~~December 31, 2010~~
September 19, 2011

IN THE MATTER OF: JORY CAPITAL INC.

- and -

IN THE MATTER OF: INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA (IIROC)

Revised to correct section reference in paragraphs 45 and 46.

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Panel:

Acting Chair:	Mr. J.W. Hedley
Commission Members:	Mr. G.J. Lillies
	Mr. G.S. Posner

Appearances:

Counsel for Jory Capital Inc.:	Art Stacey

Counsel for IIROC:	Wietzke Gerber Faye Emmanuel

Introduction

1. Jory Capital Inc. ("Jory") has made an application pursuant to Section 31.1(4) of The Securities Act (Manitoba) (the "Act") seeking a decision as described in a letter dated September 27, 2010, over the signature of legal counsel to Jory, A.J. Stacey of the firm Thompson, Dorfman, Sweatman LLP. The Respondent to Jory's application is Investment Industry Regulatory Organization of Canada ("IIROC"). The relief sought is the removal of certain restrictions imposed upon Jory by IIROC, described in the application by Jory as the "Business Restrictions".

2. IIROC has made an interim motion to the Commission submitting that there are three grounds upon which the Commission either lacks legislative authority to deal with Jory's application or should decline to exercise whatever legislative authority it may have.

3. This panel heard argument from counsel for IIROC and for Jory. We have also had the benefit of briefs of law together with relevant case law, all of which have been of assistance to us.

4. We have decided to deny IIROC's motion and allow Jory to proceed with its application. Our reasons for such decision follow.

Grounds

5. As we have indicated, IIROC based its interim motion on three grounds:

a) that Jory's application was filed after the limitation period expressly set forth in The Securities Act had expired. Further, there is no provision in the Act for an extension of the prescribed limit;

b) that IIROC has its own "internal review remedies" which should have been exhausted by Jory making Jory's application to the Commission premature. The remedy available to Jory pursuant to IIROC rules was an "adequate alternative remedy"; and

c) that, pursuant to IIROCs own internal rules, which Jory has adopted as a matter of contract and which have been approved by the Commission, a member such as Jory can only bring an application if it has been directly affected by a decision of the Board of Directors, a District Council, hearing panel or board panel. However, none of those entities has made the decision by which Jory considers itself aggrieved and therefore there is no provision under IIROC rules for a request to the Commission of the type of review requested by Jory.

6. We will deal with each of those grounds separately.

Limitation Period

7. As previously stated, Jory's application is brought before the Commission pursuant to Section 31.1(4) of the Act which reads as follows:

> 31.1(4) If the Commission considers it in the public interest to do so, it may make a decision in respect of:
> (a) an internal regulation or proposed internal regulation of a self-regulatory organization; or
> (b) a direction, decision, order or ruling made under an internal regulation of the organization.

8. Section 31.1 is in Part IV.1 of the Act entitled "Self-Regulatory Organizations".

9. As well, IIROC brings into play in its Motion Section 29 (in part IV of the Act entitled "Appeals") which reads as follows:

> 29(1) Any person or company affected by a direction, decision, order or ruling of the director given or made under this Act or any other Act of the Legislature may, by notice in writing sent by registered mail to the commission within thirty days after the mailing of the notice of the direction, decision, order or ruling, request and be entitled to a hearing and review thereof by the commission.
> 29(2) Upon a hearing and review, the commission may by order confirm, quash, or vary, the direction, decision, order or ruling under review, or make such other direction, decision, order or ruling as the commission deems proper.

10. It is IIROC's position that Section 29(1) must be read together with Section 31.1. If it were otherwise, IIROC argues, a party such as Jory would not have standing to be heard, citing the language appearing in Section 29(1)(b) "Entitled to a hearing and review……." . Section 31.1 lacks similar language. So, if a party is to be "entitled to be heard", reading Section 29(1) together with Section 31.1must be done to fill the void.

11. Moreover, IIROC cites, as precedent for the proposition that the two sections must be read together, the following sentence contained in a previous decision of the Commission involving Jory dated October 10, 2007 (the "previous Jory case"):

> "Reference in subparagraph 29(1) to the "Director" is deemed to include the IDA (the predecessor to IIROC)."

12. Jory argues in reply that reference to Section 29 from the previous Jory case arose in the context of a "true" appeal process. There was no concern during that process about the limitation period prescribed by Section 29 and the quoted

sentence had no significance as to the determination of that matter. More importantly, the reference to Section 29, were it to bear the interpretation suggested by IIROC, was simply wrong and baseless.

