Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue queen ouest Toronto ON M5H 3S8

Citation: Ziaian (Re), 2021 ONSEC 9
Date: 2021-03-17
File No.: 2020-34

IN THE MATTER OF
BARDYA ZIAIAN

REASONS AND DECISION
(Section 21.7 of the *Securities Act*, RSO 1990, c S.5)

Hearing: November 12, 2020

Decision: March 17, 2021

Panel: Timothy Moseley — Vice-Chair and Chair of the Panel

Appearances:

Appearances:	Joseph Groia Trevor Fairlie	For Bardya Ziaian
	Sylvia Samuel Andrew Werbowski	For Staff of the Investment Industry Regulatory Organization of Canada
	Gavin Mackenzie Alexandra Matushenko	For Staff of the Commission

TABLE OF CONTENTS

I. OVERVIEW ... 1

II. FACTUAL BACKGROUND ... 1

III. PRELIMINARY ISSUE – ROLE OF COMMISSION STAFF ... 2

IV. ISSUES AND ANALYSIS ... 3

A. Introduction ... 3
B. Has Mr. Ziaian established that the Commission should interfere with the IIROC Decision? ... 4
C. IIROC's authority to conduct a hearing and to choose the mode of the hearing ... 6
D. Does a respondent's entitlement to be "heard in person" require physical presence in the same room as the panel and/or the witnesses? ... 7
E. What, if anything, flows from IIROC's offer to conduct Mr. Ziaian's hearing offsite? ... 9

V. CONCLUSION ... 9

REASONS AND DECISION

I. OVERVIEW

[1] Mr. Ziaian applies to the Ontario Securities Commission to review a decision[1] of the Investment Industry Regulatory Organization of Canada (**IIROC**) about a proceeding brought by IIROC Staff against him.

[2] The hearing on the merits of IIROC Staff's allegations has not started. It was initially to proceed as an oral hearing.

[3] Before the IIROC hearing could begin, the COVID-19 pandemic intervened. IIROC decided that the hearing would instead proceed electronically. Mr. Ziaian objected, but IIROC overruled that objection. Mr. Ziaian asks the Commission to review that decision.

[4] Mr. Ziaian argues that IIROC did not have authority to change the mode of the hearing over his objection. I disagree. I find that IIROC can hold the merits hearing as an electronic hearing. However, I reach that conclusion for reasons that differ in some respects from the IIROC hearing panel's reasons.

II. FACTUAL BACKGROUND

[5] On July 31, 2019, IIROC Staff filed a Statement of Allegations against Mr. Ziaian. The following day, IIROC issued a Notice of Hearing, which advised that pursuant to s. 8409 of the *IIROC Rules of Practice and Procedure* (**IIROC Rules**),[2] the merits hearing would be an oral hearing.

[6] The merits hearing was initially scheduled for May 2020. However, as the widespread effects of the COVID-19 pandemic began to take hold, a pre-hearing conference was held. The merits hearing was adjourned to a date to be determined. The parties and the hearing panel reserved dates in October, although no order was made fixing those dates.

[7] On August 26, IIROC's hearing co-ordinator advised the parties that the merits hearing could take place on the reserved dates, either by videoconference or at the offices of the court reporting service used by IIROC. The hearing co-ordinator asked whether the merits hearing would proceed on the dates the parties had reserved. IIROC Staff replied that the hearing should proceed by videoconference. Mr. Ziaian said that the hearing must be in person.

[8] On August 27, IIROC's hearing co-ordinator confirmed to the parties that an electronic pre-hearing conference would take place on September 2. That conference proceeded as scheduled. At the conference, IIROC Staff advised that it was ready to proceed on the reserved dates.

[9] On September 8, IIROC issued a *Pre-Hearing Conference Memorandum* signed by the hearing panel, which purported to confirm matters discussed at the pre-hearing conference. It stated that:

a. Mr. Ziaian's request for "an oral in-person hearing" was denied;

b. Mr. Ziaian's request for an adjournment of the hearing to January 2021 was denied;

---

[1] *Ziaian (Re)*, 2020 IIROC 34 (**IIROC Decision**)

[2] IIROC, online: https://www.iiroc.ca/industry/rulebook/Documents/rule-8400.pdf

c. the hearing would be an electronic hearing;

d. the hearing would proceed on the reserved dates in October; and

e. if Mr. Ziaian wished to bring a motion asking for an adjournment and "an oral in-person hearing", he should do so expeditiously.

