ALBERTA SECURITIES COMMISSION

DECISION

Citation: Re Schillaci, 2021 ABASC 161 **Date: 20211007**

Simon Schillaci

Panel:	Tom Cotter Kari Horn
Representation:	Don Young Tracy Knight for Commission Staff Charles Corlett for Investment Industry Regulatory Organization of Canada Simon Schillaci for himself
Submissions Completed:	July 9, 2021
Decision:	October 7, 2021

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I. INTRODUCTION

[1] By email correspondence dated May 26, 2021, Simon Schillaci (the **Applicant**) sought to have the Alberta Securities Commission (**ASC**) hear an appeal of the January 16, 2007 decision (the **Decision**) of an Investment Dealers Association of Canada (**IDA**) hearing panel. The Decision followed a disciplinary hearing held on October 5 and 6, 2006 in which the Applicant – then the Calgary branch manager of Union Securities Ltd. (**Union Securities**) – was alleged to have contravened IDA regulations and policies in 2002 and 2003 by failing to adequately supervise the account management activities of a registered options representative, **EL**, and by failing to maintain adequate supervision records and establish appropriate procedures and controls for the effective supervision of EL and other registered employees.

[2] The Applicant's May 26, 2021 email to the ASC Registrar was preceded by a series of ten emails between the Applicant and staff of the Investment Industry Regulatory Organization of Canada (**IIROC**). The emails were sent between January 19 and March 12, 2021. In that correspondence, the Applicant asked that IIROC expunge his records, remove any public postings relating to his guilt, and reimburse him for the fine and costs he was required to pay as a result of the Decision, citing several grounds supporting his request. In reply, IIROC staff advised the Applicant that they did not have the authority to reverse or revisit disciplinary decisions made by an IDA or IIROC hearing panel, and that the Applicant should seek independent legal advice on potential recourse.

[3] It should be noted that IIROC is the successor of IDA through a combination of IDA and Market Regulation Services Inc. (**RS**), effective June 1, 2008. Following the voluntary surrender of IDA's recognition order in April 2014, IIROC undertook to continue to discharge, perform or fulfill all the obligations of IDA arising on, before or after the combination.

[4] Following receipt of the Applicant's email to the ASC Registrar, ASC staff corresponded with the Applicant advising him of the time in which an appeal to the ASC must be brought pursuant to s. 36 of the *Securities Act* (Alberta) (the **Act**), and of certain procedural requirements found in s. 217 of the Act and ASC Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings*.

[5] This panel advised the parties through the ASC Registrar that, in light of the Applicant's request that the ASC grant him an appeal from the Decision, the panel considered that request an application under s. 213 of the Act to exempt the Applicant from the 30-day limitation period stipulated in s. 36 for appealing a decision of a self-regulatory organization under s. 73 of the Act (the **Application**). Even though the Applicant did not frame his request as an application under s. 213, the panel made that determination as the only potential statutory authority for granting the relief sought. The panel directed that the Application would be heard in writing and established a timetable for the parties to provide written submissions limited to the issue of whether the Applicant should be exempt from the limitation period in s. 36. The parties – ASC staff, IIROC and the Applicant – filed their respective submissions in June and July 2021.

[6] After considering the written submissions we are dismissing the Application, and the reasons for our decision follow.

II. POSITIONS OF THE PARTIES

A. Applicant

[7] The principal ground cited by the Applicant in support of the merits of his requested appeal was that, shortly after the Decision, IDA withdrew allegations of regulatory contravention against EL. The Applicant maintained that the finding in the Decision that he failed to properly supervise EL must be overturned because of the disposition of the allegations against EL. The Applicant also asserted that the finding relating to not maintaining records and having appropriate procedures and controls must be overturned because IDA and Union Securities were responsible for removing the branch records from the Applicant's possession or control. Further, he suggested that he received inadequate legal representation during the IDA hearing process because his lawyer was dealing with a serious family medical issue.

[8] The Applicant relied on the Ontario Securities Commission (**OSC**) decision *Re McQuillen*, 2014 ONSEC 30 as authority to allow an appeal, despite the passage of time and the provisions of s. 36 of the Act. In *McQuillen*, the OSC vacated a settlement agreement between McQuillen and RS made approximately seven years before the application to the OSC. That application was made approximately 14 months after an IIROC panel dismissed allegations against his co-respondent and former supervisor following a contested hearing. The allegations against both McQuillen and his co-respondent arose from the same impugned trading upon which the settlement agreement was based.

