

Litigation - Canada

Court confirms IIROC's jurisdiction over investment dealer members

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Introduction

The Ontario Divisional Court's recent decision in *Deeb v IIROC*, 2012 ONSC 1014 (CanLII) will be of interest to securities law practitioners with clients operating in Ontario, as it speaks to the ability (or inability) of respondents to circumvent the disciplinary process of the Investment Industry Regulatory Organisation of Canada (IIROC) by means of an application for judicial review. *Deeb* confirms that, in line with previous decisions, IIROC derives its authority from the contractual relationships with its members and not from statute, and that when an individual or firm contractually submits to IIROC's jurisdiction, it is bound by that commitment and will be unable to bypass IIROC's disciplinary procedures by proceeding directly to the civil courts.

Background

IIROC is a self-regulatory organisation that regulates investment dealers in Canada. IIROC is recognised as a self-regulatory organisation by the Ontario Securities Commission (OSC) pursuant to the Ontario Securities Act (RSO 1990, c S.5), which allows persons or companies affected by a direction, decision, order or ruling made by IIROC to apply to the OSC for a hearing and review of the relevant direction, decision, order or ruling. Despite being recognised by the OSC, IIROC is an independent body and receives its funding from its members.

Hampton Securities Limited is a dealer member of IIROC. Peter Michael Deeb, the president and chief executive officer of Hampton, is registered as an 'approved person' with IIROC. Both agreed to be bound by IIROC's rules and bylaws and submitted to IIROC's jurisdiction. Specifically, in its April 2008 membership application, Hampton stated that it "submits to the jurisdiction of IIROC", and that it "agrees that IIROC is entitled to exercise such jurisdiction over the applicant and its approved persons with respect to any matter, facts, actions or circumstances existing or arising prior to, as at, or after the date" on which it became a member.

In late 2009 IIROC commenced an investigation into both Deeb and Hampton on the basis of three anonymous complaint letters received by IIROC, which were shown but not produced to them. The investigation led to a business conduct review of Hampton in 2010, which resulted in a business conduct report describing three matters relating to Hampton's conduct.

Subsequent to the release of the business conduct report, on September 1 2011 IIROC issued a notice of hearing pursuant to its rules naming Deeb as a respondent in a disciplinary hearing. An alert concerning the notice of hearing was posted on the IIROC's website and distributed to its members. Hampton and Deeb alleged that they experienced several deleterious consequences as a result, including loss of business to Hampton, loss of Hampton's staff and the inability of Deeb to open a bank account.

On November 3 2011 the applicants commenced an application in the Ontario Divisional Court under the Judicial Review Procedure Act (RSO 1990, c J.1), seeking an order quashing IIROC's notice of hearing and compelling it to retract its business conduct report, produce the three anonymous complaint letters and set aside the close supervision by IIROC to which Deeb had previously consented. IIROC subsequently moved to quash the application for judicial review.

Decision to quash application for judicial review

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The test on a motion to quash an application for judicial review in Ontario is whether it is plain and obvious that the application cannot succeed or, alternatively, that it is beyond doubt that the application will fail. On its motion, IIROC submitted that the application should be quashed for two reasons:

- There was no jurisdiction for the court to hear the application under the Judicial Review Procedure Act; and
- The application was premature as the applicants had proceeded directly to the divisional court without pursuing relief before an IIROC hearing panel.

In granting IIROC's motion and quashing the application, Justice Pepall held that IIROC had met the plain and obvious test on both issues.

Lack of jurisdiction

Section 2(1) of the Judicial Review Procedure Act provides that an application for judicial review may request any relief that the applicant would be entitled to in any:

- proceedings by way of application for an order in the nature of mandamus, prohibition or certiorari; or
- proceedings by way of an action for a declaration or for an injunction, or both, in relation to the exercise, refusal to exercise or proposed or purported exercise of a statutory power.

The plain language of the act indicates that the judicial review jurisdiction under the second category is limited to exercises of 'statutory power', while case law has established that the jurisdiction under the first category is limited to exercises of 'state power'.

In accepting IIROC's submission that its disciplinary jurisdiction over the applicants flowed from the contractual commitments made by its members, the court held that IIROC was not created by and derived no authority from statute, and that it did not exercise any state power other than narrow delegated powers that were not engaged in the current case. Accordingly, disciplinary investigations or steps initiated by IIROC were properly overseen by IIROC and were not the subject of judicial review under the act.

The court also rejected the applicants' argument that IIROC derived its regulatory authority from the OSC's recognition order, referring to the Ontario Court of Appeal's decision in *Taub v Investment Dealers Association of Canada*, 2009 ONCA 628 (CanLII), which specifically confirmed that "[IIROC's] duties are not determined by statute and... recognition by the OSC does not transform [IIROC] into a government actor".

Prematurity

The court agreed with IIROC's second submission, holding that in the event that its decision concerning jurisdiction was incorrect, the application was nonetheless premature as there were ongoing proceedings before a properly constituted IIROC hearing panel. The hearing panel was properly the decision maker of first instance in the context of IIROC's disciplinary proceedings and should decide the merits of any requests made by parties to those proceedings. Finally, the court held that there were no exceptional or extraordinary circumstances that justified the exercise of its discretion to permit the application to be heard despite the ongoing IIROC proceedings.

Comment

The divisional court's decision in *Deeb* follows the Ontario Court of Appeal's ruling in *Taub* that IIROC's jurisdiction over its members is grounded in contract and not in either statute or in IIROC's recognition as a self-regulatory organisation by the province's securities commission. Accordingly, one should expect that the courts in Ontario will continue to respect IIROC's jurisdiction in regards to disciplinary proceedings over its members (and former members) and, absent extraordinary circumstances, will not intervene in such proceedings at the preliminary stages through applications for judicial review.

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