13. Thus, Jory argues that, for the purposes of its application, there is no connection between Sections 31.1(4) and 29(1) of the Act.

14. In propounding the position that Jory's application to the Commission is out of time, IIROC's argument is supported by the aforementioned reference from the previous Jory case, to Section 29(1) of the Act but otherwise mainly by securities legislation from this jurisdiction and others. As indicated, counsel refers to the words contained in Section 29 "be entitled to a hearing" as indicative that only those words or words to that effect can provide a party with standing to be heard. We have also been provided with references to securities legislation outside Manitoba in which provision is specifically made for limitation periods, in some cases by expressed linkages between sections similar to Sections 31.1(4) and 29(1).

15. It does seem to us that Section 29, particularly Section 29(2), adapts more readily to the hearing process itself. It provides specifically for the Commission's options once a "hearing and review" has taken place. Section 31.1 does not. Section 29, as discussed, refers expressly to being "entitled to a hearing". Section 31.1 does not. Interpreting Section 31.1 would have been made easier if it had been worded similarly to Section 29. As such, one is frankly tempted to read the two sections together as we are urged to do by IIROC.

16. However, we ultimately do not agree with IIROC in its analysis of the enabling legislation.

17. The fact that other jurisdictions have chosen to include limitation periods expressly in their legislation is, with respect, of no consequence as far as this panel is concerned.

18. With respect to the statement made by the panel in the previous Jory matter suggesting that Section 29(1) provides the sole legislative foundation for access to the Commission, along with Section 31.1, we do not consider ourselves bound by those words or by IIROCs preferred interpretation thereof. We note that neither counsel has suggested that the doctrine of *stare decisis* has any application to the decision at hand. Even if the doctrine of *stare decisis* were applicable, an administrative tribunal is surely entitled to take the approach available to the courts which is to follow decisions at its own level which were based on the facts at least consistent with those under consideration.

19. In the previous Jory case, Jory came to the Commission with an appeal from a decision made by a hearing body duly constituted under IDA rules. If there was a limitation period applicable, such period commenced when the hearing panel's

decision was made. The process was quite clear and there was no controversy as to whether any party lacked standing.

20. The question to us, purely and simply, is whether there is a limitation period provided for in the Act, expressly or by implication.

21. The existence of limitation periods or filing deadlines can be seen in many examples of judicial and administrative frameworks and we see from IIROC's argument that limitation periods and filing deadlines exist and are applied in securities legislation in other Canadian jurisdictions. However, Jory argues that the possibility of extending a limitation deadline does not occur when no limitation period exists. In this regard, reference is made to *The Law of Limitations* a legal text authored by Graeme Mew, relevant excerpts from which are as follows:

> "The law of limitations is wholly a creature of statute….. If there is not a statutory limitation period applicable to a cause of action, proceedings may be commenced at any time."

22. The approach expressed by Graeme Mew and endorsed by Jory's counsel is appropriate as far as this panel is concerned. For contextual purposes, we refer again to the preamble of Section 31.1(4):

> "If the commission considers it in the public interest to do so, it may make a decision ……"

23. A determination of whether Section 31.1 and 29 should be read together must be made within the context of those words. We are naturally not inclined to apply rigid guidelines which might have the effect of depriving the Commission of exercising its mandate to make decisions which it considers to be in the public interest.

24. Counsel for Jory submits that the purpose of the Commission is to regulate the securities industry in Manitoba which gives the Commission an over-arching responsibility in areas within its legislative framework. Jory's counsel refers us to Chapter 8 of *Sullivan on the Construction of Statutes* and entitled Purposive Analysis which contains the following passage:

> A purposive analysis of legislative text is based on the following propositions:
>
> 1. All legislation is presumed to have a purpose. It is possible for courts to discover or adequately reconstruct this purpose through interpretation.
>
> 2. Legislative purpose must be taken into account in every case and at every stage of interpretation, including initial determination of a text's meaning.

3. Insofar as the language of the text permits, interpretations that are consistent with or promote legislative purpose should be adopted, while interpretations that defeat or undermine legislative purpose should be avoided."

