ALBERTA SECURITIES COMMISSION

RULING

Citation: Re Lutheran Church-Canada, the Alberta-British Columbia District, 2019 ABASC 43
Date: 20190228

Lutheran Church-Canada, the Alberta-British Columbia District, Lutheran Church-Canada, the Alberta-British Columbia District Investments Ltd., Donald Robert Schiemann, Kurtis Francis Robinson, James Theodore Kentel, Mark David Ruf, Harold Carl Schmidt

Panel:	Tom Cotter Maryse Saint-Laurent
Representation:	Janet McCready Lorenz Berner for Commission Staff
	John R. Singleton, Q.C. Veronica S.C. Rossos for Lutheran Church-Canada, the Alberta-British Columbia District, Lutheran Church-Canada, the Alberta-British Columbia District Investments Ltd., Donald Robert Schiemann, Kurtis Francis Robinson, James Theodore Kentel, Mark David Ruf, Harold Carl Schmidt, William Ney, Harold Ruf, James Schuelke, Mark Beiderweiden, Harold Haberstock, James Heinbuch, Cliff Haberstock, Gene Gabert, Richard Lutz, David Schick, Cindy Willisko, Daryl Becker, Randy Heide, Mark Sander, Judith Burns, Marj Plitt, Gerry Steinke, Keith Kruse, Forrest Stroup, Keith Haberstock, Melanie Kuhn, David Dressler, Phillip Washeim, Greg Giese, Wayne Lunderby, Michael Gillingham, Craig Tufts, Rhonda Buck, Vic Esperanza, Lynn Gergens, Deloyce Weist, Janice Ruf, Candace Rivet, Darla Henning, Ted Ulmer, Frank Kobie, Marvin Mutschler, Stan Lee, Brian Lewis, Don Haberstock, Mark Wolgram, David Bode, Roland Kubke, Bill Morgan, John Mueller, Glenn Schaeffer, Steven Grande and Paul Eifert
	Katrina Edgerton-McGhan Neil Tichkowsky for EnCharis Community Housing and Services, David Schoepp, Grant McMaster, Hans Heumann and James Weschler
Submissions Completed:	January 8, 2019
Decision:	February 28, 2019

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I. INTRODUCTION

[1] On June 27, 2018, staff (**Staff**) of the Alberta Securities Commission (the **ASC**) issued a notice of hearing (**NOH**) alleging breaches of the *Securities Act* (Alberta) (the **Act**) by the Lutheran Church – Canada, the Alberta-British Columbia District (the **District**), the Lutheran Church – Canada, the Alberta-British Columbia District Investments Ltd. (**DIL**) and several of their alleged former directors and officers, namely Donald Robert Schiemann, Kurtis Francis Robinson, James Theodore Kentel, Mark David Ruf, and Harold Carl Schmidt (collectively with the District and DIL, the **Respondents**).

[2] Specifically, the Respondents are alleged to have made misrepresentations contrary to s. 92(4.1) of the Act in connection with the securities of the District and DIL, which were offered primarily to members of the Lutheran Church. Staff alleged that while investors and potential investors were given certain information with respect to the safety of the investments and the intended use of their funds, the reality was different than what had been represented. According to the NOH, the investment programs "collapsed financially in early 2015", and the District and DIL sought and were granted court protection under the *Companies' Creditors Arrangement Act*.

[3] The allegations in the NOH are currently scheduled for hearing on the merits beginning May 13, 2019. In this ruling, we refer to the hearing and all other proceedings related to the hearing as the **ASC Proceedings**.

[4] Along with a number of other parties, the Respondents are named as defendants in four civil class actions commenced by District and DIL investors approximately two to three years ago – two in the superior courts of British Columbia (**B.C.**), and two corresponding actions in Alberta (the **B.C. Class Actions** and the **Alberta Class Actions** respectively; collectively, the **Class Actions**). The factual allegations that gave rise to the Class Actions are similar but not identical to those that gave rise to the ASC Proceedings: the circumstances surrounding the investments made in District and DIL securities and the subsequent use of investment funds. However, the causes of action pleaded in the Class Actions are different than the breaches of the Act alleged in the NOH: the NOH alleges breaches of s. 92(4.1), whereas the allegations in the Class Actions include breach of trust, breach of fiduciary duty, negligence, breach of contract and oppression.

[5] On October 15, 2018, the Respondents and a large group of their co-defendants in the Class Actions who were also alleged directors, officers or employees of the District or DIL (or both) but who are not parties to the ASC Proceedings (the **Non-Parties**, and collectively with the Respondents, the **Initial Applicants**) filed a notice of motion with the ASC Registrar (the **Initial Application**) seeking the following relief:

(a) pursuant to s. 6.1 of ASC Rule 15-501 *Rules of Practice and Procedure for Commission Proceedings* (**Rule 15-501**), leave for the Non-Parties to be heard on the Initial Application;

(b) pursuant to s. 31 of the Act, a stay of the ASC Proceedings pending final resolution of the Alberta Class Actions; and

(c) pursuant to s. 221(5) of the Act, an order holding in confidence all materials and evidence filed and submitted in the ASC Proceedings until the stay sought under (b) is lifted.

[6] On November 14, 2018, a second group of Class Action defendants who were not named as respondents in the NOH filed a similar application with the ASC Registrar. According to the application materials, that group was comprised of EnCharis Community Housing and Services and several of its alleged former directors, namely David Schoepp, Grant McMaster, Hans Heumann and James Weschler (collectively, the **EnCharis Applicants**, and together with the Initial Applicants, the **Applicants**). Under this application (the **EnCharis Application**, and together with the Initial Application, the **Applications)**, the EnCharis Applicants sought an order staying the ASC Proceedings pending final resolution of the Class Actions and an order for costs of the application. They did not seek a confidentiality order, and their application materials did not expressly indicate that they sought an order for leave to be heard. However, it was clarified through the submissions of their counsel that the EnCharis Applicants, like the Non-Parties, sought standing to be heard pursuant to s. 6.1 of Rule 15-501.

[7] This panel heard the Applications together on January 7 and 8, 2019. The Initial Applicants, the EnCharis Applicants and Staff each filed affidavit evidence (respectively, the **Initial Applicants Affidavit**, the **EnCharis Affidavit** and the **Staff Affidavit**). In addition, the Initial Applicants and the EnCharis Applicants filed written submissions (respectively, the **Initial Applicants Brief** and the **EnCharis Brief**). Staff filed two sets of written submissions – one in response to the Initial Applicants Brief and one in response to the EnCharis Brief. At the hearing, counsel for all of the parties also made oral submissions and responded to questions from the panel.

[8] On January 21, 2019, we delivered a brief oral ruling (i) dismissing the Initial Application; and (ii) allowing the EnCharis Application for standing or leave to be heard, but dismissing the balance of the EnCharis Application. We indicated that written reasons for our oral ruling would follow, and these are our reasons.

II. POSITIONS OF THE PARTIES

A. Initial Applicants

1. Evidence

[9] The Initial Applicants Affidavit was sworn by a paralegal employed in the office of counsel for the Initial Applicants. It attached copies of the pleadings in the Class Actions and a copy of a consent order issued by the B.C. Supreme Court on August 30, 2018 staying one of the B.C. Class Actions pending resolution of the corresponding Alberta Class Action. Though only the one consent order was attached, the Initial Applicants Affidavit and the Initial Applicants Brief indicated that both of the B.C. Class Actions had been stayed pending resolution of the corresponding Alberta Class Actions.

[10] The Initial Applicants Affidavit noted that "no steps" had yet been taken by the plaintiffs in the Alberta Class Actions. The Initial Applicants Brief indicated that the Alberta Class Actions have not yet been certified, and that no date has yet been set for hearing certification applications.