[9] Among other reasons for its decision in *McQuillen*, the OSC concluded it had the authority under s. 147 of the *Securities Act* (Ontario) (the **OSA**) to grant an exemption from the 30-day notice period stipulated in s. 8(2) of the OSA. Sections 147 and 8 of the OSA are similar to ss. 213 and 36 of the Act, respectively, but contain important differences discussed later in this decision.

[10] The Applicant acknowledged that he learned from an IDA Bulletin posted on May 9, 2007 that the allegations against EL had been withdrawn. He sought legal advice on a future course of action, and "after considering several factors such as that I was already outside of the 30-day appeal period, we decided to leave the case".

[11] The Applicant gave various explanations for the 14-year delay before seeking to appeal the Decision. These can be broadly described as psychological in nature, including feeling discouraged, anxious and stressed.

[12] The Applicant made a number of other submissions in support of the Application, which generally pertained to his good character. For example, he highlighted his children's accomplishments as evidence that he could not be rightfully accused of poor supervision. He also suggested that his current work with a First Nation could be adversely affected by the Decision.

B. ASC Staff

[13] ASC staff submitted that s. 213 of the Act cannot apply to an exemption under s. 36(2) "because the ASC Panel would effectively be exempting itself". They cited the Alberta Court of Appeal decision *Bahcheli v. Alberta (Securities Commission)*, 2007 ABCA 166, in which the court ruled that the 30-day appeal period cannot be extended unless an application is made within the prescribed 30 days. ASC staff also submitted that the ASC's authority to extend the appeal period

only where an application to extend is brought within the appeal period was enacted in 1984 despite the prior enactment of s. 213. If s. 213 conferred authority to extend the s. 36(1) appeal period, s. 36(2) would have no effect or purpose.

[14] Even if we could extend the appeal period under s. 213, ASC staff submitted that such an order in these circumstances would be contrary to the public interest, specifically the principle of finality of decisions. Reference was made to the judicial test in *Cairns v. Cairns* (1931), 26 Alta. L.R. 69 at 78-79 (CA) for consideration of applications to extend appeal periods – namely, a heavy burden is on an applicant to demonstrate: an intention to appeal while the right existed and a special circumstance justifying the failure to appeal at that time; no unjust prejudice caused by disturbing the judgment; no taking of the benefits of the judgment; and a reasonable chance of success if allowed to appeal. ASC staff argued that the Applicant did not satisfy any of the enumerated criteria from *Cairns*.

[15] *McQuillen* was distinguished in several respects, both on the facts and the applicable statutory provisions. ASC staff pointed out that, in *McQuillen*, the allegations against the two co-respondents were the same, whereas in this case they were likely different. In *McQuillan* the applicant's settlement was set aside after a contested hearing of the co-respondent's allegations, in contrast to this case where the allegations against EL were withdrawn for unknown reasons.

[16] ASC staff pointed to differences between the Act and the OSA provisions considered in *McQuillen*. Most notably, s. 8 of the OSA does not require an application for extending an appeal period to be brought within 30 days, as stipulated in s. 36(2) of the Act. Moreover, they argued that the OSA gives a broader remedial power than the Act, from which we assume they were comparing s. 147 of the OSA with s. 213 of the Act.

C. IIROC Staff

[17] IIROC staff submitted that the Decision was made after a full hearing on the merits and penalty concerning conduct that occurred in 2002 and 2003. The Applicant was represented by counsel, and the sanctions ordered in the Decision were consistent with his counsel's submissions on penalty. Like ASC staff's submissions, IIROC staff referred to jurisprudence on appeal period extensions for judicial proceedings, including the Supreme Court of Canada's decision in *R. v. Roberge*, [2005] 2 S.C.R. 469, setting out factors to be considered similar to those in *Cairns*. They argued that the Applicant did not satisfy that test either.

[18] IIROC staff addressed the merits of the Applicant's requested appeal, asserting that the underlying premise of the Applicant's position was fallacious – i.e., that the adverse findings in the Decision were contingent on EL's contraventions as alleged. They pointed out that the Applicant's hearing, at which he contested his case on the merits, was held before any case was determined against EL. The IDA panel made its findings in the Decision without needing to first find that EL was in breach of a rule.

[19] IIROC staff also distinguished *McQuillen* on the facts, emphasizing the dramatic difference in delay before the respective applicants sought recourse after favourable outcomes for their co-respondents.

