

Corporate Securities Law

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Final Isn't Always Final - OSC Reverses Settlement In Rare Circumstance

Settlements with regulatory bodies regarding infractions are generally final and binding on all of the parties. This allows the parties to put the regulatory infraction to rest and move forward with their lives. But what happens when a decision of today calls into question the fairness of a settlement from yesteryear? That is the question at the heart of the Ontario Securities Commission (OSC) decision issued in the matter of Marc McQuillen on September 15, 2014.

Mr. McQuillen worked as an Assistant to Mr. David Berry when Mr. Berry was head of preferred share trading at Scotia Capital. Both were charged by Investment Industry Regulatory Organization of Canada (IIROC), a self-regulatory organization (SRO) under purview of the OSC, with manipulating the sale of new share issues being underwritten by Scotia. Mr. McQuillen settled with IIROC and paid a \$25,000 fine in lieu of undergoing costly proceedings. Mr. Berry did not settle, but years later won his case against IIROC after a highly contested hearing on the matter. Soon thereafter, Mr. McQuillen petitioned the OSC to have his settlement reversed.

Mr. McQuillen argued that, while as a “pure matter of law” his opportunity to challenge the charges ended with his settlement, that opportunity was severely curtailed by the cost of the legal process. Now that the charges were proven to be unsubstantiated by virtue of Mr. Berry’s success in defeating them, Mr. McQuillen stated that the OSC, as a matter of fairness, ought to overturn his settlement. He argued that he should be treated similarly to Mr. Bernie Ashe, the former AIT Chief Executive, whose settlement in an analogous case was overturned in 2008.

IIROC, for its part and supported by OSC staff, argued that the settlement was final and non-reviewable, and that overturning the settlement would open the floodgates to

future challenges. Moreover, IIROC argued that neither it nor the OSC had the jurisdiction to overturn the settlement.

Was Mr. McQuillen’s settlement truly final? The OSC says no. IIROC has been ordered to expunge Mr. McQuillen’s disciplinary record (and if that is not practicable, IIROC must include a prominent statement to that effect in conjunction with any future reference by IIROC to the settlement agreement or to Mr. McQuillen), and to repay his fine. The OSC Vice-Chair James Turner underpinned his decision on the “manifest unfairness” that would result if Mr. McQuillen’s settlement were not overturned, stating that “McQuillen continues to suffer damage to his reputation and career as a result of the settlement agreement that he should not suffer.”

In addressing the arguments advanced by IIROC, Mr. Turner set aside the notion of a jurisdictional vacuum, issuing his decision pursuant to the OSC’s supervisory jurisdiction over IIROC under subsection 21.1(4) of the Ontario *Securities Act*. He stated that “if neither IIROC nor the Commission has jurisdiction to reconsider the Settlement Approval in any circumstances, that would be a material and unfortunate defect in our securities regulatory regime.”

Mr. Turner furthermore rejected the floodgates argument, noting that Mr. McQuillen’s case was “unique and the rarest of circumstances.” The OSC can only intervene in the decision of an SRO where (i) the IIROC Hearing Panel made a fundamental error of law or principle or overlooked material evidence; (ii) the IIROC’s Hearing Panel’s perception of the public interest conflicts with that of the OSC; or (iii) new and compelling evidence is presented to the OSC that was not before the IIROC Hearing Panel.

For those seeking to challenge SRO decisions in the future, Mr. McQuillen’s case is only slightly encouraging. The fundamental nature of settlement arrangements – that they are binding on the parties and non-reviewable – remains intact. In unique and the rarest of circumstances, however, “final” might not always mean final.

For further information on these proposals, please contact any member of our Corporate Securities Group.