



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue queen ouest
Toronto ON M5H 3S8

**IN THE MATTER OF THE *SECURITIES ACT*,
RSO 1990, c S.5**

- AND -

**IN THE MATTER OF A HEARING AND REVIEW OF THE DECISION
OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA
REGARDING PORTFOLIO STRATEGIES SECURITIES INC.**

- AND -

IN THE MATTER OF CLIFFORD TODD MONAGHAN

REASONS AND DECISION

Hearing: December 5, 2016

Decision: December 8, 2016

Panel: Alan J. Lenczner - Commissioner

Appearances: Matthew Britton - For Staff of the Commission

Diana Iannetta - For Staff of the Investment Industry
Regulatory Organization of Canada

Usman Sheikh - For Portfolio Strategies Securities Inc.

Clifford Todd Monaghan - For himself

REASONS AND DECISION

- [1] Mr. Monaghan has filed an Amended Application for a Hearing and Review (Application) of the Investment Industry Regulatory Organization of Canada's (IIROC) April 13, 2012 approval of the recapitalization of Portfolio Strategies Securities Inc. (PSSI) and the Ontario Securities Commission (OSC) non-objection letter dated April 20, 2012.
- [2] In response, PSSI, the OSC and IIROC brought motions to dismiss or stay the Application on the basis that: (1) Mr. Monaghan is not directly affected by the decision and therefore has no standing to bring the hearing and review, (2) the request for the hearing and review was filed after the 30 day time limit set out in the *Securities Act* RSO 1990, c S.5 (the Act), and (3) the request for a hearing and review is frivolous and vexatious.
- [3] Mr. Monaghan brought a cross motion to dismiss the motions of PSSI, the OSC and IIROC.
- [4] Mr. Monaghan is a shareholder of Laurier Capital Holdings Inc. (LCHI). He owns 34.4% of LCHI. Prior to the approval of the PSSI transaction, LCHI held 100% ownership of PSSI. After the approval of the PSSI transaction, LCHI's interest in PSSI was reduced to 4.8%.
- [5] Mr. Monaghan's complaint is that IIROC approved the PSSI transaction based on incorrect and misleading information and that notice of IIROC's decision approving the transaction was not promulgated in a timely manner. At the hearing Mr. Monaghan emphasized that the failure of IIROC to post its decision approving the transaction on its website and the lack of transparency surrounding the decision significantly delayed Mr. Monaghan's ability to properly seek civil remedies; specifically to bring an oppression remedy to rectify the stripping of his value in PSSI.
- [6] The relief sought by Mr. Monaghan in his request for a hearing and review does not fall within the jurisdiction of IIROC or the OSC. In his application, Mr. Monaghan seeks to unwind the PSSI transaction because the dilutive outcome of the transaction was unfavourable to him. Private issues between shareholders do not fall within IIROC or the OSC's regulatory authority. Commercial disputes fall within the jurisdiction of the courts. Mr. Monaghan was unsuccessful before the Superior Court and Divisional Court and now he is attempting to use the OSC hearing and review process as a way to request an unwinding of the PSSI transaction.
- [7] IIROC has the role of overseeing all investment dealers, which also includes approving transactions involving investment dealers. IIROC Dealer Member Rule 5.4 which parallels the requirement in section 11.10 of NI 31-103 requires that IIROC approve transactions that permit an investor to own a significant equity interest in a dealer member. It is through this lens that IIROC reviewed the PSSI transaction. As part of this review, pursuant to IIROC Rule 5.4(2)(c) IIROC examined the following factors: whether the transaction is likely to give rise to a conflict of interest, whether it is likely to hinder the registered firm in complying with securities legislation, whether the transaction is inconsistent with an adequate level of investor protection, or otherwise prejudicial to the public interest.
- [8] The IIROC District Council considered as a relevant factor that:

The transaction will not result in a change in the operations of PSSI, its key Executive (i.e. UDP and CCO) or the composition of its board of directors. From a regulatory perspective the transaction should have no material impact. Background checks were conducted on HoldCo and no concerns were identified such that approval of the transaction should be withheld. Messrs. Kent, Carbonaro, Gilday and Poulter are all currently IIROC Approved Persons and Mr. Kent is already approved as an Investor.

