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

- and -

IN THE MATTER OF

FRANK YOUDEN

Applicant

and

THE INVESTMENT DEALERS ASSOCIATION OF CANADA

Respondent

DECISION

[1] On March 22nd, 2007, a disciplinary panel of the Investment Dealers Association ('the Hearing Panel') refused to delay a hearing to determine the sanction to be imposed on Mr. Frank Youden who, the panel had determined, failed to properly supervise a broker employed in his office. Mr. Youden has urgently appealed the refusal of the delay to the Nova Scotia Securities Commission.

[2] The Hearing Panel made its decision in December 2005 that Mr. Youden failed to properly supervise a broker. Early in 2006, Mr. Youden learned that the chairman of the Hearing Panel had, in his private legal practice, been involved in a suit against Mr. Youden's employer which alleged a failure to supervise a broker. Mr. Youden went back to the Hearing Panel arguing the panel should disqualify ("recuse") itself because of an apprehended bias. The Hearing Panel considered its position, but found no apprehension of bias and refused to disqualify itself (the "recusal decision"). Mr. Youden appealed the recusal decision to an IDA "Appeal Panel".

[3] Mr. Youden says that the Securities Commission should order the IDA to delay holding a hearing to consider what penalty should be imposed on him until the Appeal Panel has considered and ruled on the appeal of the recusal decision. Mr. Youden argues in his appeal to the Securities Commission that the IDA is bound by its own rules to delay proceeding once an appeal within the IDA process has been filed.

[4] The IDA replies that the rules and the Act properly interpreted do not require a delay and that as a matter of discretion I should not fragment the proceeding. The IDA says Mr. Youden

has every right to pursue his IDA appeals, but the appeals should not hold up the IDA penalty hearing.

[5] To repeat, Mr. Youden appealed the IDA panel's refusal to disqualify itself to an IDA "Appeal Panel". He also asked the Hearing Panel to delay proceeding to the penalty phase of the hearing pending the outcome of the appeal. The Hearing Panel refused both requests. It is an appeal of the Hearing Panel's refusal to delay that comes before me now as a member of the Nova Scotia Securities Commission. I am asked to determine, in the words of Mr. Youden's written argument:

> Whether there should be an order staying further proceedings by the Hearing Panel until Mr. Youden's appeal of the Hearing Panel's Recusal Decision made January 31, 2007 has been finally concluded.

[6] As stated above, the IDA says that the IDA panel should complete its work by determining what sanction should be imposed. Mr. Youden's appeals should proceed in the normal course.

[7] Mr. Youden argues that IDA hearing panels are bound to follow the IDA's own by-laws. The IDA is a self-regulatory organization. It is not constituted by statute. The IDA's authority to act in discipline of its members comes within its own constitution and by-laws, and the IDA cannot act outside of them.

[8] Mr. Youden says that the recusal decision falls within the definition of "decision" in by-law 20.1:

> Decision means:
>
> a determination, including reasons, arrived at after consideration of facts and/or law by a Decision-maker pursuant to this By-law. Decision includes rulings and orders.

[9] He says the effect of an appeal is to stay the proceeding because of by-law 20.53:

> 20.53 Effect of Appeal Application
>
> (1) An appeal to the Appeal Panel from a decision of a Hearing Panel shall operate as a stay from the decision, unless ordered otherwise by the Appeal Panel.

[10] In summary, Mr. Youden argues that as a matter of law under the IDA's own by-laws, a hearing panel cannot proceed with the penalty hearing as a result of the pending recusal appeal to the IDA Appeal Panel. If the IDA is unhappy with this procedure, then he points out, the IDA

has full power to amend its own by-laws for the future, but in the meantime, and with respect to Mr. Youden, the IDA is bound by them.

[11] The IDA replies that the recusal decision was not a decision pursuant to by-law 20. It is an interlocutory decision, that is to say that it is a decision made in course of proceeding. The IDA says there may be many "decisions" on various issues in a proceeding and the rule was not intended to enable a party to use an appeal to deflect the progress of a hearing.

[12] Mr. Youden replies that the argument effectively reads into the by-law words that are not there. He says, in effect, the words are clear and simple. Apply them.

[13] The IDA by-laws are the terms of a contract between its members. How is the contract to be interpreted? I agree with the interpretation applied by the IDA.

[14] By-law 20.50 (1) provides for the appeal of a disciplinary decision:

> **Right of Appeal**
> (1) The Association and a Respondent may appeal a disciplinary decision made by a hearing Panel to an Appeal Panel...

[15] I interpret "disciplinary decision" in the context of the right of appeal to be more than a "decision" under by-law 20.1.

[16] I interpret "disciplinary decision" to be the decision arising out of the process as a whole. Similarly, the right of appeal is a right arising out of the process as a whole. So, when 20.53 says an appeal brings a stay, it means a stay of the "disciplinary decision" as a whole and, in the context, particularly a stay of the enforcement of any sanction imposed.

[17] I do not construe "stay" in the context to mean a stay in the proceedings pending the resolution of some procedural, collateral or "interlocutory" issue. 20.53 says, in my view, that the IDA will not "execute" its penalty decision until the appeal is resolved.

[18] Statutes are to be broadly and liberally construed to determine the legislative intent. The by-laws of the IDA must be interpreted more narrowly, but one should not be unmindful of the expectations or intentions of members. Members want fairness in any disciplinary proceeding. Equally, they would not want the process to be subject to procedural manipulation.

[19] In the specifics of this case, I accept that Mr. Youden's argument would probably not unduly complicate matters if accepted. But the general proposition is a guide to my interpretation. If Mr. Youden's argument is correct, and given that the definition of decision under 20.01 is so broad, anything ruled upon by a hearing panel is appealable and invokes a stay or, at least, a general invitation to litigate what is appealable and what is not appealable. Members of the IDA should be understood to expect that a disciplinary procedure will proceed quickly and efficiently. I agree with the IDA that preference is to be given to an interpretation which encourages linear proceedings without procedural derailments.

[20] Mr. Youden submitted a decision of an IDA panel in Ontario, *Re Taub,* [2006]

I.D.A.C.D. No.22 as authority for the proposition that appeals may be made on interlocutory decisions within a proceeding. *Taub* proceeded by agreement of the parties on the assumption that an appeal might be taken from its preliminary, interlocutory decision on a question of jurisdiction. The panel said at paragraph 51:

> This was an unusual hearing. We agreed to hear the preliminary motion on jurisdiction at the opening of this hearing. Counsel for both parties asked that we hear that motion and then also hear the Respondent's motion on jurisdiction. They both anticipated there would be an appeal in this matter and felt a decision on both motions might be of some assistance.

[21] I do not find the assumption that an interlocutory decision would found an appeal persuasive on the point of whether such an appeal could or should be made of an interlocutory ruling under the by-laws of the IDA. The hearing panel in *Taub* did not hear argument or rule on the point. The hearing panel and the parties accepted that there was an appeal, but in my view, simple acceptance does not constitute a legal opinion.

[22] I also agree with the IDA about the proper resolution as a discretionary matter. I am persuaded by the various opinions submitted, including *Goodine Dairy Farm v. New Brunswick (Milk Marketing Board)*, [2002] N.B.J. No. 177 (NBCA), that it is not wise, not even in Mr. Youden's case, to deflect or divert the IDA proceeding into another forum.

[23] The proceeding, in my view, should proceed to the penalty hearing and all issues should be dealt with by the Appeal Panel as provided in the by-laws.

[24] I dismiss the motion.

DATED this 10th day of April, 2007.

"Walter Thompson"
J. WALTER THOMPSON, Q.C.
Nova Scotia Securities Commission