Manitoba Financial Services Agency

February 1, 2024

IN THE MATTER OF: AN APPEAL OF A DECISION OF A HEARING PANEL OF THE CANADIAN INVESTMENT REGULATORY ORGANIZATION (CIRO)

AND IN THE MATTER OF: ANDREW KAZINA ("APPELLANT")

REASONS FOR DECISION

OF

THE MANITOBA SECURITIES COMMISSION

Panel:

Panel Chair:	L.A. Vincent
Member:	C.D. Burns
Member:	A.W. Babiuk

Appearances:

J. Galarneau L. Koornhof	))	on behalf of the Canadian Investment Regulatory Organization (CIRO)
A. Kazina	)	Self-represented

A. Introduction and Issue

1. On December 22, 2023, Andrew Kazina ("Kazina" or the "Appellant") filed an appeal with the Manitoba Securities Commission (MSC) from the Merits Decision (defined below) of a hearing panel (the "CIRO Hearing Panel") of the Canadian Investment Regulatory Organization (CIRO).

2. This hearing panel (the "Panel") of the MSC agreed to hear from the parties on the issue of whether it is appropriate and in the public interest for it to intervene and hear the appeal at this time, or whether it should wait until the CIRO Hearing Panel has completed its work and issued a decision on the sanctions and penalties.

3. The Panel asked the parties to make written submissions and file same on or before Thursday January 25, 2024. Both parties made submissions and the Panel has reviewed those submissions.

4. For the reasons that follow, the Panel is dismissing the request by Kazina to have an appeal from the Merits Decision of the CIRO Hearing Panel heard at this time.

5. The parties are directed to fully complete the processes under the CIRO rules. Subsequent to that time the parties may appeal the CIRO Hearing Panel's decision(s) provided they meet all relevant requirements.

B. Facts

6. On June 4, 2020, pursuant to a Notice of Hearing, the Mutual Fund Dealers Association of Canada (now CIRO) commenced a disciplinary proceeding against Kazina pursuant to its by-laws.

7. The CIRO Hearing Panel heard the matter on a bifurcated basis; first considering the merits, and, only after determining the issue of merits and issuing a written decision on same, proceeding to deal with sanctions and penalties. The merits hearing phase was held on November 14 to 18, 2022 and November 21, 2022 and on January 13, 2023 and

April 3, 2023. The CIRO Hearing Panel issued its written decision on the merits (the "Merits Decision") on November 15, 2023.

8. Finding that a number of contraventions had been proven, the CIRO Hearing Panel scheduled a hearing on the sanctions and penalties portion of the hearing for February 26, 2024.

9. The Appellant filed an appeal application to the MSC, as stated above, on December 22, 2023.

10. The Appellant is self-represented and has been throughout the proceedings before the CIRO Hearing Panel.

11. CIRO is represented at this appeal by staff counsel (Staff of CIRO).

12. Staff of the MSC take no position in this matter and are not involved in any way other than to facilitate the administration of the Panel's work.

C. Statutory and Regulatory Provisions

13. On May 11, 2023, by Order No. 7601, CIRO was recognized as a self-regulatory organization (SRO) under the provisions of Section 31.1. of The Securities Act C.C.S.M. c.S50 (the "Act") to operate as a successor to the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (the "MFDA"), following the legal amalgamation of IIROC and the MFDA.

14. CIRO is subject to the provisions of Order No. 7601 (the "Order") and to ongoing oversight by the MSC. CIRO is responsible for many matters including establishing and maintaining rules to ensure compliance with applicable legislation, the protection of the investing public, and administering robust compliance and enforcement processes including handling disciplinary matters, conducting disciplinary hearings and imposing sanctions.

15. This matter comes to the Panel pursuant to the provisions of Section 31 of the Act. The relevant section reads:

Review of a self-regulatory organization's decision

31.5.1(1) *Any person or company affected by a decision of a self-regulatory organization may, within 30 days after the decision is made, apply to the commission for a review of the decision. On receiving the application, the commission has discretion whether to review the decision.*

D. Position of the Parties

The Appellant

16. The Appellant argues that it does not make sense to him that the CIRO Hearing Panel should complete its work on the sanctions and penalties until after his appeal on the Merits Decision has been heard by this Panel. He argues that if he is successful in the appeal to this Panel any further work by the CIRO Hearing Panel would be unnecessary.

Staff of CIRO

17. Staff of CIRO argue that it is premature for this Panel to hear the appeal at this time and at this stage of the CIRO proceedings, and that the proper course of action is for the CIRO Hearing Panel to complete its work and issue a written decision on the penalty and sanctions phase. They argue that the appropriate time for an appeal is when the CIRO Hearing Panel has fully completed its work.