[10] Mr. Ziaian says that he did not ask for an adjournment or an oral hearing, contrary to what the memorandum states.

[11] On September 10, Mr. Ziaian filed a notice of motion with IIROC. He asked for an order that the merits hearing continue as an oral hearing or, in the alternative, that the proceeding be permanently stayed because IIROC had no jurisdiction to continue the merits hearing as an electronic hearing.

[12] On September 23, the IIROC hearing panel heard the motion. The following day, it issued its decision, in which it dismissed Mr. Ziaian's motion and ordered that the merits hearing proceed on the reserved dates in October.

[13] On September 30, Mr. Ziaian filed his application with the Commission to commence this proceeding. He asks the Commission to set aside the September 24 decision of the IIROC hearing panel and to order that the merits hearing be an in-person oral hearing.

[14] On October 7, following an attendance that day by IIROC Staff and Mr. Ziaian, the IIROC hearing panel ordered that the merits hearing not proceed on the reserved dates, but rather on dates to be set following the issuance of this decision.

III. PRELIMINARY ISSUE – ROLE OF COMMISSION STAFF

[15] Before I analyze the substantive issues raised by this application, I must address a preliminary issue raised by Mr. Ziaian about OSC Staff's role in this proceeding.

[16] At midday on November 11, the day before the hearing, counsel for Mr. Ziaian wrote to the Registrar and to counsel for IIROC Staff and for OSC Staff. He advised that he intended to raise a preliminary issue at the hearing about whether OSC Staff has standing as a party in this proceeding. He had first informed OSC Staff the evening before of his intention to raise the issue.

[17] At the hearing on November 12, I dismissed Mr. Ziaian's objection for the following reasons.

[18] It is well established that OSC Staff is a party in proceedings of this kind.[3]

[19] Furthermore, OSC Staff's role as a party to this proceeding was clear and undisputed no later than October 7, more than a month before this hearing. On that day, counsel for Mr. Ziaian wrote to the Registrar (with a copy to counsel for IIROC Staff and for OSC Staff), advising that "[c]ounsel for the Parties (Mr. Ziaian, IIROC Staff and OSC Staff)" had agreed on a schedule for the delivery of materials before the hearing. That schedule contemplated that OSC

[3] See, *e.g.*, *Derivative Services Inc (Re)*, (2001) 24 OSCB 4575 at para 34; *Market Regulation Services Inc (Re)*, 2009 ONSEC 37, (2009) 32 OSCB 8051 at para 11; *Hahn Investment Stewards & Co (Re)*, 2009 ONSEC 41, (2009) 32 OSCB 8683 at para 12; *CI Financial Corp (Re)*, 2011 ONSEC 27, (2011) 34 OSCB 10937 at para 11; *TD Securities Inc (Re)*, 2013 ONSEC 29, (2013) 36 OSCB 7492 at para 7

Staff, as one of the parties, would deliver its memorandum of fact and law by November 4.

[20] The Commission issued an order on October 8 reflecting the agreed-upon schedule.[4] The three parties delivered their materials by that schedule.

[21] The parties exchanged correspondence on November 11, the day before the hearing. At approximately 5:00pm that day, counsel for Mr. Ziaian advised that "[t]his problem was caused entirely by [OSC] Staff making submissions in their factum that exceed any reasonable role that it can or should play." Counsel for Mr. Ziaian maintained that position at the hearing before me.

[22] At the hearing, I declined Mr. Ziaian's invitation to rule formally on the reasonableness of OSC Staff's submissions. In particular, I declined to rule on whether any of those submissions went beyond Mr. Ziaian's suggested description of OSC Staff's role as an *amicus*, or friend of the tribunal. Even if some or all of the submissions were unreasonable or excessive, that would not disqualify OSC Staff from being a party. It is open to me, as it would be to any hearing panel, to disregard submissions that cross the line.

