



Capital
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Citation: *Odorico (Re)*, 2023 ONCMT 10
Date: 2023-03-01
File No. 2022-18

**IN THE MATTER OF
MARK ODORICO**

REASONS AND DECISIONS

**(Subsection 8(4) of the *Securities Act* RSO 1990 c S.5 and Rule 22(4) of the
Capital Markets Tribunal Rules of Procedure and Forms)**

Adjudicators: Andrea Burke (chair of the panel)
Sandra Blake
Cathy Singer

Hearing: By videoconference, November 25, 2022; final written submissions
received January 30, 2023

Appearances: Mark Odorico For himself

Kathryn Andrews For Staff of the New Self-Regulatory
Marie Abraham Organization of Canada (formerly the
Investment Industry Regulatory
Organization of Canada)

Erin Hoult For Staff of the Ontario Securities
Commission

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REASONS AND DECISIONS

1. OVERVIEW

- [1] This is a motion by Mark Odorico (**Odorico**), a self-represented party, for a stay (the **Stay Motion**) of two decisions of the Investment Industry Regulatory Organization of Canada (**IIROC**) dated April 7, 2022¹ and August 15, 2022,² (collectively the **IIROC Decisions**) until the disposition of his application to the Tribunal for a hearing and review of the IIROC Decisions (the **Review Application**). The Review Application is scheduled to be heard on March 7, 2023.
- [2] Pursuant to the IIROC Decisions, Odorico was disciplined for certain conduct, including misappropriating client funds, effecting unauthorized trades in a client account and failing to cooperate with Staff of the New Self-Regulatory Organization of Canada (formerly IIROC) (**New SRO Staff**) in its investigation. Sanctions imposed included a fine of \$125,000, disgorgement of \$579,000 and a permanent ban from registration with IIROC. In the absence of a stay, the sanctions ordered by IIROC remain in effect, as they have been since July 15, 2022 (when the penalty order was made with reasons to follow).
- [3] The hearing of the Stay Motion was conducted by videoconference on November 25, 2022, and an order was issued dismissing the Stay Motion, with reasons to follow.³
- [4] At the outset of the hearing of the Stay Motion, Odorico made an additional request of the panel for an order that his oral testimony at the hearing be kept confidential and not be made available to the public. We agreed to proceed with Odorico's testimony in the absence of the public pending further submissions from the parties prior to concluding the Stay Motion, primarily because Odorico had not filed an affidavit in support of the Stay Motion and the scope of his intended testimony was not known, making it difficult to consider and make a ruling in advance.

¹ *Re Odorico* 2022 IIROC 6

² *Re Odorico* 2022 IIROC 21

³ (2022) 45 OSCB 9924 (**November 28 Order**)

- [5] New SRO Staff and Staff of the Ontario Securities Commission (**Commission Staff**) opposed the request for confidentiality and in the alternative suggested that Odorico's testimony be kept confidential until the parties received a copy of the hearing transcript and had an opportunity to make further submissions in writing on which parts of the transcript, if any, should remain confidential. We agreed and ordered that the transcript containing Odorico's testimony remain confidential pending further order of the Tribunal.⁴ We note that the transcript is not strictly restricted to Odorico's evidence, but also includes submissions.
- [6] These are our reasons for dismissing the Stay Motion and our decision and reasons for allowing limited select parts of the Stay Motion transcript to remain confidential on the basis that the limited select parts offend the personal dignity of Odorico.

2. BACKGROUND

- [7] Odorico was once a registered representative with CIBC World Markets. He ceased to be registered with IIROC on April 30, 2019.
- [8] The IIROC disciplinary hearing took place on March 1 and 2, 2022, after numerous adjournments were requested and received by Odorico between 2021 and 2022.
- [9] The IIROC panel found that:
- a. between March 2014 and October 2018, Odorico misappropriated funds from three clients, contrary to Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400 (after September 1, 2016);
 - b. between January 2016 and February 2019, Odorico effected unauthorized trades in a client's account, contrary to Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400 (after September 1, 2016); and

⁴ November 28 Order

- c. in May 2020, Odorico failed to co-operate with New SRO Staff who were conducting an investigation, contrary to section 8104 of the Consolidated Rules.