18. Staff of CIRO note that the process undertaken by the CIRO Hearing Panel in this matter is similar to the proceedings utilized in other tribunals and administrative bodies in that they bifurcate the proceedings to deal with the merits of the matter first, and only after finding that the case has been made, proceed to deal with the issue of potential sanctions and penalties.

19. Staff of CIRO submit that only in exceptional circumstances should a court or other administrative tribunal intervene in the midst of an initial tribunal's work and that no exceptional circumstances operate in this instance.

20. In support of its position, Staff of CIRO submitted the following cases for us to consider: *Northern Securities, Re TSX Inc.* (2007) 30 O.S.C.N. 8917, *Ontario College of Arts. et. Al v Ontario Human Rights Commission* (1993) 11 O.R. (3d) 798 (Ont. Div. Ct.) and *Hauchecorne (Re)* [1999] 14 BCSC Weekly Summary 5.

E. Analysis and Decision

21. The Panel reviewed a number of relevant cases, including the cases that Staff of CIRO submitted. We found recent cases of the Manitoba Court of Appeal to be instructive and relevant to the matter before us.

22. In ***Northern Securities*** (*supra*), the Ontario Securities Commission (OSC) was asked to intervene in an ongoing hearing before a hearing panel of the Toronto Stock Exchange (TSX), a recognized marketplace SRO subject to the oversight of the OSC. The facts of ***Northern Securities*** are considerably more complex than those before us here. However, the primary issue was whether the OSC should intervene before the hearing panel of the TSX had completed its work.

23. In refusing the applicant's request to intervene before the TSX hearing panel had completed its work, the OSC noted:

> *"[181] Essentially, premature attempts to review tribunal decisions are routinely rejected because interrupting the proceedings prevents the first instance tribunal from properly and effectively performing its function."*
>
> *"[184] …only in exceptional circumstances should a reviewing court or tribunal hear an application in the midst of a hearing before the first instance tribunal."*
>
> *"[205] Clearly, SROs have an essential role to play in the regulation of the capital markets. Consequently, the mandate of SROs and the manner in which they pursue it, should be respected and supported. SROs are often best suited to deal with the issues put before them and unnecessary appeals and motions of other tribunals should not be permitted to bypass the SRO jurisdiction."*

24. In ***Neufeld et. al. v The Manitoba Securities Commission*** (2018) MBCA 101 (CanLII), the Court refused to hear an appeal in the middle of a proceeding before a hearing panel of the MSC, notwithstanding that leave had been granted. The court held that, barring

"*exceptional circumstances*" courts should be reluctant to intervene before administrative proceedings are completed.

"[5] *Courts are generally reluctant to intervene at the early stage of an administrative proceeding. As stated by Cromwell J in Halifax (Regional Municipality) v Nova Scotia (Human Rights Commission), 2012 SCC 10 (at para 36):*

> *Early judicial intervention risks depriving the reviewing court of a full record bearing on the issue; allows for judicial imposition of a "correctness" standard with respect to legal questions that, had they been decided by the tribunal, might be entitled to deference; encourages an inefficient multiplicity of proceedings in tribunals and courts; and may compromise carefully crafted, comprehensive legislative regimes [citations omitted]."*

The Court noted further that:

[17] "…appeals from interlocutory decisions by an administrative tribunal will not be permitted except in the most extraordinary or exceptional of circumstances (see Canadian National Railway v Winnipeg (City) Assessor, 1998 Carswell Man 594 at paras 31-32 (CA); and Canada (Border Services Agency) v CB Powell Ltd, 2010 FCA 61 at para 33)."

25. In ***Thielmann v Association of Professional Engineers, et.al.*** (2020) MBCA 8 (CanLII), the issue before the Court was the extent to which a *"…a statutory tribunal ought to be allowed to fulfill its mandate before a party seeks recourse before the courts*." [para 1]

26. Thielmann was a member of the Association of Professional Engineers and was seeking a prohibition or stay of a disciplinary proceeding. He argued that the Association lacked jurisdiction as its hearing tribunal had not strictly complied with the procedures set out in the mandating legislation, and that there was a reasonable apprehension of bias.