[23] I conclude by finding that OSC Staff was properly a party from when Mr. Ziaian filed his application and that counsel for Mr. Ziaian agreed to that fact no later than October 7. There was no reasonable basis for Mr. Ziaian's counsel to resile from that agreement, particularly on the eve of the hearing. In any event, I have found no need to rely on OSC Staff's submissions in coming to my decision.

IV. ISSUES AND ANALYSIS

A. Introduction

[24] Before turning to the main issues, I set out the legal framework for this proceeding.

[25] Mr. Ziaian brings this application under s. 21.7 of the *Securities Act*,[5] which provides that any person directly affected by a decision of a recognized self-regulatory organization may apply to the Commission for a review of that decision.

[26] On an application such as this, the Commission may confirm the IIROC decision or make such other decision as it considers proper.[6] The Commission's review of an IIROC decision is a hearing *de novo* rather than an appeal. In other words, the Commission exercises original jurisdiction rather than a more limited appellate jurisdiction. The Commission need not defer to the IIROC hearing panel's decision.[7]

[27] Although such deference is not required, the Commission has chosen as a matter of practice to limit the circumstances under which it will substitute its own decision for that of a self-regulatory organization such as IIROC.[8] This choice is consistent with the requirement in the Act that the Commission have regard to

---

[4] (2020) 43 OSCB 8066

[5] RSO 1990, c S.5

[6] *Securities Act*, ss. 21.7(2) and 8(3)

[7] *Johal v Funeral Services*, 2012 ONCA 785 at para 4

[8] *Pariak-Lukic v Investment Industry Regulatory Organization of Canada*, 2016 ONSC 2564 (Div Ct) at para 14

the fundamental principle that the Commission should "use the enforcement capability and regulatory expertise of recognized self-regulatory organizations."[9]

[28] The Commission has often stated[10] that it will interfere with a decision of a self-regulatory organization only if:

a. the hearing panel proceeded on an incorrect principle;

b. the hearing panel erred in law;

c. the hearing panel overlooked some material evidence;

d. new and compelling evidence is presented to the Commission that was not presented to the hearing panel; or

e. the hearing panel's perception of the public interest conflicts with that of the Commission.

B. Has Mr. Ziaian established that the Commission should interfere with the IIROC Decision?

[29] Mr. Ziaian submits that the first three of the above criteria are met in this case.

[30] As I have noted above, I reach the same conclusion as the IIROC hearing panel did, although I follow a different analytical path to that conclusion. I identify three aspects of the IIROC Decision that I would approach differently. It is a close call whether all three differences of view constitute errors. Still, I consider them sufficient, taken together, for me to exercise the original jurisdiction conferred by the Act.

[31] I respectfully depart from the IIROC panel's approach in the following ways.

[32] First, and most importantly, the IIROC panel's analysis of a respondent's entitlement about the hearing mode is perfunctory and confusing. In its brief reference to s. 8423(2)(i) of the IIROC Rules (which section prescribes a respondent's entitlement to be heard "in person" at a merits hearing), the panel presents a videoconference hearing and "an in-person hearing" as mutually exclusive alternatives. The panel states that the "sole difference between [a videoconference hearing] and an in-person hearing is the physicality of attending." [11]

[33] The IIROC Rules contemplate three hearing modes: an "oral hearing", an "electronic hearing", and a "written hearing". An "in-person hearing" is not among them.

[34] It was a central question before the IIROC panel, and it is a central question before me, whether an electronic hearing conducted by videoconference would satisfy the "in person" requirement in the rule about a merits hearing. To present an electronic hearing and an "in-person hearing" as mutually exclusive is problematic, especially given the IIROC panel's ultimate conclusion that the merits hearing could proceed electronically.

