



Court of Appeal re-establishes IDA's right to discipline former members

By David N. Vaillancourt, Affleck Greene McMurtry LLP

A unanimous panel of the Ontario Court of Appeal has overturned the Divisional Court's ruling in *Taub v. Investment Dealers Association of Canada*. The appeal court's decision restores an earlier Ontario Securities Commission ruling, which held that the Investment Dealers Association of Canada (now known as the Investment Industry Regulatory Organization of Canada, or IIROC) retains the ability to discipline a former member up to five years after that member has left the organization. The ruling also opens the door to IIROC and other self-regulatory organizations, such as the Mutual Fund Dealers Association of Canada, levying court-enforceable fines against its former members.

Stephen Taub was a registered representative, designated as an "Approved Person" under the by-laws of the IDA, from 1988 until he resigned from his position and from the IDA in September of 2004. In October of 2005, the IDA commenced disciplinary proceedings against Taub, alleging that he had engaged in conduct unbecoming an IDA member. In instituting these proceedings the IDA relied upon section 20.7 of IDA By-law 20, which provides that the IDA retains jurisdiction to discipline former members for a period of five years following their departure from the association. Taub challenged the IDA's jurisdiction, arguing that section 20.7 was rendered inoperative by section s. 21.1(3) of the Ontario *Securities Act*. This section of the *Securities Act* provides that a self-regulatory organization (SRO), such as the IDA, has jurisdiction to regulate the "conduct of its members." Taub argued that this section limited the IDA's jurisdiction to current members since there was no express grant of jurisdiction over former members.

Taub's interpretation of the *Securities Act* was rejected by the OSC, and then accepted by the Divisional Court on judicial review. The IDA appealed the Divisional Court decision to the Court of Appeal, which restored the ruling of the OSC. The Court of Appeal found that the OSC's interpretation of the *Securities Act* was reasonable. The Court noted that the *Securities Act* provision in question was not jurisdictionally limiting, and furthermore, section 21.6 of the *Securities Act* expressly permits an SRO to "impose additional requirements within its jurisdiction." The Court held that this section "effectively enlarges the power of the SRO to enact rules to fulfill its regulatory mandate."

The Court of Appeal also considered the practical elements of disciplining a former member. After all, the former member has already rendered ineffective the most powerful sanction: expulsion. If the IDA were to levy a fine against a former member, what prospects would the IDA have for actually collecting the fine? Could the IDA enforce these fines in the courts?

The Court of Appeal described the issue of IDA fines in the following manner:

The IDA's by-laws provide for significant fines which a discipline panel may impose upon a finding of misconduct. Whether the fines can be enforced by civil action is, however, another matter. Clearly the imposition of a fine is a penalty. However, it is a penalty that each member voluntarily agrees to in applying for membership in the association.

The Court of Appeal went on to strongly suggest that such fines would be enforceable in the courts,

unless those fines are found to be unconscionable. The Court of Appeal did not fully explore this line of reasoning, since the IDA was not seeking to enforce a fine in this case. It will be interesting to see how future courts apply this reasoning now that the Court of Appeal has possibly opened the door to court-enforceable fines against former members.

Taub has indicated that he plans to seek leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.



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