ALBERTA SECURITIES COMMISSION

ORAL RULING

Citation: Re O'Brien, 2020 ABASC 54 **Date: 20200424**

Section 36 of the *Securities Act* (Alberta)

In the Matter of an Appeal from a Decision made by the Investment Industry Regulatory Organization of Canada

Between:

Michael Francis O'Brien

Appellant

- and -

Investment Industry Regulatory Organization of Canada

Respondent

Panel:	Tom Cotter Kari Horn
Representation:	Chris Jones and Jeffrey Thom for the Appellant Tayen Godfrey for the Respondent
Date of Hearing:	April 24, 2020
Date of Oral Ruling:	April 24, 2020

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The following ruling and reasons have been prepared from excerpts of the transcript of the hearing of this application, which have been edited and approved by the chair of the panel for the purpose of providing a public record.

This is a ruling on an application by Michael O'Brien (**O'Brien**) for a stay pending appeal to the Alberta Securities Commission (**ASC**).

I. BACKGROUND

[1] O'Brien is a financial advisor registered with the Investment Industry Regulatory Organization of Canada (**IIROC)**. He has been registered with IIROC since 2008, and has been employed by Raymond James Ltd. since December 2017.

[2] In late 2019, an IIROC hearing panel (**IIROC Panel**) conducted a disciplinary hearing into two allegations against O'Brien. The allegations were:

(i) that he contravened Dealer Member Rule 43 by engaging in personal financial dealings with a client without the knowledge or approval of his firm, and

(ii) that he contravened Dealer Member Consolidated Rule 1400 by making misleading representations regarding client dealings.

[3] With the exception of two particulars, O'Brien admitted the first allegation.

[4] On December 31, 2019, the IIROC Panel issued its decision on the merits of the allegations, and amended it on January 15, 2020 (**IIROC Liability Decision)**. With the exception of one particular concerning the first allegation, the IIROC Panel found that both allegations had been proved. Specifically, the IIROC Panel found that over a period of approximately four months in 2017, O'Brien borrowed more than $156,000 from a client who was an elderly widow, and then subsequently made a number of misleading statements about the loan to investigators from both IIROC and from the National Fraud Detection Group of Royal Bank of Canada.

[5] IIROC is a self-regulatory organization recognized by the ASC under section 64 of the *Securities Act* (Alberta) (**Act**). It is therefore under the oversight of the ASC in Alberta. Appeals from IIROC decisions may be brought to the ASC pursuant to section 73 of the Act, and on January 27, 2020, O'Brien filed a Notice of Appeal with the ASC.

[6] After a penalty hearing on March 11, 2020, the IIROC Panel rendered a decision on March 26, 2020 with respect to the penalties to be imposed on O'Brien (**IIROC Penalty Decision)**. The IIROC Penalty Decision included orders:

(a) prohibiting his registration with an IIROC Dealer Member firm for two years;

(b) requiring him to pay IIROC a fine of $100,000 and costs of $20,000;

(c) requiring him to rewrite and pass the Conduct and Practices Handbook examination following the conclusion of the two-year suspension period; and

(d) requiring that he be subject to strict supervision for the first 18 months following his re-entry to the investment industry.

[7] These orders came into immediate effect on March 26, 2020.

[8] As O'Brien also wished to appeal the IIROC Penalty Decision, he filed an Amended Notice of Appeal with the ASC on March 31, 2020. The Amended Notice of Appeal stated that O'Brien was appealing both the IIROC Liability Decision and the IIROC Penalty Decision on various grounds, including alleged errors of fact and law by the IIROC Panel, denial of his right to natural justice, and imposition of penalties that were "excessive and not warranted in the circumstances of the case".

[9] The appeal is scheduled to be heard by this panel on May 27, 2020.

[10] On April 1, 2020, O'Brien filed this application for an interim stay of the IIROC Penalty Decision pending the ASC's decision on the appeal. In the absence of a stay, the orders in the IIROC Penalty Decision remain in effect, including the suspension and the requirement to pay $120,000 to IIROC.

[11] On April 8, 2020, O'Brien swore an affidavit in support of the application (**O'Brien Affidavit**). It includes as an exhibit a copy of an invoice issued to O'Brien by IIROC on March 27, 2020, in the amount of $120,000, payable on receipt.

[12] Late in the afternoon the day before the hearing of this application, IIROC staff filed an affidavit sworn by an IIROC staff investigator on April 23, 2020 (**Choy Affidavit**). The Choy Affidavit states that IIROC recently learned that on April 21, 2020, Raymond James filed a Notice of Termination with respect to O'Brien on the National Registration Database. That Affidavit further states that the Notice of Termination indicates that O'Brien's registration was terminated effective April 20, 2020, but he remains on staff with Raymond James to assist in transitioning his clients to a new advisor. As a result, O'Brien is no longer an IIROC "Approved Person", even though it is not necessary for a Notice of Termination to be filed when a registrant is suspended for disciplinary purposes.