[10] Following further adjournment requests, only one of which was granted, a sanctions and costs hearing was held before IIROC on July 15, 2022. On August 15, 2022, the IIROC panel released its reasons for ordering the following sanctions and costs against Odorico:

- a. fines totalling \$125,000;
- b. disgorgement in the amount of \$579,000;
- c. a permanent ban on registration with IIROC in any capacity; and
- d. costs in the amount of \$25,000.

[11] On August 14, 2022, Odorico filed the Review Application with the Tribunal. On October 27, 2022, he filed the Stay Motion.

[12] The Stay Motion was heard on November 25, 2022. The Review Application is scheduled to be heard on March 7, 2023.

3. LAW AND ANALYSIS FOR GRANTING A STAY

3.1 The test for a stay

[13] The Tribunal has the authority to grant a stay of the IIROC Decisions pending the disposition of Odorico's Review Application pursuant to s. 8(4) of the Ontario *Securities Act*⁵ and to impose conditions on such a stay pursuant to s. 16.1(2) of the *Statutory Powers Procedure Act* (the **SPPA**).⁶

[14] The following three-part test for the granting of a stay is articulated by the Supreme Court of Canada⁷ and has been adopted by the Tribunal in numerous cases:⁸

- a. there is a serious issue to be tried;

⁵ RSO 1990, c S.5

⁶ RSO 1990, c S.22; see also *Argosy Securities Inc (Re)*, 2015 ONSEC 38 (**Argosy**) at paras 14-16

⁷ *RJR-MacDonald Inc. v Canada (Attorney-General)*, [1994] 1 SCR 311 (**RJR-MacDonald**)

⁸ *Eley (Re)*, 2020 ONSEC 30 (**Eley**) at para 14; *Argosy* at para 12

- b. the moving party would suffer irreparable harm if the stay was refused;
and
- c. the balance of convenience favours granting the stay.

[15] Odorico bears the onus of establishing that all three parts of the above test have been met.

[16] New SRO Staff opposes the Stay Motion. Commission Staff takes no position with respect to the outcome of the Stay Motion.

[17] We will consider each element of the above test in turn.

3.2 Is there a serious issue to be tried?

[18] The threshold to establish that there is a serious issue to be tried is low. The Tribunal is required to make a preliminary assessment, not a prolonged examination, of the merits of the Review Application to be satisfied that the application is neither vexatious nor frivolous.⁹

[19] Odorico's Review Application is relatively sparse but does raise the following matters:

- a. the financial penalties and permanent ban imposed by IIROC were excessive and unfair in the circumstances;
- b. Odorico was not treated fairly in light of his health condition and needed more time to be properly represented at the IIROC hearing; and
- c. Odorico did not do anything wrong in connection with the client investment account.

[20] These same matters (unfair process, insufficient time to properly prepare and participate in the hearing and defend the allegations, and undeserved and punitive penalties) are raised in Odorico's Stay Motion.

[21] Odorico submits that due to his health issues he was unable to properly represent himself before IIROC and as a result, he is facing large fines and has

⁹ *RJR-MacDonald* at paras 49-50

been banned for life, which he believes is unfair as it impedes him from earning an income.

[22] New SRO Staff submits that while it believes that the Review Application is ultimately without merit, it concedes that the Review Application is neither vexatious nor frivolous.

[23] Based on a preliminary assessment, we are satisfied that the low threshold to establish that there is a serious issue to be tried has been met and that the Review Application is neither vexatious nor frivolous. Accordingly, Odorico has satisfied this first part of the test.

3.3 Will Odorico suffer irreparable harm if a stay is not granted?

[24] The second part of the test requires the Tribunal to determine whether a refusal to grant the Stay Motion could so adversely affect Odorico's interests that the harm could not be remedied.¹⁰

[25] Irreparable 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.¹¹ Evidence to demonstrate irreparable harm must be "clear and not speculative".¹²

[26] Odorico submits that a permanent ban from registration with IIROC constitutes irreparable harm. He further submits and testifies that he has suffered financial hardship and damage to his reputation that he can never regain, and that he is unable to pay the amounts ordered by IIROC until he finds a job.

[27] New SRO Staff submits that Odorico has not been an IIROC registrant since April 30, 2019. Further, Odorico has provided no documentary evidence of his financial condition to support his oral testimony.