2. Standing

[11] As noted above, the Non-Parties relied on s. 6.1 of ASC Rule 15-501 in support of their application for leave to be heard on the Initial Application. That section provides:

> When a non-party requests to be designated as a party to a proceeding or to be heard by a panel during a proceeding, the panel may consider the following in determining whether or not to grant the request:
>
> (a) the nature of, and the issues raised in, the proceeding;
>
> (b) the extent to which the non-party will be affected by the proceeding;
>
> (c) the likelihood that the non-party will make a useful contribution to the proceeding;
>
> (d) any delay or prejudice to the parties; and
>
> (e) any other factor the panel considers relevant.

[12] Applying these factors, the Non-Parties submitted that:

(a) "[t]he nature of and the issues raised in the ASC [Proceedings] are closely related to those raised in the [Class] Actions;"

(b) "[t]here is a real prospect that the [Non-Parties] could be substantially affected by the ASC [Proceedings];"

(c) the Non-Parties' "participation in the ASC [Proceedings] is necessary to protect their interests;" and

(d) "[t]he Respondents will not be prejudiced by the participation of the [Non-Parties] and the relief they seek."

[13] The Non-Parties also argued:

> *Whether or not* the ASC [Proceedings are] heard or stayed it will have a direct effect on the conduct of the [Non-Parties'] defence in the [Class] Actions as some or all of the [Initial] Applicants will be called to give evidence in one or both proceedings, and face prejudice due to the risk of inconsistent positions arising in the separate proceedings, and potentially be subject to findings of fact reached in the ASC [Proceedings] inconsistent with findings of fact in the [Class] Actions. (emphasis added)

[14] As this might suggest the Non-Parties were indifferent whether the Initial Application for a stay of the ASC Proceedings was granted (since the Non-Parties would be prejudiced in either event) – a position that is at odds with the relief sought in the Initial Application – the panel took this as an inadvertent error in expression. We assumed that the point was to address the factors set out in s. 6.1 of Rule 15-501 and explain some of the ways in which the Non-Parties argued they would be affected by either or both the outcome of the Initial Application and the ASC Proceedings.

[15] At the oral hearing, the Non-Parties generally deferred to the EnCharis Applicants on the issue of standing. However, in response to a question from the panel, counsel elaborated with respect to how the Non-Parties offer a unique perspective or might be affected by the ASC Proceedings differently than the Respondents. He argued that the difference is that the Non-Parties might be "covered, potentially, with the same cloak the [R]espondents are without the ability to respond on their own behalf". Otherwise, the Non-Parties did not add to the short argument on standing set out in the Initial Applicants Brief, almost all of which is reproduced herein.

3. Stay of ASC Proceedings

[16] The Initial Applicants' submissions primarily addressed their application for a stay of the ASC Proceedings. They relied on s. 31 of the Act, which provides that "[t]he [ASC] has the jurisdiction to determine all questions of fact or law that arise in any matter before it."

[17] The Initial Applicants acknowledged that a stay of proceedings "is an extraordinary remedy", which should only be granted "when there is no other means to remedy prejudice to the right to make full answer and defence". They cited the decision of Ontario's Superior Court of Justice in *Xanthoudakis et al. v. Ontario Securities Commission*, 2009 CanLII 30146 (at para. 35) for the proposition that "[t]he overarching consideration in determining whether to grant a stay is whether the interests of justice call for it."

[18] For the legal test to be applied on an application for a stay, the Initial Applicants relied on the decision of the Supreme Court of Canada (the **SCC**) in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. That decision set out a three-part test which requires the applicant to show that: (i) there is a serious issue to be determined; (ii) the applicant will suffer "irreparable harm" if the stay is not granted; and (iii) the balance of convenience favours the applicant (the **RJR Test**).

[19] The Initial Applicants argued that there is a "low threshold" to satisfy the first part of the RJR Test. Once the applicant has demonstrated that "the application is neither vexatious nor frivolous", the analysis should proceed to the second and third parts of the test. They submitted that the "serious issue" to be determined in their case was whether they would suffer irreparable harm if a stay were not granted and whether the balance of convenience weighed in their favour, given the number of parties they said could be affected. In oral argument, they also referred to the serious issue or issues to be determined in the Alberta Class Actions.

[20] With respect to irreparable harm, the Initial Applicants noted that the SCC in *RJR-MacDonald* said "irreparable" harm refers to its nature "rather than its magnitude" (*RJR-MacDonald* at para. 64). It is "irreparable" if it cannot be quantified in monetary terms or cannot be cured. The Initial Applicants suggested that their interests would be irreparably harmed in several ways if a stay of the ASC Proceedings were not granted. The Initial Applicants Brief was not always clear in this regard, but based on counsel's oral submissions, we understood the claimed harm as follows.

[21] First, the Initial Applicants submitted that the Respondents' "ability to make full and fair defence" to the allegations set out in the NOH – and thus their right to a fair trial (or, in the ASC context, a fair hearing) – would be impaired if the ASC Proceedings were conducted prior to the

conclusion of the Alberta Class Actions. They argued that certain evidence for their defence can only be obtained through the civil discovery process in the Alberta Class Actions. The ASC Proceedings, they maintained, do not allow comparable means by which they can obtain that evidence. To conduct the ASC Proceedings without this evidence would bring the "whole system into question or disrepute".

[22] Second, the Initial Applicants submitted that their right to a fair trial in the Alberta Class Actions would be impaired if the ASC Proceedings were conducted first. They contended that any admissions made or evidence given by the Respondents, or any findings of fact made by the hearing panel which are adverse to the interests of the Initial Applicants, could be imported into the Alberta Class Actions. The resulting prejudice would be compounded because (a) the panel would not have had all of the evidence available in the Alberta Class Actions through the discovery process; and (b) the Non-Parties would not have had the opportunity to participate in the ASC Proceedings and influence the outcome. The Initial Applicants emphasized the purported similarities between the facts and allegations set out in the NOH and those pleaded in the Alberta Class Actions. They argued that these similarities could place the Non-Parties' interests "at odds" with the Respondents' interests and "irretrievably damage the capacity" of all of the Initial Applicants to defend the Alberta Class Actions.

[23] Third, the Non-Parties argued that should the ASC Proceedings conclude first, they could be prejudiced in their defence of the Alberta Class Actions by virtue of their association with Respondents against whom findings had been made by an ASC hearing panel.

[24] Concerning the third part of the RJR Test, the Initial Applicants submitted that the balance of convenience weighed in their favour and therefore in favour of granting a stay. Staff would not be prejudiced by a stay, they argued, whereas the Initial Applicants would suffer "overwhelming prejudice" for the reasons just discussed. Any prejudice to Staff could be addressed with a tolling agreement suspending any applicable limitation periods, and a stay would allow certain factual issues to be resolved in the Alberta Class Actions first without prejudice to anyone's defence. The Initial Applicants forecasted that the Alberta Class Actions will be resolved within two years, as they have recently taken steps to advance the litigation.

[25] Addressing the public interest, the Initial Applicants argued that "none of the individual Respondents profited personally or at all from activities at issue in the [NOH], nor are they professional securities brokers, dealers, or promoters whose regulation is of central concern to the [ASC]". Because the Respondents pose no future risk to the investing public or the Alberta capital market, a stay would not undermine the public interest. Instead, the Initial Applicants argued that the public interest in protecting the right of litigants to a fair trial weighed in favour of a stay.

[26] Lastly, the Initial Applicants argued that the real public interest at issue was that of the investor plaintiffs in the Alberta Class Actions. Since the plaintiffs are principally concerned with obtaining financial compensation through that litigation, they would not be prejudiced by a stay of the ASC Proceedings – again weighing the balance of convenience in the Initial Applicants' favour.