[13] A copy of the Form 33-109F1 *Notice of Termination Information for an Individual* obtained from the National Registration Database is attached to the Choy Affidavit as an exhibit. Under the heading, "Reason for termination", the form states: "The firm removed [O'Brien's] ability to conduct registerable activities upon receipt of [the IIROC Penalty Decision]. As a result, we are also cancelling his registration. He remains an employee of Raymond James to transition his book to another advisor."

II. POSITIONS OF THE PARTIES

A. O'Brien

[14] In support of his application, O'Brien relies on the well-known decision, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311, in which the Supreme Court of Canada set

out a three-part test to be applied by adjudicators considering applications for injunctions and stays of proceedings (**RJR Test**).

[15] As described at paragraph 48 of the *RJR* decision, the RJR Test is as follows:

(a) the adjudicator must make a "preliminary assessment . . . of the merits of the case to ensure that there is a serious question to be tried";

(b) the adjudicator must determine "whether the applicant would suffer irreparable harm if the application were refused"; and

(c) the adjudicator must make "an assessment . . . as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits" – often referred to as an assessment of the balance of convenience.

[16] As to the first part of the RJR Test, O'Brien submits that there are serious questions to be tried with respect to both the IIROC Liability Decision and the IIROC Penalty Decision, and that his appeal is not frivolous, vexatious, or hopeless. He submits that the serious questions include but are not limited to:

(a) "whether the IIROC . . . Panel applied the correct test in respect of Consolidated Rule 1400 and the extent of . . . O'Brien's obligation to disclose, neither of which have been previously considered by an IIROC Hearing Panel"; and

(b) "whether the penalties imposed were excessive on the facts of the case and denied . . . O'Brien's right to natural justice by imposing sanctions which were not argued during the penalty hearing or sought by either party".

[17] For the second part of the RJR Test, O'Brien submits that he will suffer irreparable harm if the stay is not granted because he will lose both his employment and his clients as a result of the ordered suspension. This, he says, "would also render the appeal nugatory", because even if he succeeds on appeal, he will already have lost his job and his clients.

[18] In the O'Brien Affidavit, he deposes that as a result of the IIROC Penalty Decision, his employer, Raymond James, "has removed [his] access from client accounts or other systems related to trading". He has been instructed not to offer any advice or guidance to clients, and to direct all client inquiries to his branch manager. He further deposes that his employer has advised him that if a stay of the IIROC Penalty Decision is not granted within 30 days, his employment will be terminated. Therefore, even if he is successful on his appeal, he says "there will be no employment or clients for [him] to return to".

[19] The Choy Affidavit and exhibit disclose that O'Brien's employer has already terminated his registration. Therefore, O'Brien submits, the harm has already started to occur. However, he speculates that if a stay is granted in short order, he may be able to convince his employer to reinstate him pending the outcome of the appeal – particularly since the appeal is to be heard a little over a month from now. He reiterates that if the stay is not granted, even if he is successful

on his appeal in a month, his employer is unlikely to want to "unwind" the steps taken to terminate his registration and transition his clients to another advisor.

[20] On the third part of the RJR Test, O'Brien submits that the balance of convenience favours a stay, because in the absence of a stay, his clients will be prejudiced since they will be without their financial advisor "in a time of extreme economic uncertainty". In addition, he submits that the stay sought will be of short duration – the month until the appeal is heard – and, if he can get his employer to reinstate him, the stay will simply preserve the status quo that was in effect since the notice of hearing was issued by IIROC staff on February 21, 2019: since that time and until the IIROC Penalty Decision was issued on March 26, 2020, he continued working for his current firm as a financial advisor.

[21] O'Brien expands upon the potential prejudice to his clients in his affidavit, where he states that because he has not been permitted to provide his clients with any of his services since the IIROC Penalty Decision, his clients have been left "without investment advice in a time of economic upheaval, or are receiving advice from another advisor with whom they would not have a long[-] term relationship and who would not be familiar with their investments, strategies, and objectives". By contrast, he argues that a stay of a short duration will not adversely affect the public interest.

B. IIROC Staff

[22] IIROC staff (or **staff**) oppose the stay. In their reply materials, they agree that the applicable test for a stay pending appeal is the RJR Test. However, they argue that O'Brien has not met the test.

[23] While IIROC staff concede that there is a low threshold for the first part of the RJR Test, they argue O'Brien has not established that there is a serious issue to be tried. They say his application materials do "little more than make bald assertions", as they only refer to his grounds of appeal and do not include any argument or cite any case law in support of his position.

