnerability of the clients and the amount of unrealized losses involved. In paragraph 16 of the Penalty Decision, the IIROC Panel noted that Locke "...was a very experienced registrant who had held senior supervisory positions for several dealers. Her misconduct occurred over several years and demonstrated a blatant disregard for her professional regulatory and ethical obligations to her clients, dealer and the industry."
- [68] In paragraph 47 of *O'Brien, Re., supra*, the ASC noted that a stay of a penalty decision could undermine public confidence in IIROC's ability to discipline registrants against whom it has made serious findings of misconduct. The Merits Decision and the Penalty Decision set out serious findings of misconduct. We find that the risk of harm in this case is not to Locke's appeal right but rather to the public interest which is exacerbated where the actions involved are serious and reflect a sustained pattern of behaviour.
- [69] Locke submitted that as an alternative to ordering a stay of the Penalty Decision, the Commission could order a stay conditional on Locke being subject to close supervision by Aligned Capital. Locke referred to three decisions (*Yazdanfar, supra; Li, supra; Kooner v. College of Physicians & Surgeons (Ontario)*, [2001] O.J. No. 5134 (Ont. Div.Ct.)) where the outcomes turned on whether interim measures were workable to protect the public interest.
- [70] We did not find these decisions to be helpful in determining whether a conditional stay would be appropriate for Locke. The three decisions all relate to medical professionals and the determination of whether a conditional stay order was appropriate turned on the particular facts relating to, and legislation governing, those professionals.
- [71] Under subsection 6(4) of the Act, the Commission has the discretion to grant a stay until disposition of a hearing and review. The provision is silent as to whether the Commission has the authority to impose terms and conditions on the stay. Neither party addressed this issue in their submissions. As a result, we do not have the analysis required to enable the Commission to determine whether it could or should grant a conditional stay order.

[72] We are not satisfied that Locke has met the burden of establishing that she meets the third part of the test. In balancing Locke's interests against IIROC's public interest mandate, we find that the balance of convenience weighs in favor of IIROC and its public interest mandate.

IV. CONCLUSION

[73] Locke's request for a stay of the Penalty Decision is denied. The motion is dismissed.

DATED at Halifax, Nova Scotia, this 16th day of September, 2020.

NOVA SCOTIA SECURITIES COMMISSION

(signed) "Shirley P. Lee"
Shirley P. Lee, QC
Chair

(signed) "Valerie Seager"
Valerie Seager
Commissioner

(signed) "Heidi Walsh-Sampson"
Heidi Walsh-Sampson
Commissioner