(Memorandum to the IIROC District Council dated March 21, 2012 – Exhibit 1 page 124)

- [9] This was a straightforward transaction which only involved a change in share ownership. The issues raised by Mr. Monaghan are not regulatory issues but shareholder issues which belong before the proper forum in the courts. Mr. Monaghan cannot bring such disputes before the regulators.
- [10] In order to bring a request for a hearing and review before the OSC, the person requesting the review must be “directly affected” by the decision. The leading case interpreting the meaning of “directly affected” is *Re Instinet Corp.*, (1995) 18 OSCB 5439 (*Instinet*). In that case, it was emphasized at paragraph 57 that:
- Given the nature and purpose of our registration system, it was difficult for us to conceive of a case in the registration context where someone other than the registrant or an applicant for registration would be “directly affected” by a Director’s decision.
- [11] The reasoning in *Instinet* also applies to the current case. PSSI is the investment dealer and was directly affected by the decision to approve the transaction and received notice of the decision. Individual shareholders of an investment dealer are not provided with notice of the decision. Mr. Monaghan is a shareholder of LCHI, which held a position in PSSI. With respect to the nature of the power exercised by IIROC, this was a regulatory power intended to assess the fitness for registration of any new significant investor of a regulated investment dealer and was directed towards ensuring the protection of the investing public as clients of such dealers. It was not the role of IIROC to address complaints of a shareholder regarding corporate acts of recapitalization.
- [12] The Act also requires that a request for a hearing and review of a decision of a self-regulatory organization must be brought within 30 days after the mailing of the notice of the decision.
- [13] In this case, the IIROC decision to approve the transaction was dated April 13, 2012. Mr. Monaghan’s initial application for a hearing and review is dated June 3, 2015, more than 3 years later.
- [14] More importantly, a review of the documents from Mr. Monaghan’s civil proceedings demonstrates that Mr. Monaghan was aware of the regulatory approvals for the PSSI transaction at a much earlier date. Once Mr. Monaghan received the non-consolidated September 30, 2013 financial statements for LCHI in January 2014, which showed that LCHI no longer owned 100% of PSSI, it was clear that a transaction had taken place. Upon reviewing this financial statement Mr. Monaghan requisitioned a shareholder meeting of LCHI, the result of which he rejected. He then commenced civil proceedings. Specifically, Mr. Monaghan

knew that the PSSI transaction took place as paragraph 15 of his 2014 Statement of Claim in the civil oppression remedy proceeding states:

On January 26, 2014 the Plaintiff learned that sometime in 2012 the Corporation's 100% interest in Portfolio Strategies was reduced to 4.8%.

- [15] In the civil proceeding, Mr. Monaghan argued before Justice Penny of the Superior Court of Justice for Ontario that the PSSI transaction was never actually confirmed until 2014 and that the form and result of the transaction were not precisely contemplated earlier on. However, Justice Penny rejected this argument:

Given the plaintiff's admissions on discovery and his counsel's correspondence in 2011, I can only conclude that the limitation period with respect to the claim on the Portfolio dilution transaction began to run, at the latest, between January and May 2011, more than three years before the claim was eventually commenced.

(Endorsement of Justice Penny of the Ontario Superior Court of Justice, dated February 16, 2016 at para. 39)

- [16] On February 16, 2016, Justice Penny granted the motion for summary judgment dismissing Mr. Monaghan's civil claim as statute-barred. This decision was upheld by the Divisional Court on November 10, 2016.
- [17] I see no reason to interfere with the decision of the Superior Court and Divisional Court. These courts found that Mr. Monaghan knew of the approval of the PSSI transaction at an earlier date and he could have commenced his legal proceedings earlier within the limitation period. The same applies for Mr. Monaghan's request for a hearing and review. Mr. Monaghan failed to take timely action to commence his request for a hearing and review within any reasonably applied time limit.
- [18] Taking into consideration that Mr. Monaghan did not adhere to the time limit in the Act to bring his request for a hearing and review when he had knowledge of the PSSI transaction and that Mr. Monaghan is not a person directly affected by IIROC's regulatory decision to approve the PSSI transaction and that the relief sought by Mr. Monaghan is relief that is properly the subject of an oppression remedy before the courts and is part of a shareholder dispute that does not fall within the regulatory mandate of IIROC and the OSC to review, I grant the motions of PSSI, IIROC and the OSC and dismiss Mr. Monaghan's Application for a hearing and review.

Dated at Toronto this 8th day of December 2016.

"Alan J. Lenczner"

Alan J. Lenczner