4. Confidentiality

[27] As mentioned, the Initial Applicants relied on s. 221(5) of the Act in support of their application for an order holding in confidence all materials and evidence filed and submitted in the ASC Proceedings "pending a lifting of the stay sought in [the notice of motion] and, as a result, the resolution of the [Alberta Class] Actions". Section 221(5) provides that on the application of an "interested person or company", the ASC may "make an order directing that any material or class of material provided to or obtained by the [ASC] or the Executive Director, be held in confidence if the [ASC] considers that it would not be prejudicial to the public interest to grant the order".

[28] The Initial Applicants submitted that "a confidentiality order will prevent prejudice to the [Initial] Applicants caused by potential disclosure of the settlement and the underlying investigation during discoveries", and that such an order "would not be contrary to the public interest". Nothing further was said in the Initial Applicants Brief to explain or support these submissions, but in oral argument, counsel submitted that in the absence of a stay, a confidentiality order "would perhaps go some distance" in preventing the prejudice to the Initial Applicants argued on the stay application. Counsel also clarified that the order sought would direct the ASC Proceedings to be conducted *in camera*, and would prevent public disclosure of any findings or settlements until after the conclusion of the Class Actions.

B. EnCharis Applicants

1. Evidence

[29] The EnCharis Affidavit was sworn by a legal assistant employed in the office of counsel for the EnCharis Applicants. Like the Initial Applicants Affidavit, it attached copies of the pleadings filed in the Class Actions, although three of the four pleadings appeared to be earlier versions than those that were attached to the Initial Applicants Affidavit. The EnCharis Affidavit also attached a copy of the NOH. It had no other substantive content.

2. Standing

[30] Although standing or leave to be heard on the EnCharis Application was not one of the orders specifically sought under the EnCharis Applicants' notice of application, the issue was addressed in the EnCharis Brief and by counsel at the oral hearing.

[31] Like the Non-Parties, the EnCharis Applicants relied on s. 6.1 of Rule 15-501. They confirmed that they did not seek standing in the ASC Proceedings as a whole, but only on the EnCharis Application. With reference to the factors set out in s. 6.1 of Rule 15-501, they submitted that they had standing to appear for several reasons, some of which overlapped with their arguments for a stay of the ASC Proceedings (and are therefore discussed further in the next section of this ruling). As we understood them, the reasons included the following:

(a) the EnCharis Applicants would be affected by the panel's decision on a stay and by the ASC Proceedings because:

    i. they would be prejudiced in their defence of the Class Actions if the ASC Proceedings were not stayed until the Class Actions are resolved;

ii. the NOH "expressly pleads prejudicial factual allegations against EnCharis" despite the fact that the EnCharis Applicants were not named as respondents; and

iii. although the causes of action pleaded in the ASC Proceedings and the Class Actions "differ to some extent", the underlying facts are the same; thus, the facts found in the ASC Proceedings could bind and prejudice the EnCharis Applicants in the Class Actions even though the EnCharis Applicants would not have participated in the ASC Proceedings;

(b) the EnCharis Applicants would make a useful contribution to the stay application because they "offer[ed] a different perspective and argument" on the issues than those advanced by the Initial Applicants; this was because:

i. they had a different role in the underlying events at issue than the Initial Applicants;

ii. at least one of the causes of action pleaded in the Class Actions uniquely affects them; and

iii. none of the EnCharis Applicants are respondents in the ASC Proceedings; and

(c) no party would suffer delay or prejudice as a result of the EnCharis Applicants' participation, since the Initial Application was already scheduled to be heard.

3. Stay of ASC Proceedings

[32] The EnCharis Applicants sought a stay of the ASC Proceedings until the Class Actions are concluded. They submitted that the appropriate test to be applied on an application for a stay of securities commission proceedings is unclear. Like the Initial Applicants, they referred to the RJR Test, but they also noted that in past decisions on applications to "interrupt one of two parallel proceedings", the ASC has relied on the test in *Seaway Trust Co. et al. v. Kilderkin Investments Ltd. et al.* (1986), 29 D.L.R. (4th) 456 (Ont. H.C.J.) (the **Seaway Test**) (see *Re Workum*, 2006 ABASC 1490 at para. 28). The Seaway Test requires an applicant to show that there are "exceptional and extraordinary circumstances" to justify a stay (*Workum* at para. 28).

[33] However, the EnCharis Applicants also noted that in *Workum*, the hearing panel remarked that "the analysis under either test might be the same" (at paras. 29-30), because "finding extraordinary or exceptional circumstances demands irreparable prejudice or harm" to the applicants "that tips the balance against any competing interest", including the public interest (at para. 48). Therefore, the EnCharis Applicants essentially argued both tests.

[34] Beginning with the first branch of the RJR Test, the EnCharis Applicants repeated the Initial Applicants' submission that there is a low threshold to demonstrate a "serious issue to be tried". If the application is not vexatious or frivolous, the adjudicator should proceed to the next two parts of the test (*RJR-MacDonald* at paras. 54-55).

[35] According to the EnCharis Applicants, the serious issue here was that there are "extensive" common factual issues between the ASC Proceedings and the Class Actions, and the way that the NOH was pleaded presents a "grave risk that issue estoppel or factual estoppel in a settlement agreement will prejudice" them in their defence of the Class Actions.

[36] The EnCharis Applicants elaborated on the estoppel argument under the second branch of the RJR Test (and, by extension, under the Seaway Test). Like the Initial Applicants, they argued that irreparable harm "need not be significant", only incurable. However, there must be evidence of harm that is "'clear and not speculative'", and which demonstrates that the EnCharis Applicants "'would suffer it'" (*Re Mason*, 2018 ONSEC 16 at para. 15, citing *Sazant v. The College of Physicians and Surgeons (Ontario)*, 2011 CarswellOnt 15914 at para. 11).

[37] The EnCharis Applicants argued that the necessary evidence could be found in the NOH and the pleadings filed in the Class Actions, examined in the context of the applicable law. They then explained the various ways they would be irreparably harmed or prejudiced if the ASC Proceedings were not stayed.

[38] First, it was contended that the NOH is too broad. The EnCharis Applicants argued that the NOH includes "highly prejudicial factual allegations" that "mirror" the allegations made in the Class Actions. Even though Staff did not name the EnCharis Applicants as respondents, the EnCharis Applicants submitted that the "overbroad" NOH could implicate them and result in "an estoppel operating against them" in the Class Actions.

[39] The EnCharis Brief expounded on the legal doctrine of estoppel and how it could apply to the prejudice of the EnCharis Applicants. Whether or not this was properly described as estoppel, the essence of their argument was similar to an argument made by the Initial Applicants: either findings by a panel or admissions made by the Respondents (including admissions in a settlement agreement) could determine issues that are common to the Class Actions. By operation of law, those findings or admissions could be admitted into evidence or otherwise imported into the Class Actions and bind the result. If the findings or admissions are adverse to the interests of the EnCharis Applicants, this will operate to their detriment in circumstances where they had no opportunity to participate in the ASC Proceedings. As this would impair their right to a fair trial in the Class Actions, there would be irreparable harm.

[40] The EnCharis Applicants submitted that this possibility constituted exceptional and extraordinary circumstances sufficient to meet the Seaway Test. The "overbroad" NOH overlaps the pleadings in the Class Actions to an extent that creates "an exceptional and extraordinary risk of irreparable harm or prejudice" to the EnCharis Applicants by estoppel.

[41] The EnCharis Applicants also argued that they could be uniquely affected by findings or admissions in the ASC Proceedings that establish a specific cause of action pleaded against them in the Class Actions: the allegation that certain defendants were in knowing receipt of trust property in breach of trust. Several of the individual Respondents were alleged to have been directors or officers of the corporate EnCharis entities at the same time as they were directors or officers of the District and DIL. It was therefore argued that this created a particular risk that any

findings or admissions in the ASC Proceedings as to the knowledge of these alleged directors and officers would be imputed to the EnCharis Applicants in the Class Actions and establish this cause of action. Again, they argued, this could occur even though the EnCharis Applicants would not have had the opportunity to answer the allegation or ensure they were afforded procedural fairness.