25. The case of LeClair v. Manitoba (Residential Care, Director) was referred to in argument by both IIROC and Jory. In that case, an appeal was filed one day too late and the Manitoba Court of Queen's Bench held that the court had no jurisdiction to extend the time for filing. That decision was upheld by the Court of Appeal which approved the following passage from *Driedger on Construction of Statutes*:

> There is only one rule in modern interpretation, namely, courts are obliged to determine the meaning of legislation in its total context, having regard to the **purpose of the legislation** the **consequences** (our emphasis), of proposed interpretations, the presumptions and special rules of interpretation, as well as external aids. In other words, the courts must consider and take into account all relevant and admissible indicators of legislative meaning. After taking these into account, the court must then adopt an interpretation that is appropriate.

26. In our view, the imposition of limitation deadlines should be avoided, using the words suggested by Sullivan, unless we are expressly directed by statute or binding case law to do otherwise. That is more in keeping with the purpose of the Act as we see it.

27. We have decided that the 30 day period prescribed in Section 29(1) of the Act has no bearing on the present application by Jory. We have concluded that, absent an expressed limitation period in our governing legislation, there is nothing, given the purpose of such legislation, to move us toward an implied one. Moreover, again with legislative purpose in mind, we do not consider the absence of the words "entitled to a hearing" in section 31.1 to be determinative. In so deciding, we accept Jory's argument that the Commission's legislated purpose of regulating the securities industry and its over-arching duty to guard the public interest leaves no room for rigid guidelines unless clearly and expressly imposed.

Adequate Alternative Remedy

28. We found the second ground argued by IIROC, that of the existence of an adequate alternative remedy, to be the most compelling of the three grounds. This is so because we agree with counsel for IIROC that the regime of a self-regulatory organization should not be interfered with lightly. She warned against the undermining of the integrity of the SRO process and sighted the expertise of organizations such as IIROC in dealing with its members. We agree with her

argument that the SRO process should be respected and supported. As far as we are concerned, the adequate alternative remedy argument, in spirit, fits the purposive analysis of the Act to which we have referred.

29. We refer now to the framework within which the alternate remedy would exist.

30. IIROC Rule 20 states in part as follows:

> 20.28
>
> 1. The corporation may order that a dealer member designated as being in Early Warning Level 2, pursuant to Rule 30, be prohibited from:
>
>   a) Opening any new branch offices;
>   b) Hiring any new registered representative, or investment representative;
>   c) Opening any new customer accounts; or
>   d) Changing, in any material respect, the inventory positions of the Dealer Member.
>
> 2. Written notice of an order made under subsection 1 shall be provided to the Dealer Member.
>
> 20.29
>
> 1. The Dealer Member may request a review of a Rule 20.28 order by a hearing panel within three business days after a release of the decision.
>
> 2. If a request for review is made, the hearing shall be held as soon as reasonably possible and no later than 21 calendar days after the request for review, unless otherwise agreed by the parties.
>
> 3. If the Dealer Member does not request a review within the time period prescribed in subsection 1, the Rule 20.28 order becomes effective and final.
>
> 4. A Hearing Panel may:
>
>   a) Affirm the order;
>   b) Quash the order; or
>   c) Vary or remove any prohibitions imposed on the Dealer Member; and
>   d) Make any decision that could have been made by the corporation pursuant to Rule 20.28.
>
> 5. A decision of the Hearing Panel is a decision for which no further review or appeal is provided in the Rules.

31. The “order” complained about by Jory was one made pursuant to IIROC Rule 30 in which case the opportunity for a Rule 20.29 review by IIROC has long since passed.

32. We agree that the Commission ought not disturb the SRO process, but there is no process available to Jory under IIROC rules. When we say there is no process available, we mean there is little doubt that the IIROC limitation period

will have expired pursuant to IIROC rule 20.29, not that IIROC does not have an alternate process available.

33. It is the expiration of the limitation period which renders the adequate alternative remedy argument “disingenuous”, according to Jory.

34. However, the analysis cannot simply stop there in light of the impressive array of case law referred to us by counsel for IIROC in support of the argument.

35. In Canadian Pacific Ltd. v. Matsqui Indian Band, [1995] 1 S.C.R. 3, the Supreme Court of Canada stated that:

> On the basis of the above, I conclude that a variety of factors should be considered by courts in determining whether they should enter into judicial review, or alternatively require an applicant to proceed through a statutory appeal procedure. These factors include: The convenience of the alternative remedy, the nature of the error, and the nature of the appellant body (i.e. it’s investigatory, decision making and remedial capacities). I do not believe that the category of factors should be closed, as it is for the courts in particular circumstances to isolate and balance the factors which are relevant.