[28] New SRO Staff cites both the *Azeff* and *Eley* decisions to support its opposition to the Stay Motion. In *Azeff*, the Divisional Court denied a stay and noted that there was "little evidence as to the full and accurate state of the Appellants'

¹⁰ *RJR-MacDonald* at para 58; *Argosy* at para 24

¹¹ *RJR-MacDonald* at para 59

¹² *Sazant v College of Physicians & Surgeons (Ontario)*, 2011 Carswell Ont 15914 (ONCA) at para 11

finances".¹³ Conversely, in *Eley*, the Tribunal granted a stay after considering evidence which demonstrated that the applicant's career as a registered representative and portfolio manager was the primary source of income for him and his family, and that he faced a real prospect of irreparable damage to his career, income, business and reputation as a registered representative if the stay was not granted.¹⁴

[29] Based on the evidence before us, we do not find that Odorico will suffer irreparable harm if the Stay Motion is not granted. It has been more than three and a half years since Odorico was registered with IIROC. We have no evidence that a stay will further his prospects of employment as a registered representative and portfolio manager, nor that a stay will unwind any financial impacts to him that may have flowed as a consequence of his retirement or the IIROC investigation and proceedings. While we are sympathetic to Odorico's financial condition that was described to us, we have no evidence before us other than Odorico's oral assertions to support his submissions of impecuniosity. Financial hardship or inability to pay a fine is not, in and of itself, irreparable harm and Odorico made no submissions and provided no evidence as to how efforts by New SRO Staff to enforce the fines would result in irreparable harm. Furthermore, a stay will not remedy or address any damage to Odorico's reputation, which he submits has already occurred.

3.4 Does the balance of convenience favour granting a stay?

[30] The third part of the test requires an assessment of which of the parties will suffer greater harm from granting or denying the stay.¹⁵

[31] Given that we have found that Odorico has failed to establish that he will suffer irreparable harm if a stay is not granted, we do not need to consider this part of the three-part test and conclude that Odorico's request for a stay is dismissed.

¹³ *Azeff v Ontario Securities Commission*, October 19, 2015, endorsement of Kruzick J. (**Azeff**) at p 2

¹⁴ *Eley* at paras 25 and 30

¹⁵ *RJR-MacDonald* at para 62

4. LAW AND ANALYSIS REGARDING CONFIDENTIALITY

4.1 Introduction

[32] We now turn to Odorico's request that the confidential transcript of the Stay Motion remain fully confidential or have portions redacted. New SRO Staff and Commission Staff opposed his request and submitted that very limited portions of the transcript should remain confidential. We dismiss Odorico's request that the entire transcript be kept confidential and find that limited portions will be marked confidential on the basis that they offend the personal dignity of Odorico and the public interest in privacy outweighs the public interest in the open court principle.

4.2 Law

[33] Subsection 9(1) of the *SPPA* provides that the Tribunal may hold a hearing in the absence of the public where it is of the opinion that avoiding disclosure of intimate financial or personal matters or other matters during the hearing outweighs adherence to the principle that hearings should be open to the public. Rule 22(2) of the Capital Markets Tribunal *Rules of Procedure and Forms (Rules)* contains a similar provision and Rule 22(4) provides that a panel may order that part of an adjudicative record (including a hearing transcript) be confidential if the circumstances in Rule 22(2) apply to the adjudicative record.

[34] We are also mindful of the Capital Markets Tribunal *Practice Guideline* which states that personal information relevant to the resolution of a matter is generally not treated as confidential.

[35] In applying s. 9(1) of the *SPPA* (as well as Rules 22(2) and 22(4) of the Rules) it is helpful to consider the common law relating to confidentiality in court or administrative tribunal proceedings.¹⁶

[36] New SRO Staff and Commission Staff cite the recent Supreme Court of Canada decision in *Sherman*¹⁷ and submit that the threshold is high when rebutting the open justice principle. A person must establish that:

¹⁶ *Hudbay Minerals Inc (Re)*, 2009 ONSEC 18 at para 28

¹⁷ *Sherman Estate v Donovan*, 2021 SCC 25 (***Sherman***)

- a. court openness poses a serious risk to an important public interest;
- b. the order sought is necessary to prevent this serious risk to the identified interest because reasonable available alternate measures will not prevent this risk; and
- c. as a matter of proportionality, the benefits of the order outweigh its negative effects.¹⁸

[37] The Supreme Court of Canada describes the bar as being higher and more precise than a “sweeping privacy interest”. The open court principle brings necessary limits to the right to privacy.¹⁹ Open court proceedings by their nature can be a source of discomfort and embarrassment and these intrusions on privacy are generally seen as of insufficient importance to overcome the presumption of openness.²⁰ Rather, the individual must establish “that there is a serious risk that, without an exceptional order, the affected individual will suffer an affront to their dignity.”²¹

[38] There is no exhaustive list as to what constitutes an affront to dignity.²² We must consider the facts before us. We therefore turn to the submissions of the parties and to the details of the transcript.

