

**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 CONDITIONAL STAY
(Subsections 30(5) and (5A) and 6(4))**

Hearing	In writing	
Decision	December 23, 2020	
Panel	Shirley P. Lee, QC Valerie Seager Heidi Walsh-Sampson	Chair Commissioner Commissioner
Counsel	Brian K. Awad, QC Kevin J. Kiley Kathryn Andrews April Engelberg	Counsel for Shirley A. Locke Counsel for the Investment Industry Regulatory Organization of Canada

I. BACKGROUND

- [1] This is the continuation of 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 the motion (the Motion) brought by Shirley A. Locke (Locke), a dealing representative with Aligned Capital Partners Inc. (Aligned Capital) registered with the Investment Industry Regulatory Organization of Canada (IIROC).
- [2] In the interests of expediency, this continuation proceeded as a written hearing with written submissions from Locke dated November 27, 2020, and staff of IIROC (IIROC Staff) dated December 4, 2020.
- [3] The Motion was to hear an application for a stay of the Penalty Decision dated August 8, 2020 (the Penalty Decision) issued by a Hearing Panel (Nova Scotia District) of IIROC (the IIROC Panel) pending the conclusion of a hearing and review of the IIROC Panel's Decision on the Merits dated May 28, 2020 (the Merits Decision) and the Penalty Decision before the Commission (the Hearing and Review).
- [4] We heard the Motion on August 26, 2020, and issued a written decision dated September 16, 2020 (the Motion Decision).
- [5] As set out in the Motion Decision, we applied 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 and found that:
- (a) the Hearing and Review is neither vexatious nor frivolous and that Locke had met the low threshold for establishing that there is a serious issue to be tried;
 - (b) Locke had not met the burden of establishing that she will suffer irreparable harm if the stay is not granted; and
 - (c) in balancing Locke's interests against IIROC's public interest mandate, the balance of convenience weighed in favor of IIROC and its public interest mandate.
- [6] Locke had 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. As neither party had addressed this issue in their submissions, we concluded that we did not have the analysis required to enable us to determine whether we could or should grant a conditional stay order.

[7] Based on our analysis, we denied Locke's request for a stay of the Penalty Decision and dismissed the Motion.

II. APPEAL OF MOTION DECISION

[8] On September 18, 2020, Locke filed an Application for Leave to Appeal and Notice of Appeal (Tribunal) (Interlocutory) with the Nova Scotia Court of Appeal (NSCA) appealing the Motion Decision. After considering written submissions from Locke and IIROC, the NSCA issued its order with recitals to explain its reasons on November 16, 2020 (the NSCA Order). The information relating to the appeal set out in this decision is taken directly from the NSCA Order.

[9] Locke submitted to the NSCA that the Commission erred by ruling:

- (a) there was no irreparable harm to Locke;
- (b) the balance of convenience for an unconditional stay favoured denial of the stay; and
- (c) the Commission had no authority to consider whether or not to issue a conditional stay.

[10] In applying the three-part test for a stay in *RJR-MacDonald Inc.*, *supra*, the NSCA concluded that:

- (a) there is a serious issue to be tried;
- (b) the Commission erred in law by mis-defining the test for irreparable harm. Locke would lose significant income during her suspension. If Locke succeeds in the Hearing and Review, she will have no cause of action to recover those losses and will have served most or all her suspension, rendering her appeal of the suspension moot. Denial of an unconditional stay would cause irreparable harm to Locke;
- (c) the balance of convenience is a factual and discretionary balance of dissimilar factors for which the Commission is best suited. The Commission's decision that an unconditional stay was unwarranted shows neither an error in law or principle nor any palpable and overriding error of fact. The outcome does not result in a manifest injustice; and
- (d) The Commission's decision that it had no authority to consider whether or not to issue a conditional stay was an error of law. The power to measure and balance the harms to the parties implies a

power to consider whether or not there are conditions that would minimize the harms to both the parties.

- [11] The NSCA granted leave to appeal and ordered that the:
- (a) ground of appeal that challenges the Commission's denial of the unconditional stay is dismissed;
 - (b) ground of appeal that challenges the Commission's refusal to consider whether or not to issue a conditional stay is allowed; and
 - (c) issue of whether or not to issue a conditional stay is remitted to the Commission for consideration without delay.

III. ISSUE TO BE CONSIDERED

- [12] The issue before the Commission is whether a conditional stay of the Penalty Decision should be granted pending the disposition of the Hearing and Review.
- [13] Our decision is that a conditional stay of the Penalty Decision should be granted. Our reasons for this conclusion follow.