36. In Delmas v. Vancouver Stock Exchange, [1995] CanLII 1305 (BC C.A.), the British Columbia Court of Appeal approved a lower court's statement, in a matter involving an internal appeal available within the Vancouver Stock Exchange disciplinary panel process, that:

> “This legislative scheme ensures that relatively specialized bodies will deal with matters at earlier stages...." and "....to permit such a procedure (judicial relief) as is sought to be employed here would tend to fragment proceedings and be productive of delay."

37. These cases, and other cases cited by counsel for IIROC, do present a tendency on the part of the courts to prefer that routes of appeal legislated for specialized bodies, such as IIROC, be preferred and that the integrity of those processes be guarded.

38. Again, there is a process which would have been available to Jory. Jory had the opportunity to commence its appeal under IIROC rules only within a short time after the Rule 30 decision had been made, that is the order placing Jory under the Early Warning System. To complicate matters, what Jory has complained about is not only the Rule 20.28 order itself. The main source of complaint has been the refusal on the part of IIROC to accede to certain requests made over time by Jory for favourable rulings concerning interpretations of the Early Warning prohibitions.

39. The negative responses by IIROC to those requests do not constitute "decisions" which would trigger the right to a Rule 20.29 hearing. According to Jory, however, they do engage the public interest, opening the door to the Commission under Section 31.1(4) of the Act. According to Jory's counsel, it is preposterous to talk about limiting access to a review to the prescribed three day window in this circumstance. He characterizes that as an unacceptable limitation to the over-arching duty on the part of the Commission to oversee SRO's in respect of regulatory activities of this nature.

40. In any event, the argument by IIROC that an adequate, alternative remedy exists may not in of itself be disingenuous but, in our opinion, it would be wrong to quash a review of IIROC's decisions affecting Jory at this preliminary stage. We might have decided otherwise had there been some effective mechanism available to Jory to apply for relief over the manner in which IIROC was applying its own rules.

41. Although counsel for IIROC warns quite correctly about the dangers of jurisdiction shopping, it is not jurisdiction shopping in our view to ask an overseeing entity, in this case the Commission, to review the actions of an entity which it oversees, in this case IIROC.

"Decision"

42. The third ground for IIROC's motion is that, pursuant to IIROC Rule 33 (*Review by Securities Commission),* a Dealer Member such as Jory may bring an application for an appeal to the Commission if it has been directly affected by a decision of "the Board of Directors, a District Council, Hearing Panel or Board Panel." In the present case, as IIROC argues, it is IIROC itself, the "Corporation", which imposes Business Restrictions. As such, Jory has not been directly affected by a "decision" within the wording of Rule 33.

43. IIROC sets forth in its argument the fact that there is a contractual relationship between Jory and IIROC which enables IIROC to impose its own rules and obliges Jory to comply with them and, by extension, not to attempt to circumvent them. Further, the Commission has recognized and endorsed the role of IIROC as a self-regulatory body to regulate its members, and has approved its Rules. So, in cases where the Commission's jurisdiction is derived from an IIROC rule, in this case Rule 33, the wording of such rule must be used in the decision-making process.

44. We agree with Jory that it would be an affront to the over-arching authority on the part of the Commission relative to the securities industry in Manitoba were we to limit our jurisdiction by fettering ourselves with the wording of a Rule written for an SRO over which the Commission has ultimate authority.

45. Having so stated, neither this argument nor the alternate remedy argument can or should be dismissed out of hand. There is merit in the notion that organizations such as IIROC should be left to fulfill their arbitral or judicial responsibilities in situations where they've been properly constituted to make decisions which they are properly constituted to make. Courts are constantly being asked to respect the duties of alternate dispute or quasi-judicial bodies. It is a sound argument that the Commission has approved IIROC to deal with its own internal rules and shouldn't be intruding. However, if Section ~~34.1~~31.1 is to have the affect we believe it was intended to have, it must be available to parties legitimately affected by decisions touching on the public interest.

Decision

46. The issue described by counsel for Jory is:

"Either Section ~~34.1(4)~~31.1(4) gets Jory before the Commission or it doesn't".

In our opinion, it does, in the context of all three of IIROC's arguments.

47. It is our decision that Jory's application will not be terminated on a preliminary and summary basis. Jory may therefore make its application.

"J.W. Hedley"
J.W. Hedley
Chair

"G.J. Lillies"
G.J. Lillies
Member

"G.S. Posner"
G.S. Posner
Member