4.3 Analysis

[39] Odorico submits that his preference is for the entire transcript to remain confidential. Alternatively, he proposes that the bulk of his testimony be redacted, submitting that should the information be made public he would suffer great harm to his current health condition.

[40] New SRO Staff and Commission Staff propose redactions to the Stay Motion transcript in only a handful of instances. Their proposed redactions focus on the type of doctor Odorico visited, detailed particulars of his symptoms at hospitalization and a doctor’s note previously redacted by the Tribunal.²³ They

¹⁸ *Sherman* at para 38

¹⁹ *Sherman* at para 58

²⁰ *Sherman* at para 56

²¹ *Sherman* at para 34

²² *Sherman* at para 77

²³ *Odorico (Re)*, 2022 ONCMT 36

submit that the balance of the transcript does not contain information that would cause Odorico to suffer an affront to his dignity.

[41] We have no doubt that Odorico may feel embarrassed about portions of his testimony and submissions. Arguably, there are portions of the transcript that go to dignity issues. However, we must also consider the disclosure that is relevant to the public interest in support of our decision and reasons on the Stay Motion.

[42] While we concur that Odorico has not met the threshold for a confidentiality order to be applied to the entire transcript, we find that there are certain parts of the transcript that would, without redaction, cause an affront to the personal dignity of Odorico where the public interest in privacy outweighs the public interest in the open court principle. Those include the proposed redactions by New SRO Staff and Commission Staff as well as some additional redactions sought by Odorico.

[43] We find that certain intimate details about Odorico's current health and some of his personal and family issues are highly sensitive and go to personal dignity while not being relevant to our decision on the Stay Motion and can remain confidential. We also find that certain intimate details about Odorico's health at the time of the IIROC hearing, including language tracking his particular diagnosis or doctor's advice, can also remain confidential. However, the details about how Odorico's health impacted his ability to properly participate in and defend himself at the IIROC proceedings as well as the details about his financial circumstances that we have not agreed should be redacted, should be public having regard to a balancing of privacy concerns against the fundamental principle of public access to proceedings. In our view, this information is important and requires transparency considering all the relevant circumstances, including the grounds advanced by Odorico in the Stay Motion and in the Review Application.

5. CONCLUSION

[44] For the reasons set out above, we dismissed Odorico's Stay Motion.

- [45] We also order that the transcript of the confidential portion of the November 25, 2022, hearing is to be made public, with the following redactions made:
- a. the words after "with" on line 25, page 8;
 - b. the words between "hospital" on line 2, page 10 and "These" on line 5, page 10;
 - c. the words between "to" on line 7, page 10 and "It's" on line 8, page 10;
 - d. the words after "that" on line 13, page 10 through to the end of line 14, page 10;
 - e. the word after "I'm" on line 5, page 21;
 - f. the words between "and" on line 6, page 21 and "riding" on line 7, page 21;
 - g. the words between "know" on line 18, page 21 and "you know" on line 20, page 21;
 - h. the words between "absence" on line 26, page 21 and "but" on line 27, page 21;
 - i. the words between "Odorico" on line 7, page 23 and "Sincerely" on line 14, page 23;
 - j. the words between "just" and "but" on line 21, page 23;
 - k. the word between "of" and "at" on line 22, page 23;
 - l. the words between "suffering" on line 22, page 24 and "do you" on line 23, page 24;
 - m. the words between "because" on line 22, page 25 and "that had" on line 23, page 25;
 - n. the words between "my house" on line 25, page 25 and "everything" on line 26, page 25;
 - o. the words between "saying that" on line 2, page 26 and "I can't" on line 3, page 26; and
 - p. the words between "I've got" and "I'm under" on line 16, page 28;

and only the redacted version of the transcript of the confidential portion of the hearing shall be available to the public.

Dated at Toronto this 1st day of March, 2023

"Andrea Burke"

Andrea Burke

"Sandra Blake"

Sandra Blake

"Cathy Singer"

Cathy Singer