[24] Addressing O'Brien's contention that the IIROC Panel erred in its interpretation and application of Consolidated Rule 1400 and the extent of O'Brien's obligation to disclose, IIROC staff noted that Consolidated Rule 1400 replaced Dealer Member Rule 29.1, and both contain almost identical language setting out ethical standards of business conduct for registrants. IIROC staff also noted that contrary to O'Brien's assertion that these issues have not previously been considered by an IIROC hearing panel, Dealer Member Rule 29.1 and a registrant's obligation to provide information while under an investigation have been considered "extensively" in a number of past IIROC decisions. Several of those decisions were cited in the IIROC Liability Decision. Moreover, staff argue that O'Brien's application materials did not suggest another interpretation of the business conduct rule or test, or how it should have been applied by the IIROC Panel.

[25] As to the penalties imposed against O'Brien, IIROC staff acknowledged that the specifics were not argued at the IIROC hearing. However, they emphasized that O'Brien had the opportunity to argue what he thought the appropriate sanctions should be. In addition, they pointed out that they had argued for an even more severe sanction, including a permanent ban.

[26] In their written submissions, IIROC staff conceded that O'Brien was likely to lose his job with Raymond James if a stay were not granted. Notwithstanding this concession, they argued that "it is not clear that the appeal would . . . be nugatory" as O'Brien claims, since he would be able to seek employment with another Dealer Member if his appeal were successful, thus not suffering irreparable harm. Moreover, O'Brien admitted to the first contravention and did not contest many of the aggravating facts at the hearing or put them in issue on this appeal. IIROC staff argued that the admitted facts alone were sufficient to warrant a "significant suspension", and thus the "irreparable harm" complained of would occur in any event.

[27] In light of the information in the Choy Affidavit, during oral submissions before us, IIROC staff acknowledged that the harm O'Brien sought to avoid has already started to occur. However, they argued that this militates against granting a stay, because it is already too late to avoid the harm. In addition, they pointed out that there is no evidence before the panel that Raymond James will reinstate O'Brien's registration as he hopes, even if the stay is granted. In fact, Raymond James was aware of the date that the stay application would be argued, and did not even wait the extra few days to see what the result would be before terminating O'Brien.

[28] Concerning the third part of the RJR Test, IIROC staff emphasized that this matter "involves serious misconduct that undermines the integrity of the investment industry". They argued that the public interest must be considered, as IIROC has a mandate similar to the ASC's: to foster fair and efficient capital markets, and to protect the investing public. Enforcing registrant standards of conduct is one way it works to achieve this mandate.

[29] In support of this contention, IIROC staff cited the ASC's decision in *Re Lutheran Church-Canada, the Alberta-British Columbia District*, 2019 ABASC 43, which commented on the need for timely enforcement of regulatory standards. Staff also cited the Alberta Court of Appeal's decision in *Collett v. College of Physicians & Surgeons of Alberta*, 2019 ABCA 86, which commented on the need to ensure regulators are free to carry out their statutory responsibilities. While O'Brien relies on the decision of the Court of Appeal in *Hill v. Hill*, 2015 ABCA 260, IIROC staff argued that *Collett* is more analogous to this matter because the decision at issue was made by a public interest regulator considering the conduct of one of its members, while in *Hill*, the decision at issue only affected the interests of litigants in private civil litigation.

[30] In the result, IIROC staff submitted that O'Brien's application should be dismissed.

III. ANALYSIS

[31] As mentioned, O'Brien's appeal to the ASC was brought under section 73 of the Act. That section provides in part that:

> **73(1)** . . . a person or company directly affected by a direction, decision, order or ruling made under a bylaw, rule, regulation, policy, procedure, interpretation or practice of a . . . recognized self-regulatory organization [and other such entities], may appeal that direction, decision, order or ruling to the [ASC].
>
> **(2)** Section 36 applies to an appeal made under this section.

[32] Subsection 36(5) of the Act states that, "[n]otwithstanding that a person or company requests an appeal, the decision under appeal takes effect immediately unless the [ASC] grants a stay until disposition of the appeal." O'Brien relies on this subsection in bringing this application.

[33] We agree with the parties that the appropriate legal test to be applied on this application is the RJR Test.

A. Serious Question to be Tried

[34] As acknowledged by IIROC staff, in the *RJR* decision, the Supreme Court of Canada stated that the threshold for an applicant to establish that there is "a serious question to be tried" is "a low one" (at para. 54). The adjudicator is to make "a preliminary assessment of the merits of the case", but "[a] prolonged examination of the merits is generally neither necessary nor desirable" (at paras. 54-55). Even if the adjudicator does not think the applicant will ultimately succeed, as long as he or she is satisfied that the application is "neither vexatious nor frivolous" (at para. 55), the first stage of the RJR Test is met.