27. The Court held that it was premature for it to intervene on the facts before it.

"[24] In the past decade, there has been a significant shift away from early judicial intervention in the work of a tribunal. The general rule with respect to prematurity is that "absent exceptional circumstances, courts should not interfere with ongoing administrative processes until after they are completed, or until the available, effective remedies are exhausted" (Canada (Border Services Agency) v CB Powell Limited, 2010FCA 61 at para 31). Moreover, the exceptional circumstances exception is exceptionally narrow and the threshold for intervention is exceptionally high (ibid at para 33)." (emphasis added)

"[27] This shift away from court intervention in ongoing administrative processes, whether by interlocutory appeal or by judicial review, has been accepted by many Canadian appellate courts, including our own. See, for example, Neufeld et al v The Manitoba Securities Commission,2018 MNCA 101 at para 7 ; Dorn v Association of Professional Engineers and Geoscientists (Man, 2014 MBCA 25), at para 13 ; Mzite at para 44; 689799 Alberta Ltd v Edmonton (City), 2018 ABCA 212 at para 2 ; Saskatoon (City) v Wal-Mart Canada Corp, 2019 SKCA 3 at para 72; French v Township of Springwater, 2018 ONSC 94 at para 36 ; and Potter v Nova Scotia (Securities Commission), 2006 NSCA 45 at para 16."

28. With respect to what constituted the exceptional circumstances necessary for courts to intervene, the Court held:

"[49] In conclusion, the courts have not provided a definition of "exceptional circumstances" with respect to the prematurity principle. The factors to be considered in exercising this discretion cannot be reduced to a checklist or a statement of general rules. The list of factors to be considered is not closed and courts will not have to apply every factor, but only those that are relevant.

*[50] Among the factors that might be considered are: (i) hardship/prejudice (including irreparable harm, urgency, and excessive delay); (ii) waste of resources if judicial review is not proceeded with; (iii) delays if judicial review proceeds; (iv) fragmentation of proceedings; (v) strength of the case, including whether there is a clear abuse of process or proceedings that are so deeply flawed that it is clear and obvious that judicial review will be successful; and (vi) the statutory context, including whether there is an adequate alternative remedy. Furthermore, weight should always be given to the overarching consideration that an administrative tribunal should be given the opportunity to determine the issue first, and to provide reasons that can be considered by the court on any eventual review. (*emphasis added*)*

29. In ***Winnipeg (City of) v Manitoba (Director – Contaminated Sites Remediation Act, et.al.)*** *2022 MBCA 72 (CanLII)* the Court considered whether it was appropriate to intervene before a matter had fully been addressed by the Director and determined that such a review was premature. The Court held:

"[42] In light of this Court's decision in Neufeld 2018, the onus lies on the City to demonstrate that exceptional circumstances exist in this case before this Court can determine its leave to appeal application because administrative proceedings in relation to responsibility for remediation of the site for the heavy metals contamination are not complete.

[43] The threshold for demonstrating exceptional circumstances is "very high" (Dorn at para 13; see also Thielmann v The Association of Professional Engineers and Geoscientists of the Province of Manitoba, 2020 MBCA 8 at para 24). As explained in Thielmann, there are no "hard and fast rules or pattern" as to what constitutes

exceptional circumstances (at para 37); at best, there are relevant factors to weigh. As Professor Mullan explains, "context almost invariably matters" in deciding questions of prematurity (David J Mullan, Administrative Law (Toronto: Irwin Law, 2001) at 494)."

30. The generally accepted rule is that an administrative tribunal should not intervene in the work of a first instance tribunal until that tribunal has completed its work. In this case, that work includes the CIRO Hearing Panel making its determination on the issue of sanctions and penalties.

31. The Panel should only be intervening at this time if it finds "exceptional circumstances". Those circumstances are not set out in a checklist and depend on the factors in each case.

32. The Appellant did not argue that any exceptional circumstances existed. He argued that if he is successful in his appeal any further work by the CIRO Hearing Panel would not be necessary. This is not a persuasive argument. It is most efficient that the CIRO Hearing Panel complete its work at this time to ensure that the same panel members are available and that this decision is made close in proximity to the time in which the CIRO Hearing Panel rendered its Merits Decision.

33. Given that the Appellant is self-represented, the Panel reviewed whether there were any exceptional circumstances in the facts before us that would warrant its intervention at this time. We did not find any exceptional circumstances, including any of the circumstances set out by the court in the ***Thielmann*** (supra) case.

34. We are of the opinion that our intervention at this time would unnecessarily fragment the work of the CIRO Hearing Panel and would be disruptive and wasteful of resources. There is an adequate statutory remedy available to the Appellant at the conclusion of the work of the CIRO Hearing Panel.

35. Accordingly, the Panel dismisses the application of Kazina to have the MSC hold an appeal from the Merits Decision of the CIRO Hearing Panel at this time.

36. The parties are directed to fully complete the processes under the CIRO rules. Subsequent to that time the parties may appeal the CIRO Hearing Panel's decision(s) provided they meet all relevant requirements.

"L.A. Vincent"

L.A. Vincent, Hearing Chair

"C.D. Burns"

C.D. Burns, Member

"A.W. Babiuk"

A.W. Babiuk, Member