IV. POSITIONS OF THE PARTIES

A. LOCKE

- [14] Locke submits that the balance of convenience analysis requires us to weigh in the balance the interests of Locke and the public interest.
- [15] The NSCA recognized two interests of Locke: her economic interest in continuing to earn a living; and a procedural interest in being able to exercise her statutory right of review, including with regard to the suspension, before that right is rendered wholly or substantially moot due to the suspension already having been served.
- [16] Locke submits that the public interest has two components: the need to protect the public from a particular registrant during the review period; and the need for securities regulators to be fair and firm in promoting public confidence in the securities industry and its regulation.
- [17] With respect to the first component of the public interest, Locke submits that ordering interim supervision is an accepted and effective way to protect the public from a particular registrant and that "close supervision" and "strict supervision" are well-established forms of practice restriction in the Canadian securities industry.

[18] Locke submitted the following orders staying IIROC ordered suspensions pending a hearing and review:

- (a) British Columbia Securities Commission Stay Order re Catherine Deborah Jones (Jones) and IIROC, 2014 BCSECCOM 149 (the Jones Order), in which IIROC consented to a stay of the penalty decision on condition that Jones be placed under strict supervision until disposition of the review. The penalty decision included a three-month suspension;
- (b) Ontario Securities Commission (OSC) order re Joseph Debus (the Debus Order) dated August 26, 2019, in which the OSC, after considering the consent of all parties, ordered a stay of the two IIROC decisions pending the disposition of a hearing and review. The penalty decision included a nine-month suspension; and
- (c) OSC order re Douglas John Eley (Eley) dated November 16, 2020, in which the OSC ordered, with reasons to follow, a stay of two IIROC decisions on the condition that Eley's registration be subject to close supervision by his sponsoring firm. The penalty decision included a twelve-month suspension. The OSC issued its Reasons for Decision on a Stay Motion dated December 15, 2020 (the Eley Decision).

[19] With respect to the second component of the public interest, Locke submits that as important as it is for regulators to send a signal that misconduct is taken seriously, they must also not be draconian or disrespect the review rights in their constating statutes.

[20] Locke referred to paragraph 37 of the Saskatchewan Court of Appeal (Sask. CA) decision *Abrametz v. Law Society of Saskatchewan*, 2019 SKCA 21, in which that Court decided that the interests the Law Society of Saskatchewan (the Law Society) protects could be protected by attaching conditions to the grant of a stay of the penalty decision:

[37] Respectfully, I am unable to agree that the public is as quickly offended by the deferment of punishment pending an appeal as the Law Society would suggest. Right-minded people will understand that the presumption of innocence the member enjoyed before being found guilty no longer exists, but they will also understand the law provides for rights of appeal and review that may result in a different outcome. In this regard, they will be mindful that a wrong may be committed if someone is punished or subject to an order that is later set aside. Right-minded people will want to ensure that there is no actual risk to the public, or that the actual risk to the public is sufficiently managed while the appeal or review is undertaken. In this case, they will observe that conditions attached to a stay will reasonably achieve this. In short, I do not share the Law Society's concern that, in the circumstances of this case at least, a stay will cause significant harm to the reputation of the Law Society or the administration of justice.

- [21] Locke submits that in weighing her interests against the public interest, the best balance is struck by allowing her to remain licensed, but subject to a form of supervision during the appeal period.

B. IIROC STAFF

- [22] IIROC Staff oppose Locke's motion on the basis that she has not met part three of the test in *RJR-MacDonald Inc., supra*, and a conditional stay should not be imposed by the Commission. In light of the serious findings of misconduct involving multiple clients, it is not in the public interest that Locke be permitted to continue registerable activity, even under enhanced supervisory conditions, pending resolution of the Hearing and Review.
- [23] IIROC Staff submits that the public interest involves IIROC achieving its mandate to foster fair and efficient capital markets, protecting the investing public, and enforcing registrant standards of conduct as discussed by the Alberta Securities Commission (ASC) in *Re O'Brien*, 2020 ABASC 54.
- [24] IIROC Staff submits that in the balancing exercise, the interest of the public must be given extra weight as stated by Judge Kruzick in the Endorsement for a stay motion heard October 19, 2015 *Re Azeff v Ontario Securities Commission*.
- [25] IIROC Staff submits that the broader public interest weighs heavily in favour of IIROC. Allowing Locke to continue in registerable activity is contrary to the IIROC Panel's findings and decision to impose a nine-month suspension. It is also contrary to the important principle of allowing IIROC to carry out its disciplinary function, especially when the contraventions were egregious, involved multiple clients at three member firms, and covered a lengthy period of time.
- [26] IIROC Staff submits that *Abrametz v. Law Society of Saskatchewan, supra*, is distinguishable as the Sask. CA found harm to the clients of Peter Abrametz (Abrametz) if a stay was not granted.
- [27] IIROC Staff submits that in the alternative, if Locke's motion is granted, the Commission should impose strict supervision and an additional term requiring Locke to make contemporaneous typed notes of all client trade instructions, which are to be reviewed by Aligned Capital compliance every two weeks.

V. LAW AND ANALYSIS

A. Law

- [28] 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."