[35] It may be that the IIROC panel meant "oral hearing" instead of "in-person hearing". If so, then in my respectful view, while the panel's analysis was correct

---

[9] Paragraph 4 of section 2.1 of the Act

[10] See, *e.g.*, *Canada Malting Co (Re)*, (1986) 9 OSCB 3565 at para 24; *Marek (Re)*, 2017 ONSEC 41, (2017) 40 OSCB 9167 at para 24

[11] IIROC Decision at para 34

(although misstated), the panel did not adequately confront the ordinary meaning of the words "in person" and whether it thought that the words could bear an interpretation that includes appearing by videoconference.

[36] Whether or not the IIROC panel meant "oral hearing" instead of "in-person hearing", the uncertainty and confusion remain. This alone is a sufficient basis for me to interfere with the IIROC panel's decision.

[37] My second point of divergence relates to the IIROC panel's statement that Mr. Ziaian was effectively arguing that "the ultimate control of the hearing process for hearings on the merits lies with the Respondent, not the Panel."[12] In my view, that is an overly broad mischaracterization of Mr. Ziaian's submissions before the IIROC hearing panel.

[38] The third point on which I diverge from the IIROC panel is about how it framed the choice of hearing mode. It stated: "when an in-person [oral?] hearing is not possible and may not be for some considerable period of time, an electronic hearing is a viable and fair alternative"[13].

[39] That phrase repeats the problematic juxtaposition of an "in-person hearing" and an "electronic hearing". Apart from that, while it may be true that an electronic hearing is a viable and fair alternative to an oral hearing, the hearing panel's authority to choose the hearing mode must be explicit. The viability and fairness of an electronic hearing are not a sufficient basis for changing the hearing mode without authority to do so.

[40] For clarity (because I do not take the IIROC hearing panel to have suggested this), I note that an electronic hearing may be a viable and fair alternative even if an oral hearing is available. No inference should be drawn that a hearing panel can choose to proceed electronically only when an oral hearing is unavailable.

[41] For these reasons, it is appropriate for me to exercise original jurisdiction and consider the issues anew. This application presents the following three principal issues, which I will address in turn:

a. What is the source of IIROC's authority to conduct a hearing and to choose the mode of the hearing?

b. Does a respondent's entitlement to be "heard in person" at a merits hearing require physical presence in the same room as the panel and/or the witnesses?

c. What, if anything, flows from IIROC's offer to conduct Mr. Ziaian's hearing offsite?

[12] IIROC Decision at para 24
[13] IIROC Decision at para 45

C. IIROC's authority to conduct a hearing and to choose the mode of the hearing

[42] I begin by locating IIROC's authority to conduct a hearing and to choose the hearing mode. It is common ground that:

a. the IIROC tribunal has no inherent jurisdiction;

b. the *Statutory Powers Procedure Act*[14] (**SPPA**) does not apply to proceedings before the IIROC tribunal; and

c. the tribunal's authority to conduct a hearing and choose the hearing mode is found in s. 8409(1) of the IIROC Rules, which states that subject to enumerated subsections (to which I will return below), "a hearing panel may conduct a hearing as an oral hearing, electronic hearing or written hearing."

[43] Subsection 8409(3) states that in determining the hearing mode, "a hearing panel may consider any relevant factors, including… the… timeliness of the hearing [and] the fairness of the hearing process to, and the convenience of, each of the parties".

[44] It is important to note that the authority set out in s. 8409(1) is that of the hearing panel and that the list of relevant factors explicitly applies to the hearing panel's choice. Further, it is important to note that the authority in s. 8409(1) is not time-limited; in other words, a hearing panel may exercise that authority at any time, subject to any constraints appearing elsewhere.

[45] Before considering how this authority is limited by a respondent's entitlement to be "heard in person" at a merits hearing, I wish to address two arguments made by Mr. Ziaian.

[46] First, he points out that s. 8409(9)(ii) gives a hearing panel the authority, "on its own motion, at any stage of a proceeding", to make an order "continuing" an oral hearing as an electronic hearing. The panel may exercise this authority only where no party objects. Mr. Ziaian objects, and he contends that his objection deprives the hearing panel of its only authority to choose to proceed with the hearing as an electronic hearing.

[47] I reject that submission because s. 8409(9)(ii) applies to a hearing panel "continuing" a hearing. As Mr. Ziaian has agreed, the merits hearing has not yet commenced. A hearing that has not yet begun cannot be said to "continue".