[42] Lastly, the EnCharis Applicants submitted that they could be prejudiced and thus suffer irreparable harm if evidence in the ASC Proceedings that is adverse to their interests is admitted in the Class Actions.

[43] As to the final part of the RJR Test, the EnCharis Applicants argued that the balance of convenience weighed in their favour: the risk of irreparable harm and prejudice they face for the reasons discussed above "outweighs the public interest in these circumstances". Similar to the Initial Applicants, they asserted that there is no risk of future misconduct or harm to the public by the Respondents, since "all the entities are now dissolved and [the individual Respondents] are not dealing in securities" or otherwise operating in the capital market.

[44] They also maintained that a stay was in the public interest. A stay would ensure that non-parties were not irreparably harmed by the ASC Proceedings, and that procedural fairness was not "wholly sacrificed to administrative efficiency" – both of which are public interest concerns. In addition, a stay would encourage Staff to draft future notices of hearing more specifically, and confine the allegations to the parties named.

C. Staff

1. Evidence

[45] The Staff Affidavit was sworn by a Staff investigator. It attached a copy of an affidavit sworn in the *Companies' Creditors Arrangement Act* proceedings by Respondent Kurtis Robinson, who deposed that 60% of the investors in District securities were over 70 years old. The Staff Affidavit also indicated that: (i) at least three of the witnesses Staff intends to call at the hearing of this matter are over 70 (including one who is 88), while two others are in their 60s; and (ii) Staff contacted the Alberta Court of Queen's Bench in Calgary, and were told that the only opening available in the foreseeable future for a long trial was in June 2021, and the next available dates after that were in 2022.

2. Standing

[46] Staff opposed standing for both the Non-Parties and the EnCharis Applicants. They submitted that the factors set out in s. 6.1 of Rule 15-501 weighed against standing, and that granting standing in this case would be "inefficient, unnecessary, and not in the public interest". Further, Staff expressed the concern that granting standing in this case would open the "flood gates" to others in future cases.

[47] More specifically, Staff argued that the issues in the ASC Proceedings are not so similar to those raised in the Class Actions "that non-parties will be significantly affected" by the ASC Proceedings. They acknowledged that the ASC Proceedings and the Class Actions "flow partly from the same events", but emphasized that the allegations and causes of action "are completely different".

[48] Staff submitted that the hearing panel's findings will only apply to the named Respondents, and only with respect to the allegations in the NOH. They disputed the contention that any other individuals who served as directors, officers or employees of the District or DIL but who were not named in the NOH could be implicated by ASC findings against the District or DIL, as this would ignore the fact that at law, corporations are separate legal persons. Staff also characterized this concern as speculative – an argument that these parties might be prejudiced in the Class Actions by evidence that might be given or findings that might be made in the ASC Proceedings.

[49] In addition, Staff pointed out that to be granted standing, an applicant must show that it will "make a useful contribution to the proceedings without injustice to the immediate parties". A useful contribution is made where the applicant "will advance arguments or evidence that would not otherwise be presented". In their view, the Non-Parties did not add anything to the arguments made and evidence tendered by the Respondents (given that the same materials were submitted on behalf of all of the Initial Applicants), nor did the EnCharis Applicants add anything substantive to what had already been argued by the Initial Applicants.

3. Stay of ASC Proceedings

[50] Staff opposed the applications for a stay of the ASC Proceedings. They cited the RJR Test, but submitted that, given the ASC's public interest mandate, there should be a "very high threshold" for a stay. Thus, they argued, the Seaway Test is the appropriate test in this context. However, they further submitted that in accordance with *Workum*, either test would lead to the same result: there were no exceptional or extraordinary circumstances here to justify a stay, and neither group of Applicants satisfied the second and third parts of the RJR Test.

[51] Staff began their argument by pointing out that parallel proceedings on similar facts are not uncommon. Therefore, the fact of parallel proceedings in this case is not an exceptional or extraordinary circumstance, and would not in itself prejudice the Applicants.

[52] Staff refuted the contention that evidence adduced in the ASC Proceedings would impair the Applicants' right to a fair trial in the Class Actions. They argued that evidence is required to establish irreparable harm (citing *Li v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 18528 at paras. 20-24), and it was speculative to assert that evidence given before the ASC will conflict with evidence given in the Class Actions, and thus cause prejudice to the Applicants. Staff questioned how the Applicants could be prejudiced by "true facts" – given that witnesses are bound to tell the truth – and pointed out that even within a single proceeding, there is always a risk that evidence will be adduced which conflicts with other evidence. It is up to the trier of fact to resolve the conflict, and to ensure procedural fairness. As a result, Staff argued, this could not constitute an exceptional and extraordinary circumstance, especially since the Applicants did not demonstrate any specific way in which the possibility of conflicting evidence would prejudice them.

[53] Staff went on to submit that it was also speculative to contend that findings or admissions of fact made in the ASC Proceedings will be imported into the Class Actions, and that if they were, they would be binding, dictate the result in the Class Actions, and prejudice the Applicants. Contrary evidence could still be adduced by the Class Action defendants.

[54] Staff reiterated that an ASC hearing panel can only make findings against the parties named in a notice of hearing, and, with particular reference to the arguments of the EnCharis Applicants, disputed that estoppel, properly understood, could or would be applied against the EnCharis Applicants as suggested. Staff further noted that the application of such a doctrine is discretionary, so any possible prejudice – including prejudice resulting from the fact that a defendant in the Class Actions was not a participant in the ASC Proceedings and could not affect the result or ensure procedural fairness – can be addressed by the trial judge.

[55] As to the Applicants' argument that an ASC settlement agreement could be admitted into evidence in the Class Actions and operate to the Applicants' detriment, Staff countered that this too was speculation. Moreover, admissibility of evidence is not determinative – the trier of fact will ascribe the appropriate weight to any such agreement, like any other evidence. The parties would be at liberty to adduce their own evidence and arguments in the Class Actions to rebut it, and would also be at liberty to argue unfairness.

[56] Under the third part of the RJR Test, Staff argued that the balance of convenience weighed heavily in favour of the public interest. They referred to the ASC's public interest mandate, which requires an efficient and expeditious response to capital market misconduct, and noted other aspects of the public interest that are served by ASC enforcement proceedings. These include the imposition of sanctions that deter both named respondents and others who might undertake the same misconduct.

[57] Staff noted that the Class Actions have not proceeded beyond the filing of initial pleadings, and that at the earliest, they likely could not be set for trial before 2022. Staff submitted that the Class Actions may take years to come to a final resolution, and that delaying the ASC Proceedings will negatively affect the evidence of the witnesses, especially those who are elderly. For these and the other reasons cited, Staff maintained that such a lengthy delay was unreasonable and contrary to the public interest, and tipped the balance of convenience away from a stay.

4. Confidentiality

[58] Staff opposed the confidentiality order sought by the Initial Applicants. They disputed the need for such an order, and contended that the Initial Applicants had not cited any authority or evidence in support of it. They emphasized that in the absence of exceptional circumstances, proceedings should be public. Relying on the decision of the SCC in *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41 (at para. 45), they argued that confidentiality orders should only be granted "on exceptional grounds where necessary to prevent a serious risk to an important interest and alternative measures will not prevent the risk, *and* the positive effects of such a confidentiality order outweigh the negative effects" (emphasis in the original).

[59] In addition, Staff argued that a public proceeding would be in the interests of the parties to the Class Actions who are not respondents in the ASC Proceedings, as those parties could attend the ASC Proceedings, monitor what happens, and seek standing to raise any objections as appropriate.