III. ANALYSIS

[20] The relevant provisions of the Act are ss. 36(1) and (2), and s. 213:

> 36(1) To commence an appeal to the Commission, the appellant shall, within 30 days from the day on which the written notice of the decision is served on the appellant, serve a written notice of appeal on the Commission.
>
> (2) Notwithstanding subsection (1), the Commission may, on application by the appellant during the appeal period prescribed in subsection (1), extend the appeal period if the Commission considers that it would not be prejudicial to the public interest to do so.
>
> 213 The Commission may by order exempt
>
> (a) any person, company, trade, distribution, security or derivative, or
>
> (b) any class or classes of persons, companies, trades, distributions, securities or derivatives
>
> from all or any provision of Alberta securities laws.

[21] As mentioned, ss. 36(1) and (2) of the Act were considered by the Alberta Court of Appeal in *Bahcheli*, a case in which IDA staff sought to appeal a decision of an IDA panel. The court found that s. 73 does not confer a right of appeal on a decision maker from its own decision. Notwithstanding that conclusion, the court also decided the issue of whether the appeal was brought within the time prescribed by s. 36. It found that the appeal was time barred, stating at para. 73:

> The 30-day appeal period, prescribed by section 36 of the *Act* cannot be extended, except upon application during the prescribed 30-day period: section 36(2). There is no power to extend the time for appeal fixed by statute other than as prescribed by that statute: *Lakevold v. Dome Petroleum Ltd.* (1974), 44 Alta. L.R. (3d) 1 at 3.

[22] This statement has been cited with approval in other decisions of the Alberta Court of Appeal: see, for example, *M.Z.T. v. G.E.S.*, 2007 ABCA 268 at paras. 7-8 and *Kehewin Cree Nation v. Mulvey*, 2013 ABCA 294 at para. 14.

[23] As also mentioned, the foregoing provisions of the Act are substantively different from comparable provisions in the OSA considered in *McQuillen*. Sections 8(2) and (3) of the OSA read:

> 8(2) Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.
>
> 8(3) Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.

[24] There is no provision in s. 8 of the OSA comparable to s. 36(2) of the Act requiring an application to extend the notice period to be brought within a stipulated amount of time, and s. 147

of the OSA gives the OSC authority to order an exemption from any requirement of Ontario securities law, "[e]xcept where exemption applications are otherwise provided for in Ontario securities law". It is therefore more obvious that the general exempting authority in the OSA operates to allow a time extension for bringing an appeal under s. 8 of the OSA.

[25] In contrast, the Act was amended in 1984 to condition the ASC's discretion to extend the time for commencing an appeal on an extension application first being brought within the 30-day appeal period. This amendment was made despite the ASC having had discretionary authority to make exemption orders since at least 1981.

[26] The "modern principle" of statutory interpretation, as articulated by E.A. Driedger in *The Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) at 87, was accepted by the Supreme Court of Canada in *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27 at para. 21:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[27] We must therefore construe s. 36(2) and s. 213 together in the context of the Act and be cognizant of the presumption against tautology, which presumes that the legislature intends every word in a statute to have meaning, make sense, and have a specific role. As stated in R. Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014), at para. 8.23: "courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant".

[28] Also relevant to our analysis is the long established principle of statutory construction *generalia specialibus non derogant* (that specific provisions prevail over general ones). Sullivan discussed that principle in the context of coherence: (described at para. 11.2, citing *R. v. L.T.H.*, 2008 SCC 49 at para. 47):

> It is presumed that the provisions of legislation are meant to work together, both logically and teleologically, as parts of a functioning whole. The parts are presumed to fit together logically to form a rational, internally consistent framework; and because the framework has a purpose, the parts are also presumed to work together dynamically, each contributing something toward accomplishing the intended goal.

[29] Having regard to these maxims of statutory construction, we agree with ASC staff that s. 213 of the Act cannot be read as allowing an exemption to the timeline in s. 36(1), as such an interpretation would result in s. 36(2) having no effect or purpose. We also agree that construing s. 213 in a manner advocated by the Applicant would result in absurdity, as the exemption sought under s. 213 would be for the ASC to exempt itself from the restriction imposed on it by s. 36(2), but s. 213 does not provide the ASC with the authority to exempt itself from anything.

[30] We accept that the plain meaning of s. 36(2) of the Act is unambiguously determinative of the time in which an application to extend the appeal period stipulated in s. 36(1) must be brought. Our conclusion on this point renders moot the question of whether this would be an appropriate case to exercise our discretion in the public interest under s. 213.

IV. CONCLUSION

[31] For the above reasons, we dismiss the Application.

October 7, 2021

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn