Headnote

IN THE MATTER OF
THE COMMODITY FUTURES ACT,
R.S.O. 1990, c.C. 20, AS AMENDED

AND

IN THE MATTER OF
A HEARING AND REVIEW OF RULINGS OF THE
ONTARIO DISTRICT COUNCIL FOR THE
INVESTMENT DEALERS ASSOCIATION OF CANADA
RE: DERIVATIVE SERVICES INC. AND MALCOLM ROBERT BRUCE KYLE

Hearing:	May 28, 2001		
Panel:	Paul M. Moore, Q.C.	-	Vice-Chair (Chair of the Panel)
	John A. Geller, Q.C.	-	Commissioner
	R. Stephen Paddon, Q.C.	-	Commissioner
Counsel:	Mary L. Biggar	-	For Derivative Services Inc. and Malcolm Robert Bruce Kyle
	Brian K. Awad	-	For the Investment Dealers Association of Canada
	Johanna Superina Sarah Oseni	-	For the Staff of the Ontario Securities Commission

DECISION AND REASONS

1. This was a hearing and review pursuant to section 21.1 of the *Commodity Futures Act*, R.S.O. 1990, c.C.20, as amended (the "CFA"), of five rulings of the Ontario District Council (the "Council") for the Investment Dealers Association of Canada (the "IDA") concerning Derivative Services Inc. ("DSI") and Malcolm Robert Bruce Kyle (collectively, the "Applicants").

Issues

2. The following issues emerged in this hearing:

   i) Does the Commission staff have standing at this hearing?
   ii) Is the 30-day time limit for making a request for a hearing and review substantive or only procedural?
   iii) When did the 30-day time limit commence?
   iv) Should the Commission confirm the fifth ruling or make such other decision as the Commission considers proper?

IDA

3. The IDA is a self-regulatory organization recognized by the Commission under section 21.1 of the Ontario *Securities Act,* R.S.O. 1990, c. S.5, as amended (the "Securities Act"), and a self-regulatory body recognized by the Commission under section 16 of the CFA. Subsection 16(3) of the CFA requires such a body to regulate the operations and the standards of practice and business conduct of its members.

Right to Hearing and Review

4. Under subsection 21.1(1) of the CFA a person or company directly affected by or by the administration of a

direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation, direction or practice of a recognized self-regulatory organization may apply to the Commission for a hearing and review of the direction, decision, order or ruling. Subsection 21.1(2) of the CFA provides that section 4 of the CFA applies to the hearing and review in the same manner as it applies to a hearing and review of a decision of the director of the Commission.

5. Section 4 of the CFA reads as follows:

> 4(1) Within 30 days after a decision of the Director, the Commission may notify the Director and any person or company directly affected of its intention to convene a hearing to review the decision.
>
> (2) Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within 30 days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.
>
> (3) Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.

Background

6. By Notices of Hearing dated December 1, 1998, notice was given to the Applicants of a hearing of disciplinary actions brought by the IDA against them, the hearing to be held before the Council. In the Notices, staff of the IDA alleged that on or about June 1998, the Applicants engaged in business conduct or practice that was unbecoming or detrimental to the public interest by failing to provide documents or other information requested by the staff in the course of an investigation pursuant to By-law 19 of the IDA, contrary to By-law 29 of the IDA.

7. The Applicants brought a preliminary motion before the Council requesting a number of declarations and orders, the net effect of the granting of which would have been to terminate the hearing on the merits (the "Hearing on the Merits"). After hearing arguments on the motion, the Council issued a ruling on June 28, 1999 (the "Preliminary Motion Ruling"; see *Re Derivative Services Inc. and Kyle* (1999), 22 OSCB 5544) against the Applicants on all grounds, giving extensive written reasons for its decision.

8. The Applicants then applied to the Commission under a predecessor of section 21.1 of the CFA for a hearing and review of the Preliminary Motion Ruling, asking that the decision be set aside and that various declarations and orders be made by the Commission in lieu thereof. On a preliminary review of that application, the Commission had some doubt that it had the power to make some of the declarations and orders requested; but in view of the decision which it arrived at, it became unnecessary for the Commission to decide this.