- [29] The first two parts of the three part test for a stay in *RJR-MacDonald Inc., supra*, are not at issue in this proceeding: there is a serious issue to be tried and Locke will suffer irreparable harm if a stay is not granted. In their written submissions, IIROC Staff conceded that Locke has met these two parts of the test.
- [30] In considering the third part of the test, the Commission must be satisfied that Locke has met the burden of showing that the balance of convenience between the parties weighs in favor of granting a conditional stay.
- [31] In paragraph 7 on page 4 of the NSCA Order, the NSCA stated that “(t)he power to measure and balance the harms to the stay applicant and to the public interest implies a power to consider whether or not there are conditions that would sufficiently, to the Commission Panel's satisfaction, minimize the harms to both the applicant and public.”
- [32] Locke's interests are her economic interest in continuing to earn a living and a procedural interest in being able to fully exercise her statutory right of review.
- [33] Locke's interests must be balanced against IIROC and its public interest mandate. In paragraph 63 of the Motion Decision, we cited the ASC's discussion of IIROC's public interest mandate in paragraphs 44 and 45 of *O'Brien, Re, supra*. The ASC described 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. IIROC Staff's ability to enforce registrant standards of conduct is a crucial part of effective enforcement that is timely, efficient and final.
- [34] In the Jones Order and the Debus Order relied upon by Locke, IIROC Staff consented to the stay orders. This is distinguishable from the current proceeding where IIROC Staff opposes Locke's motion for a stay of any kind.
- [35] In the Eley Decision, the OSC applied the three-part RJR test and found that there was a serious issue to be tried and that there would be irreparable harm to Eley if a stay was not granted. In paragraph 30 of the Eley Decision, the OSC states that “Eley faces a real prospect of irreparable damage to his career, income, business and reputation as a registered representative from immediate enforcement of the suspension.”
- [36] In paragraph 39 of the Eley Decision, the OSC found that the balance of convenience weighed in favour of granting a stay “(g)iven the short duration of the stay, the specific financial and personal circumstances of Eley and the low risk of client harm...”.
- [37] In paragraph 40 of the Eley Decision, the OSC states that it is “... satisfied that in the circumstances, the risk of harm to investors is adequately addressed by the imposition of the condition of close supervision...”.
- [38] In *Abrametz v. Law Society of Saskatchewan, supra*, the Sask. CA found that in balancing Abrametz's rights of appeal and review against the public interest that

the Law Society protects, the actual risk to the public could be protected with conditions of supervision attached to the stay.

B. Close and Strict Supervision

- [39] Locke submits that an alternative to continuing the interim suspension is to order interim supervision. She refers to close supervision and strict supervision as well-established forms of practice restriction in the Canadian securities industry. She made no submissions on what form of supervision would be appropriate in these circumstances.
- [40] IIROC Staff submits that if Locke's motion is granted, the Commission should impose strict supervision and an additional term requiring Locke to make contemporaneous typed notes of all client trade instructions, which are to be reviewed by Aligned Capital compliance every two weeks.
- [41] Under IIROC rules and requirements, there is a Strict Supervision Report and a Close Supervision Report. The key difference between the two reports is the requirement for the Supervisor's pre-approval of each order made by an Approved Person in a Strict Supervision Report.

C. Balancing the Interests

- [42] In considering the balance of convenience, the question is whether we are satisfied that the imposition of conditions would sufficiently minimize the harms to both Locke and IIROC and its public interest mandate.
- [43] The irreparable harm to Locke was found to have been her economic interest in continuing to earn a living and a procedural interest in being able to fully exercise her statutory right of review.
- [44] Although Locke was found to have contravened four IIROC rules relating to five clients over a lengthy period of time, in paragraph 19 of the Penalty Decision, the IIROC Panel stated that "(n)otwithstanding the adverse findings of the Panel as to Ms. Locke's professional misfeasance failure of regulatory obligations and duty to her clients; no findings were made of malice or malfeasance."
- [45] Locke's interests must be balanced against the considerable weight of IIROC and its public interest mandate.
- [46] In considering this balance, we took into account the nature of the contraventions in the Merits Decision. We are satisfied that the conditions proposed by IIROC Staff are reasonable in the circumstances and would sufficiently manage any actual risk to the public interest until the disposition of the Hearing and Review if a stay is granted.

[47] As in the Eley Decision, the duration of any stay would be short as the Hearing and Review is scheduled for January 14 and 15, 2021.

[48] In these circumstances, we find that the balance of convenience weighs in favour of granting to Locke a stay subject to conditions.

VI. CONCLUSION

[49] Locke's request for a conditional stay of the Penalty Decision is granted. For the reasons set out above, we order a stay of the Penalty Decision until the disposition of the Hearing and Review subject to the following conditions:

(a) the registration of Locke shall be subject to strict supervision in accordance with IIROC's Strict Supervision Report by Aligned Capital; and

(b) Locke must make contemporaneous typed notes of all client trade instructions, which are to be reviewed by Aligned Capital compliance every two weeks.

DATED at Halifax, Nova Scotia, this 23rd day of December, 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