[48] Second, he notes that s. 8409(4) provides that a "party may request an electronic hearing or written hearing in a commencing notice." Subsections 8409(5) through 8409(8) set out various steps that may follow if a party makes the request contemplated by s. 8409(4). These steps include the right of another party to object to the request, and the powers and obligations of a hearing panel where a notice of objection has been filed.

[49] Mr. Ziaian asserted that s. 8409(4) through 8409(8) are relevant in this proceeding. He says that I must take them into account when considering the steps taken by IIROC or by IIROC Staff about the hearing mode.

---

[14] RSO 1990, c S.22

[50] I disagree. Subsections 8409(4) through 8409(8) apply to a party's request "in a commencing notice", and another party's objection, if any, to that request. In this case, no request for an electronic hearing was made by a party in a commencing notice. The subsections are not relevant in this proceeding.

D. Does a respondent's entitlement to be "heard in person" require physical presence in the same room as the panel and/or the witnesses?

[51] Having located the hearing panel's authority to choose the hearing mode, I will now consider how a specific limitation on that authority applies.

[52] Mr. Ziaian points to s. 8423(2)(i), which provides that at a hearing on the merits, "other than a written hearing, a respondent is entitled to attend and be heard in person".

[53] Mr. Ziaian and IIROC Staff offer two competing interpretations of this subsection.

[54] Mr. Ziaian submits that the words "attend and be heard in person", properly interpreted, give the respondent the right to be physically present in the same room as the hearing panel.

[55] IIROC Staff contends that the words do not require physical presence in the same room. IIROC Staff submits that the words give the respondent the right to "attend" (*i.e.*, participate in the hearing in real time) and be heard "in person" (*i.e.*, directly, not just through counsel or an agent).

[56] There can be no doubt that in everyday use, the words "in person" first call to mind a situation where one is physically present in the same room as another. However, that reflexive interpretation may not be the only reasonable one in the context of an IIROC hearing.

[57] The IIROC Rules do not explicitly speak to whether physical presence is required. The question, therefore, is whether the words "in person" can reasonably bear the interpretation advanced by IIROC Staff (*i.e.*, that they include a videoconference hearing in which the respondent and the hearing panel are present).

[58] The words "a respondent is entitled to attend and be heard in person" must be viewed in context. In particular, I must consider the immediately preceding words: "At a hearing on the merits, other than a written hearing, a respondent is entitled…". The entitlement to be heard "in person" applies to a hearing on the merits, other than a written hearing.

[59] The exclusion of a written hearing is sensible. It would be stretching the words "attend and be heard in person" beyond recognition to interpret them as applying to a written hearing, where there is no real-time attendance by anyone.

[60] Electronic hearings are not excluded, however, and it is unclear why that is so. If, as Mr. Ziaian submits, the words "in person" necessarily invoke an oral hearing, why do the opening words not say "At an oral hearing on the merits" or "At a hearing on the merits, other than an electronic hearing or a written hearing"? The rule, as drafted, leaves open the possibility that a respondent can attend and be heard in person at an electronic hearing.

[61] I also note how the words contrast with those found in the definition of "oral hearing". The IIROC Rules define that term in s. 8402(1) to be a "hearing at

which the parties or their counsel or agents attend before a hearing panel in person". The words "before a hearing panel", present in that definition, do not appear in s. 8423(2)(i). The reason for the difference is not evident. IIROC Staff submits that this is a deliberate distinction and that the words "before a hearing panel" necessarily require physical presence. I am not persuaded by that submission. I find the difference puzzling but not determinative one way or the other.

[62] Finally, I consider whether there is any policy reason to choose one interpretation over the other. I begin that inquiry by asking whether a requirement of physical co-location would protect an essential entitlement of a respondent who faces an IIROC proceeding.

[63] In my view, it would not. I heard no convincing argument that a videoconference hearing deprives a respondent of due process or fairness. Indeed, such a conclusion would be contrary to Commission and judicial authority on the subject.[15] Some respondents prefer to be in the same room as the hearing panel, but such a preference cannot determine the appropriate interpretation.