[35] As we are mindful of the low threshold at this stage of the RJR Test, we are satisfied that the appeal is neither vexatious nor frivolous, and proceed to consider the next two stages of the test.

B. Irreparable Harm

[36] The *RJR* decision explains that at the second stage of the RJR Test, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied" (at para. 63). We are reminded that, "'[i]rreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other" (at para. 64).

[37] We agree that O'Brien faces the prospect of irreparable harm to his career as a financial advisor as a result of a lengthy period of suspension. It is possible that during his suspension, he will lose his book of business as his clients seek other financial advisors. While it is true that if successful on appeal he can seek another job with another Dealer Member, this is small comfort if he has no clients left to bring to that job. We agree with the comments of the British Columbia Securities Commission in *Re Steinhoff*, 2013 BCSECCOM 308 at para. 90:

> Suspension of any length beyond the range of a normal vacation is, for a registered representative, an extremely serious matter. A suspension of one year . . . is tantamount to the termination of the registrant's career. At a minimum, it requires the registrant to build a book from scratch, a process that takes years and enormous effort.

[38] Moreover, on the basis of the submissions and materials before us, we are not convinced that it is inevitable O'Brien would have faced a lengthy suspension anyway based solely on the admitted contravention and admitted facts. IIROC staff did not refer us to any past IIROC decisions that would support this contention. The IIROC Panel appears to have viewed the unadmitted second contravention as particularly serious. At paragraph 39 of the IIROC Penalty Decision, the Panel remarked that, ". . . [O'Brien] committed even more serious misconduct by seeking to cover up the extent of his wrongful behaviour under Contravention 1 . . . " [emphasis added].

[39] In the absence of case law that would suggest a protracted suspension was inevitable based on the admitted contravention and admitted facts, we are satisfied that O'Brien has met the second part of the RJR Test. It is likely he will suffer irreparable harm in the absence of a stay, and, as discussed, the harm has already started to occur.

[40] That said, we note that the Alberta Court of Appeal in *Collett* (at paras. 13-14) stated that the focus at this stage of the test is on the prospect of harm to the applicant personally, whereas the "significance" of the harm is to be considered at the third stage.

C. Balance of Convenience

[41] The third stage of the RJR Test requires "'a determination of which of the two parties will suffer the greater harm from the granting or refusal'" of the remedy sought (*RJR* at para. 67). The Supreme Court of Canada observed that the factors to be considered at this stage will vary from case to case, and include the public interest – that is, the interest of society in general as well as "the particular interests of identifiable groups" (at paras. 68 and 71-72).

[42] We do not find O'Brien's argument that his clients will suffer as a result of his absence particularly compelling. There is no evidence before us that these clients will not be able to find another financial advisor, or that they will not be well-served by a new advisor, even with the present economic uncertainty and volatile capital markets.

[43] We also considered the interests of the registrant constituency at large. We concluded that their interest is similar to IIROC's: maintaining standards of conduct among registrants to preserve the public's trust and the credibility of their profession.

[44] This leaves us to balance O'Brien's interests against the considerable weight of the broader public interest in IIROC achieving its mandate to foster fair and efficient capital markets, and to protect the investing public. We agree with IIROC staff that enforcing registrant standards of conduct is a crucial part of IIROC's ability to do so.

[45] As the ASC stated in the *Lutheran* decision (at para. 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 [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.

[46] We note that the Alberta Court of Appeal made similar comments with respect to the College of Physicians and Surgeons in *Collett*. Despite finding that the applicant doctor would

suffer irreparable harm as a result of a suspension of his license to practice, the Court found that this harm was "not enough to displace the public interest in ensuring that the Appeal Committee's decision remains in force" (at paras. 14 and 16). The Court also said (at para. 15):

> In considering the balance of convenience, it is important to account for the nature of the decision sought to be stayed. A stay of the Appeal Committee's decision would enjoin a statutory body from fulfilling its mandate. The public interest weighs in favour of ensuring that the College, tasked with regulating the medical profession, is allowed to carry out the disciplinary function assigned to it by the legislature . . .

[47] We are not persuaded that a stay will significantly ameliorate the harm already suffered by O'Brien, while resulting in only a minimal impairment to the public interest. We agree with IIROC staff that the prospect of O'Brien being reinstated by his employer is speculative at best, and we conclude that it is more likely improbable. On the other hand, we are of the view that a stay could undermine public confidence in IIROC's ability to discipline registrants against whom it has made serious findings of misconduct.

[48] In the result, we find that O'Brien has not met the third part of the RJR Test, as the balance of convenience weighs in favour of the public interest.

IV. CONCLUSION

[49] We therefore dismiss O'Brien's application for a stay.

This Text Approved: April 28, 2020

For the Commission:

"original signed by"
Tom Cotter

"original signed by"
Kari Horn