III. ANALYSIS

A. Standing

[60] Toward the end of the oral hearing, Staff suggested that the issue of standing had become moot, since the panel heard submissions from all of the Applicants on all of the issues. Despite that, Staff asked that in our written ruling, we provide guidance for future matters as to "when it's appropriate to hear an application that essentially mirrors another application in every way".

[61] We disagreed that the question of standing became moot because we heard from all of the parties on all parts of the Applications. Until our oral ruling on January 21, 2019, standing had not been decided, nor had any party conceded it one way or the other. We also disagreed that the EnCharis Application mirrored the Initial Application "in every way".

[62] As we noted at the outset of the oral hearing, we considered bifurcating the Applications to first hear from the parties on standing, decide that question, and then hear submissions on the substantive applications from those who had been given standing. This is sometimes the approach taken – see, for example, *Re Pearson*, 2018 ONSEC 53; *Re Catalyst Capital Group Inc.*, 2016 LNONOSC 213; and *Re Carbonelli*, 2011 IIROC 74.

[63] However, it is not uncommon for adjudicators to hear submissions on all of the matters in dispute before making a determination on the threshold issue of standing – see, for example, *P.M. v. S.D.*, 2008 ABQB 109. The approach taken is a matter of discretion, depending on the facts and circumstances of the case. In *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, an appeal concerning public interest standing, the SCC said (at para. 16):

> This question was also considered by the High Court of Australia in *Australian Conservation Foundation Inc. v. Commonwealth of Australia* (1980), 28 A.L.R. 257, where the opinion was expressed that it is a matter of judicial discretion, having regard to the particular circumstances of a case, whether to determine the question of standing with final effect as a preliminary matter or to reserve it for consideration on the merits. The Court held that for reasons of cost and convenience the judge had properly exercised that discretion in dealing with the question of standing as a preliminary matter and striking out the statement of claim. Assuming that the question whether an issue of standing to sue may be properly determined as a preliminary matter in a particular case is one which a court should consider, whether or not it has been raised by the parties, I agree with the view expressed in the *Australian Conservation Foundation* case. It depends on the nature of the issues raised and whether the court has sufficient material before it, in the way of allegations of fact, considerations of law, and argument, for a proper understanding at a preliminary stage of the nature of the interest asserted.

[64] The Ontario Securities Commission (**OSC**) expressed a similar view in *Catalyst Capital* (at para. 45):

> We acknowledge that in some instances, because of the possible interrelationship of the evidence and considerations relating to standing and the merits or because of a very compressed hearing schedule, it may be appropriate to hear all the evidence before deciding the issue of standing. In other cases, the evidence and submissions concerning standing, and particularly the public interest factors involved, will be sufficiently distinct that the possibility of an expeditious outcome, should the issue of standing conclude the matter, will favour bifurcating the hearing.

[65] As we indicated at the start of the oral hearing, after considering whether to bifurcate, we concluded that in the circumstances, no particular efficiencies would be gained through

bifurcation, as we would be hearing submissions on the substantive applications from counsel for the Respondents in any event.

[66] Moreover, having considered the written submissions and the factors enumerated under s. 6.1 of Rule 15-501 – especially paragraphs (b) and (c) – we concluded that we needed to hear from the Non-Parties and the EnCharis Applicants on the stay issue for a full understanding of their arguments on the extent to which they might be affected by the ASC Proceedings, and whether they would make a useful contribution to the Applications. In the words of the SCC, we were of the view that we would benefit from the submissions on the question of a stay in order to develop "a proper understanding . . . of the nature of the interest asserted" (*Finlay* at para. 16). Those submissions assisted us in determining whether the Non-Parties and the EnCharis Applicants were proximate enough in interest to have a meaningful stake in the outcome, and whether they could provide a useful contribution.

[67] The factors set out in s. 6.1 of Rule 15-501 – which are very similar to those set out in the OSC's comparable rule of procedure – are essentially a codification of common law principles articulated in various decisions on applications for standing (*Re Magna International Inc.*, 2011 CarswellOnt 159 at paras. 44, 50; *Catalyst Capital* at paras. 13-14; *Carbonelli* at para. 25). They are meant to guide a panel's exercise of discretion, as they focus the inquiry on the relevant facts and circumstances of a given case, as well as the circumstances of the party seeking to intervene. We were mindful of the "flood gates" concern raised by Staff, and were thus of the view that the inquiry should also consider the broader policy and procedural implications of allowing strangers to a proceeding standing to participate, even on a limited basis.

[68] In other words, each decision on an application for standing will be case-specific and its outcome discretionary. As such, the issue of standing does not lend itself to hard and fast rules, or firm guidance of the kind we understood was sought by Staff.

[69] Having regard to the circumstances here, we found that the extent to which the Non-Parties and the EnCharis Applicants could be affected by the ASC Proceedings (and thus the outcome of the Applications) and the likelihood that they would make a useful contribution to the Applications were particularly salient factors. We agreed with the EnCharis Applicants' submission that delay or prejudice to the parties to the ASC Proceedings were of less significance, because the Respondents could and did bring an application on the same issues as of right.

[70] Though we agreed that it is possible the Non-Parties and the EnCharis Applicants could be affected by the ASC Proceedings in at least some of the ways argued (subject to our comments on the merits of the stay applications later in this ruling), we were not persuaded that the Non-Parties made a contribution to the Initial Application that was distinct from that thoroughly made by the Respondents. As said by the OSC in *Re Certain Directors, Officers & Insiders of Hollinger Inc.*, 2005 LNONOSC 858 (at para. 48):

> When deciding if a proposed intervenor will make a useful contribution to the proceedings, the [OSC] will consider whether the proposed intervenor will advance arguments or evidence that would not otherwise be presented. In *MacMillan Bloedel Ltd. v. Mullin*, [1985] B.C.J. No. 2076 (B.C.C.A. [In Chambers]) . . . at paragraph 9, the [B.C.] Court of Appeal said that a successful intervenor should "bring a different perspective to the issue before the Court". [The OSC] held in [*Re Albino*,

> (1991), 14 O.S.C.B. 365] that where an existing party can adequately advance a position, then interventions may be neither helpful nor necessary.

[71] The Non-Parties relied on the same evidence and submissions as the Respondents did in support of the same relief. They also occupied similar positions in the events giving rise to the allegations in the NOH and the Class Actions – i.e., as alleged directors, officers or employees of the District or DIL (or both). They differ from the Respondents in that they were not named as parties to the ASC Proceedings, but that in itself did not persuade us that they should be granted standing. Their position was adequately advanced by the Respondents.

[72] By contrast, we were persuaded that the EnCharis Applicants presented a different perspective and made different submissions on the application for a stay. The EnCharis Applicants were alleged to have had different roles in the underlying events than the Respondents, and they made different arguments than the Initial Applicants – including with respect to estoppel, the potential effect of the breadth of the allegations in the NOH, and the cause of action pleaded in the Class Actions that they said affects them uniquely. Though we were not satisfied that the EnCharis Applicants' distinguishing characteristics and submissions warranted a stay of proceedings, they were nonetheless helpful in giving the panel a better understanding of the issues to be decided.

[73] For these reasons, we exercised our discretion to deny the Non-Parties standing on the Initial Application, but granted the EnCharis Applicants standing on the EnCharis Application.

B. Stay of ASC Proceedings

3. Test to be Applied

[74] With respect to the test to be applied on applications for a stay pending resolution of parallel proceedings, we followed the reasoning in *Workum*, which involved an application for a stay of an ASC hearing until the conclusion of a criminal proceeding founded on largely the same facts. As mentioned, the *Workum* panel concluded that the Seaway Test was better suited to a stay application of that nature, but also held that the result applying either the Seaway Test or the RJR Test (which is generally used on applications for stays pending further review or appeal) is likely the same (at para. 30).