[64] Mr. Ziaian submits that the only evidence before the IIROC hearing panel or before me about the fairness of a videoconference hearing is an affidavit of Mr. Richard, who was Mr. Ziaian's counsel at the IIROC proceeding. Based on that affidavit, Mr. Ziaian's counsel at the hearing before me (a member of the same firm) argued that a videoconference hearing imposes a significant impairment to effective cross-examination.

[65] I cannot accept that submission as a general bar to the holding of merits hearings by videoconference. Over the past many months, courts and other tribunals (including this Commission) have held that for civil and administrative proceedings generally, videoconference hearings do not cause an impermissible unfairness to the parties.

[66] I am aware of no authority to the contrary, and Mr. Ziaian could not identify any such authority.

[67] I adopt the general approach of the courts and this Commission. As for Mr. Richard's affidavit, it identifies no circumstances particular to this proceeding that would warrant a departure from the general approach. I do not find his affidavit to be persuasive.

[68] In conclusion on the interpretation issue, and in my respectful view, the IIROC Rules are not well drafted on this point. Both the interpretation suggested by Mr. Ziaian and the interpretation suggested by IIROC Staff are reasonable. Each has its flaws.

[69] Faced with these two alternative interpretations, I am guided by s. 8403(1), which provides that the IIROC Rules "shall be interpreted and applied to secure… the most expeditious and least expensive conduct of the proceeding."

[70] Applying that rule leads me to conclude, as the IIROC hearing panel did, that a videoconference hearing sufficiently meets a respondent's entitlement to attend a

---

[15] See *First Global Data Ltd (Re)*, 2020 ONSEC 23, (2020) 43 OSCB 7349 (***First Global***), and the cases cited therein

merits hearing in person. That interpretation better satisfies the requirement of "the most expeditious… conduct of the proceeding."

E. What, if anything, flows from IIROC's offer to conduct Mr. Ziaian's hearing offsite?

[71] Having concluded that the IIROC Rules permit a hearing panel to decide that a merits hearing shall be held by videoconference, I turn to consider IIROC's advice to Mr. Ziaian and IIROC Staff that the hearing could, at least at the time, be held at the offices of a court reporting service.

[72] Mr. Ziaian places considerable emphasis on this communication. He asserts that the dispute between IIROC and Mr. Ziaian about the hearing mode is "deeply troubling" and "unnecessary"[16] because the hearing on the merits can take place at the court reporter's office. He also asserts that civil trials were taking place safely in courtrooms at the relevant time, and IIROC was scheduling in-person hearings in British Columbia.

[73] I cannot accept the submission. I take notice[17] of the fact that throughout the pandemic, circumstances have fluctuated significantly. Public health advice (which varies by jurisdiction) has changed frequently in response to the changing circumstances. The degree of safety associated with particular indoor locations depends on many factors. Evidence or assertions about what may have been happening in other venues inside or outside of Ontario, or at different times, are irrelevant.[18]

[74] There is no evidence before me that the court reporter's offices would have been a safe location for a hearing following IIROC's decision to abandon that option. I emphatically reject Mr. Ziaian's submission that IIROC's decision was irrational.

[75] Following the hearing of this application, the parties advised that IIROC had issued a news release that indicated that a merits hearing in an unrelated matter was scheduled to proceed at the court reporter's offices. I do not consider that fact to be relevant to my decision for two reasons. First, it was expressly subject to change, and second, it was at a particular point in time.

V. CONCLUSION

[76] For the above reasons, I conclude that while I take a different analytical path to the result reached by the IIROC panel, the result is the correct one. Accordingly, the hearing on the merits of the allegations against Mr. Ziaian may proceed as the hearing panel directs, including by videoconference if that is its choice.

Dated at Toronto this 17th day of March, 2021.

"Timothy Moseley"

Timothy Moseley

[16] Hearing Transcript, Ziaian (Re), November 12, 2020 at 48 lines 5-7
[17] Pursuant to s. 16(a) of the SPPA
[18] *First Global* at paras 61-65