[75] Given the ASC's public interest mandate, exceptional and extraordinary circumstances "must involve irreparable harm that outweighs the public interest in seeing the [ASC hearing] concluded" (*Workum* at para. 75). The requirement for exceptional and extraordinary circumstances sets a high threshold for establishing grounds for a stay. The mere fact that the particulars underlying the parallel proceedings overlap – even to a significant extent – is not in itself sufficient (*Workum* at para. 75).

[76] The case authorities indicate that the decision to impose a stay is a matter of discretion on the part of the adjudicator: see *Saccomanno v. Swanson* (1987), 75 A.R. 393 (QB) (at para. 9); *Re Robinson*, [1993] O.J. No. 3042 (Gen. Div.) (at para. 18); and *Stickney v. Trusz*, [1973] O.J. No. 2279 (S.C.) (at para. 9), aff'd. (1974) 3 O.R. (2d) 538 (Div. Ct.), aff'd. (1974) 3 O.R. (2d) 538 at 539, leave to SCC denied, [1974] S.C.R. xii. That discretion should be guided by "the interests of justice" (*Xanthoudakis* at para. 35), and exercised on the basis of "cogent evidence" (*Saccomanno* at para. 9). As noted by the Ontario Court of Appeal in *Sazant* (at para. 11): "[e]vidence of irreparable harm must be clear and not speculative, and it must be supported by

evidence that demonstrates that [the applicant] would suffer it." Similarly, an ASC hearing panel stated, ". . . some form of evidence is required showing . . . irreparable harm. Irreparable harm cannot be assumed without evidence, nor can it be shown through bald assertions" (*TSX Venture Exchange Inc. v. McLeod*, 2005 ABASC 191 at para. 41).

4. Irreparable Harm

[77] In view of the foregoing, we began our analysis of the stay portion of the Applications by considering whether the various grounds of irreparable harm argued by the Applicants constituted exceptional and extraordinary circumstances. For the purposes of the RJR Test, we followed the approach in *Workum* and assumed, "without needing to decide", that there was a serious issue to be tried (at para. 30).

[78] We agreed with the panel in *Workum* that the fact of parallel proceedings based on the same or similar facts and allegations is not in itself an exceptional or extraordinary circumstance. Parallel proceedings are commonplace and permissible. ASC enforcement proceedings are often preceded or followed by criminal prosecutions, civil suits – including class actions – or both. We found the following comments from the *Workum* decision (at paras. 46-47) equally applicable here:

> It is not uncommon for parallel proceedings – any combination of civil, administrative or criminal – to arise from the same set of facts. The situation in which the Applicants find themselves is not unique. The authorities are clear that such parallel proceedings are permissible (see [*Re*] *Robinson* [(1993), 16 O.S.C.B. 5667 (OSC)]). Indeed, parties seeking to interfere with such parallel processes must surmount a high threshold: they must demonstrate 'exceptional and extraordinary circumstances' (see *Seaway*).
>
> It does not in our view suffice merely to show, in this case, that both criminal and administrative charges have been levelled against a party on the basis of the same or similar facts. To hold otherwise, as the Applicants urge, would be to accept as a general proposition that whenever criminal charges are laid in respect of activity that is already the subject of a non-criminal proceeding, that latter proceeding must be interrupted and delayed. We think that such a proposition could impede or suppress any non-criminal proceeding by a regulator or litigant so long as there exists any possibility that the police or Crown may someday commence a criminal action in respect of the same circumstances. The absurdity of such an outcome underlines the correctness of the approach taken in *Seaway* and *Robinson*, which demands truly exceptional and extraordinary circumstances before interfering with a parallel proceeding.

[79] Several of the grounds of irreparable harm asserted by the Applicants are common, and could arise in virtually all parallel proceedings. Accordingly, they are neither exceptional nor extraordinary.

[80] For example, any time there are parallel proceedings, an ASC respondent may fear having to give evidence that may be used against him or her in another forum, or that may conflict with evidence led in one forum but not the other. Similar arguments were made in both *Workum* and *Stickney*, on applications for stays pending criminal proceedings. Even though liberty interests were potentially at stake (and not simply, as here, monetary damages), neither the ASC panel in *Workum* nor the Ontario court in *Stickney* was persuaded (see *Workum* at paras. 49, 65 and *Stickney* at para. 11). As stated in *Stickney* (at paras. 11-12):

> . . . the defendant has shown no specific prejudice. The facts shown by the defendant are no more than those that would be shown by anyone who is at once an accused in a criminal prosecution and a defendant in a civil action as a result of the same facts. If this was sufficient to warrant the conclusion that the matter was exceptional and a court should stay the civil proceedings there would be little or no discretion to be exercised . . . .
>
> . . . the mere fact that there are both criminal and civil proceedings pending against a person arising out of the same facts is not a sufficient ground to qualify as an exceptional case in which the civil proceedings should be stayed. It is incumbent upon the applicant to show *some specific or particular way* in which he will be prejudiced in his criminal trial. (emphasis added)

[81] Moreover, we found that these arguments were largely speculative, and were not based on "cogent evidence" (*Saccomanno* at para. 9). It was mere speculation to hypothesize that evidence from the ASC Proceedings would conflict with that in the Class Actions, or that evidence in the ASC Proceedings would affect or disadvantage the Applicants in the Class Actions. Such arguments presupposed an unfair trial and diminished the role of the trial judge, who would have the responsibility to resolve evidentiary conflicts and ensure fairness.

[82] We reached the same conclusion on the Respondents' contention that the ASC Proceedings should be stayed because they can only obtain the necessary evidence to defend the allegations in the NOH through the civil discovery process in the Class Actions. This complaint could be made every time there are proceedings extant before both the ASC and the civil trial courts, and is thus neither exceptional nor extraordinary. We also found it speculative, because the Respondents led no evidence on what information they seek, why they require it, who has possession of it, the reasons they cannot obtain it any other way, and what the effect on their case will be if they do not have it. We were left to wonder what the Respondents would have done to obtain evidence for their defence of the ASC Proceedings if no civil actions had been commenced against them, and what they will do to acquire that information if, as their counsel suggested, the Alberta Class Actions are resolved at the certification stage, prior to discovery. Nor were we given any reasons why they could not avail themselves of any of the various means potentially available for ASC respondents to obtain materials from non-parties (see, for example, *Re Arbour Energy Inc.*, 2009 ABASC 89 and *Re Arbour Energy Inc.*, 2009 ABASC 366).

[83] We were not persuaded by the other arguments made by the Applicants, for similar reasons. They contended that they would suffer irreparable harm if the ASC Proceedings were not stayed because findings of fact made by the ASC hearing panel could either be (a) inconsistent with findings of fact made by the courts in the Class Actions, to the Applicants' prejudice, or (b) admitted into evidence and somehow bind the outcome of the Class Actions, also to their prejudice. These prospects can arise in all parallel proceedings. In this case, they also called for speculation, as they required us to assume some or all of the following:

(a) the hearing panel will make findings that are adverse to the Respondents,

(b) the hearing panel will make findings that adversely affect parties to the Class Actions who are not Respondents,

(c) the hearing panel will make findings inconsistent with the findings of the courts hearing the Class Actions,

(d) the ASC findings will be admitted into evidence in the Class Actions, and

(e) once admitted into evidence, the ASC findings will be given enough weight to have a substantial (or even binding) effect on the outcome of the Class Actions.

[84] As noted by Staff, no matter how broadly a notice of hearing is framed, the ASC can only make findings against those who are named respondents, and only for the contraventions specifically alleged and proved by evidence on a balance of probabilities. In our view, the NOH is not so unusual that it created an exceptional and extraordinary circumstance. It is not uncommon for Staff to make allegations that arguably implicate parties who are not named as respondents. This could occur for a variety of reasons that fall within Staff's prosecutorial discretion – for example, a choice not to name directors or individual securities salespeople who were not the guiding minds of a named corporate respondent.

[85] In addition, we concluded that it was far from certain any findings ultimately made by the ASC hearing panel would have the prejudicial effect postulated by the Applicants, whether or not that effect was described as issue estoppel or another legal doctrine that forecloses re-litigation of "an issue that was finally decided in prior judicial proceedings between the same parties or those who stand in their place" (*Penner v. Niagara Regional Police Services Board*, 2013 SCC 19 at para. 29). Like the two proceedings at issue in *Workum*, the ASC Proceedings and the Class Actions may have a common factual foundation, but they also have numerous and significant differences, including the fact that the parties to the respective proceedings are not the same: none of the plaintiffs in the Class Actions – nor anyone who could be considered to "stand in their place" – are parties to the ASC Proceedings. Other notable differences include the breaches of law alleged (and thus the legal issues to be determined), the goals of the proceedings, the mandates of the decision-makers involved, the procedures to be followed, the applicability of the rules of evidence, and the range of possible outcomes.

[86] More importantly, the application of the legal doctrines argued by the EnCharis Applicants is a matter within the discretion of the courts that will adjudicate the Class Actions (see *Penner* at paras. 1, 29). Even if the courts were satisfied that there was sufficient identity of parties and issues between the ASC Proceedings and the Class Actions, they have the discretion not to apply such a doctrine if an injustice would result (*Penner* at para. 29). Therefore, even if these doctrines were raised during the trial of the Class Actions based on what happened in the ASC Proceedings, the Applicants would have the opportunity to present evidence and make arguments to the courts as to why they should not be applied.

[87] In *Workum*, the panel observed that "the trial judge in a criminal proceeding has the ability and responsibility to address such concerns to ensure that defendants are afforded their rights to a fair trial" (at para. 59; see also paras. 64, 67). We concluded that the same is true of the trial judge or judges who will hear the Class Actions. We were not prepared to speculate that they would exercise their discretion in a manner adverse to the Applicants, or that they would not ensure fairness is afforded to all of the parties.

[88] We therefore agreed with the *Workum* panel that "[a] finding of 'innocence' or 'guilt' in one forum neither dictates nor presupposes the same finding in the other forum" (at para. 38), and that "[r]ulings and findings in the [ASC hearing] will not determine rulings and findings in the [parallel proceeding]" (at para. 45). We also agreed with the court in *Howe v. Institute of Chartered Accountants (Ontario)*, [1994] O.J. No. 2907 (Gen. Div.), aff'd. [1995] O.J. No. 2496 (C.A.), which stated the following in its decision on an application for a stay of professional disciplinary proceedings pending resolution of two large civil actions (at para. 16):

> Although the decision of the Discipline Committee on the charges against the applicant would no doubt be granted some deference in the civil actions, and might be of considerable persuasive value in those actions, it would not be binding in the civil actions, because the plaintiffs in the civil actions will not have been parties to the disciplinary proceedings. . . . The plaintiffs in the civil actions would not be prevented from attacking a decision of the Discipline Committee exonerating the applicant, nor would the applicant be prevented from challenging in the civil actions an adverse decision by the Discipline Committee.

[89] We considered the same to be true with respect to the argument that admissions made by the Respondents in the ASC Proceedings – whether by way of a settlement agreement or otherwise – may be imported into the Class Actions and have binding effect, to the particular prejudice of those Applicants who did not participate in the ASC Proceedings, and could not lead their own evidence and arguments or ensure procedural fairness. Based on cases such as *National Bank Financial Ltd. v. Potter*, 2012 NSSC 76; *Hill v. Gordon-Daly Grenadier Securities et al.*, [2001] O.J. No. 241 (SCJ); *Moyes v. Fortune Financial Corp.*, [2002] O.J. No. 1660 (SCJ); and *Buckingham Securities Corp. (Receiver of) v. Miller Bernstein LLP*, (2008) 91 O.R. (3d) 207 (SCJ), it is unclear whether an ASC settlement agreement would necessarily be admitted into evidence in the Class Actions. If it were, the court would assess the weight that should be ascribed to it (*National Bank* at paras. 1, 52, 56; *Hill* at para. 35), and the parties would have an opportunity to make submissions in that regard.

[90] This case is different from one where the parallel proceedings involve the exact same parties as respondents in the one and as defendants in the other. We did not consider that particularly unique. Even within a single ASC enforcement matter there are often respondents who settle and others who do not. The settlement agreements may become evidence at the hearing into the allegations against the non-settling respondents, but they are not determinative of the remaining issues, even as against non-settling respondents who are similarly situated as those who settled.

[91] It was thus apparent that this argument also involved a substantial amount of speculation, for the same reasons discussed in respect of any findings that might be made by the ASC.

[92] In the result, we were not satisfied that this case involved exceptional or extraordinary circumstances within the meaning of the Seaway Test. The Applicants tendered no evidence to meaningfully differentiate this case from any other involving parallel proceedings. Nor were we satisfied that there was a reasonable basis for concluding that the Applicants would be prejudiced in their defence of the Class Actions – that is, that the Applicants would suffer irreparable harm to their interests – if the ASC Proceedings were not stayed. The complaints raised were too speculative to discharge the Applicants' onus to demonstrate "some specific or particular way in which [they] will be prejudiced" in the conduct of the parallel proceeding (*Stickney* at para. 12).

5. Balance of Convenience

[93] Given our conclusion with respect to irreparable harm, it was not necessary for us to consider the balance of convenience. However, even if we had accepted the Applicants' arguments on irreparable harm, we would have concluded that the balance of convenience weighed in favour of the public interest, and against a stay.

[94] As mentioned, the Initial Applicants argued that the public interest at issue was the interest of the plaintiff investors seeking compensation for their losses in the Class Actions. We disagreed. It is trite that the ASC's mandate is to protect investors and foster a fair and efficient capital market in which investors have confidence. This mandate involves the entire market, and extends beyond the interest of a single group – or even several groups – of specific investors, regardless of the size of the groups or the amounts invested.

[95] The ASC discharges its mandate by administering Alberta securities laws, an important part of which includes enforcement of those laws. The resolution of an enforcement proceeding by way of sanction or settlement is meant not only to deter named respondents from repeating any misconduct in which they may be found to have engaged, but also to deter others from engaging in similar misconduct. Part of that involves providing timely notice to market participants as to "whether or how securities laws apply to particular fact circumstances" (*Workum* at para. 70).

[96] Effective enforcement is timely, efficient and final. Failure to deal with allegations of misconduct expeditiously can undermine public confidence in the securities regulatory system, and is inconsistent with the protective purposes of that system. We agreed with the following statement from the Investment Industry Regulatory Organization of Canada (IIROC) disciplinary decision in *Re Malley*, 2014 LNIIROC 10 (at para. 22(b)):

> A regulator's ability to respond efficiently and effectively to non-compliance in a dynamic capital market is a fundamental requirement for a properly functioning industry. An appropriate level of procedural fairness must therefore be balanced against the need to ensure that the administrative efficiency of the system is not compromised. It is in the public interest to maintain a system of securities regulatory enforcement that effectively and expeditiously deals with allegations of capital market misconduct to protect the public.

[97] There is unquestionably a public interest in protecting a litigant's right to a fair trial in a parallel proceeding, as argued by the EnCharis Applicants. However, for the reasons given earlier, we were not convinced that the Applicants' right to a fair trial in the Class Actions is in jeopardy. Moreover – and notwithstanding counsel's assurances (as opposed to evidence) that the Respondents pose no ongoing market threat and that there is a probability the Class Actions will resolve at the certification stage – we had significant concerns about suspending the ASC Proceedings indefinitely while complex Class Actions that have not yet proceeded beyond the filing of statements of claim are concluded. In this regard, we were mindful of the evidence in the Staff Affidavit concerning the age of Staff's witnesses and the lack of available trial dates at the Alberta Court of Queen's Bench for the foreseeable future.

[98] In sum, we were of the view that absent exceptional or extraordinary circumstances, the public interest in the timely conclusion of the ASC Proceedings outweighed the Applicants' private

interest in a stay. Any potential prejudice the Applicants could face without a stay was too speculative to move the balance of convenience in their favour.

C. Confidentiality

[99] The materials filed by the Initial Applicants did not indicate that their application for an order holding "all materials and evidence filed in the ASC [Proceedings]" in confidence was an application in the alternative. However, in his oral submissions, their counsel indicated that such an order would only be necessary in the event the applications for a stay were dismissed. As mentioned, he also clarified the scope of the application, stating that the Initial Applicants sought an order directing that the entire ASC hearing be held *in camera*, and that any final decision or settlement agreements be kept confidential until resolution of the Class Actions.

[100] In *Sierra Club*, the SCC considered an appeal from the dismissal of an application for a confidentiality order protecting certain technical documents. The SCC noted "the fundamental principle of open and accessible court proceedings" and said (at para. 52):

> The importance of public and media access to the courts cannot be understated, as this access is the method by which the judicial process is scrutinized and criticized. Because it is essential to the administration of justice that justice is done and is *seen* to be done, such public scrutiny is fundamental. The open court principle has been described as 'the very soul of justice,' guaranteeing that justice is administered in a non-arbitrary manner . . . . (original emphasis)

[101] The SCC then articulated a test to guide the determination of when the open-court principle should yield to a litigant's desire to keep material confidential. The applicant must show that (at para. 53):

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

[102] The SCC elaborated further with respect to part (a) of the test, including the following comments:

- "the risk in question must be real and substantial, in that the risk is well-grounded in the evidence and poses a serious threat to the commercial interest in question" (at para. 54);

- "[i]n order to qualify as an 'important commercial interest,' the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality" which "'outweighs the public interest in openness'" (at para. 55, citing *Re N. (F.)*, 2000 SCC 35 at para. 10); and

- "the information in question must be of a 'confidential nature' in that it has been 'accumulated with a reasonable expectation of it being kept confidential' . . . as opposed to 'facts which a litigant would like to keep confidential by having the courtroom doors closed' . . ." (at para. 60, citing with approval the dissenting reasons issued in the court below: [2000] 4 F.C. 426 (Fed. C.A.) at para. 14).

[103] While *Sierra Club* decided an application under the *Federal Court Rules*, the test has been applied in other contexts where parties have sought confidentiality orders, including court file sealing orders: see, for example, the decisions of the Alberta Court of Appeal (**ABCA**) in *L.P.I. v. 000 Alberta Ltd.*, 2005 ABCA 23 and *Sidhu v. Alberta (Lieutenant-Governor)*, 2018 ABCA 284. In *L.P.I.*, the ABCA noted that a sealing order is both discretionary and "an extraordinary remedy" (at paras. 3-4), and in *Sidhu*, the ABCA observed that there is a "strong presumption" in favour of open proceedings, so an applicant seeking to seal a court file must have "a convincing evidentiary basis" for the order (at para. 10).

[104] *Sierra Club* has also been applied in securities enforcement proceedings. In *Re HudBay Minerals Inc.*, 2009 LNONOSC 350, the OSC considered an application for confidentiality orders protecting certain documents that were said to contain "commercially sensitive information" (at para. 6). The hearing panel discussed the open-court principle, which has been applied to administrative tribunals (at para. 22). It cited a prior OSC decision (*Gaudet v. Ontario (Securities Commission)* (1990), 13 O.S.C.B. 1405 at 1408 at para. 22), in which the panel said:

> "Openness" is important for the [OSC] which is charged with the responsibility of helping to ensure the integrity of the capital markets in Ontario. Disclosure is particularly important for a body which itself uses disclosure as one of its principle techniques for ensuring compliance with the law by others. Investors, those being regulated, and the general public, all have a strong interest in knowing what the [OSC] is doing and why it is doing it.

[105] The conclusion in *HudBay* was that "there is a strong presumption that all matters ought to take place in an open and public manner", and an applicant faces a "heavy burden" to displace that presumption (at para. 24; see also para. 31).

[106] The OSC made similar comments in *Re Mega-C Power Corporation et al.*, 2007 ONSEC 11 (at para. 36):

> The [OSC] is a public body, exercising its statutory powers in the public interest. It is important, in our view, that it fulfill its mandate as transparently as practically possible. This means that matters coming before the [OSC], including the details about those matters, be made public, to the broadest extent possible, absent special circumstances that would warrant some degree of confidentiality. Where such circumstances exist, the [OSC] should exercise its discretion narrowly, so as to provide the public with as much information about the proceedings before the [OSC] as possible in the circumstances.

[107] Based on the arguments made and the scant evidence before us, we were not satisfied that the heavy burden to rebut the presumption in favour of open proceedings had been discharged.

[108] Orders made under s. 221(5) of the Act are discretionary, and we agreed with the OSC in *Mega-C* that this discretion should be exercised narrowly and only in "special circumstances".

Again, we were not persuaded that there were special circumstances in this case which meaningfully distinguished it from any other matter involving parallel proceedings.

[109] The Initial Applicants did not adduce a convincing evidentiary basis to demonstrate how their circumstances were different from those of any other respondent facing parallel proceedings, much less how their situation was exceptional enough to meet the test in *Sierra Club*. Their arguments concerning the risks they would face if the ASC Proceedings were not stayed or completely closed to outside scrutiny were too speculative to persuade us that the risks are "real and substantial" (*Sierra Club* at para. 54).

[110] Here, the balance weighed in favour of openness and transparency, especially in light of the breadth of the order sought. This made it distinguishable from *Re Kostelecky*, 2016 ABASC 297, in which a confidentiality order was granted by an ASC panel, but only with respect to a single, specific piece of evidence affecting one witness in circumstances where no objections to the order were raised. It did not involve a request for a blanket order of secrecy covering virtually every aspect of the proceeding.

[111] For these reasons, we dismissed the application for a confidentiality order. The salutary effects of such an order would not outweigh the deleterious effects on the public interest and the public's confidence in the integrity of the ASC enforcement process.

IV. COSTS

[112] Section 202 of the Act and s. 20 of the ASC *Rules (General)* give ASC panels the authority to make orders for payment of Staff investigation and hearing costs against persons or companies who have been found to have contravened Alberta securities laws or acted contrary to the public interest.

[113] We do not have jurisdiction to order costs to be paid to any other parties in any other circumstances. Accordingly, we dismissed the EnCharis Applicants' application for the costs of the EnCharis Application.

V. CONCLUSION

[114] For the foregoing reasons, we exercised our discretion to deny the Applications, except with respect to leave for the EnCharis Applicants to be heard.

[115] Specifically, and as communicated in our oral ruling on January 21, 2019:

(a) the application of the Non-Parties for leave to be heard on the Initial Application is dismissed;

(b) the application of the remaining Initial Applicants (i.e., the Respondents) for a stay of the ASC Proceedings pending final resolution of the Alberta Class Actions is dismissed;

(c) the application of the remaining Initial Applicants (i.e., the Respondents) for a confidentiality order is dismissed;

(d) the application of the EnCharis Applicants for leave to be heard on the EnCharis Application is granted;

(e) the application of the EnCharis Applicants for a stay of the ASC Proceedings pending final resolution of the Class Actions is dismissed; and

(f) the application of the EnCharis Applicants for costs of the EnCharis Application is dismissed.

[116] These Applications are concluded.

February 28, 2019

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Maryse Saint-Laurent