9. On October 5, 1999, the Commission issued its decision (the "Earlier Commission Decision"; see *Re Derivative Services Inc. and Kyle* (1999), 22 OSCB 6441) that it clearly had discretion to proceed with the Applicants' request for a hearing and review of the Council's Preliminary Motion Ruling. It decided that the proper course was for the Commission to permit the Council to proceed with the Hearing on the Merits and that, if after this had been completed, and the Council had made its determination, the Applicants wished to seek a hearing and review by the Commission of the Council's decision, then that would be the appropriate time to deal with the arguments raised by the Applicants in the preliminary motion, and any other matters they may then wish to raise.

10. On November 29, 1999 the Hearing on the Merits was reconvened before the Council.

11. Counsel for the Applicants requested the Council to adjourn the proceedings pending the hearing of applications brought by the Applicants in the Superior Court of Justice pursuant to Rule 14.05 of the Rules of Civil Procedure seeking declaratory relief of the nature sought in their preliminary motion before the Council and addressed by the Council in its Preliminary Motion Ruling, and an appeal to the Divisional Court

from the Earlier Commission Decision pursuant to section 5 of the CFA. The Council was also informed that the IDA had brought a motion to dismiss the Applicants' application to the Divisional Court.

12. On December 13, 1999, the Council ruled (the "Scheduling Ruling"; see *Re Derivative Services Inc. and Kyle* (1999), 22 OSCB 8478) that the Hearing on the Merits should be scheduled for January 11 and 12, 2000, thus allowing the Applicants time to move for a stay of proceedings at the court hearing that had been scheduled for December 23, 1999.

13. On January 11 and 12, 2000, the Hearing on the Merits was held and on May 5, 2000, the Council issued its ruling on the merits ("Ruling on the Merits"; see *Re Derivative Services Inc. and Kyle* (2000), 23 OSCB 3492).

14. The Council's Ruling on the Merits concludes on page 3498 with the following:

> i) The District Council finds that the respondents committed the violations identified in the Notices.
>
> ii) The District Council rules that a penalty hearing be scheduled at the earliest convenient date.

15. On June 7, 2000, a penalty hearing of the Council was held to hear submissions on penalties.

16. The Council issued its ruling on penalties on June 29, 2000 ("Penalty Ruling"; see *Re Derivative Services Inc. and Kyle,* [2000] I.D.A.C.D. No. 26 (QL)).

17. The Penalty Ruling provided on page 14 as follows:

> Paragraph 20.12 of the Association's By-laws grants the District Council discretion to require a respondent to "pay the whole or part of the costs of the proceedings" and any related investigation. Mr. Awad requested costs in the amount of $5,000, based on time spent by the investigator and by him as counsel in connection with the preliminary motion and the hearing on the merits. He submitted that the amount of $5,000 is a conservative one and takes into account the fact that the respondents raised issues in this matter which were "interesting". Ms. Biggar made no submissions with respect to costs.
>
> The District Council has decided to award the Association costs of $5,000 against the respondents jointly and severally, so that each respondent is responsible for the full amount of the costs, although, of course, the total amount of the costs to be paid will not exceed $5,000.

18. The Penalty Ruling was sent to the Applicants on June 30, 2000. The other previous rulings of the Council had previously been sent to the Applicants.

19. On July 13, 2000, Ms. Biggar wrote to the IDA to advise that the Applicants wished to make submissions with respect to costs. In that letter she stated:

> I am aware that the Ontario District Council has rendered its decision with respect to the issue of costs and are, technically, "functus". However, the ususal practice is to request the submissions of counsel after a decision has been made with respect to costs. Therefore, on behalf of Derivative Services Inc. and Robert Kyle, I am requesting that the Ontario District Council consider re-opening their deliberations with respect to costs.

20. On July 18, 2000, the Council issued a ruling ("Refusal to Re-Open Ruling"; see *Re Derivative Services Inc. and Kyle* (2000), 23 OSCB 5244) determining not to grant the request to re-open the hearing to consider its costs order. The ruling stated at page 5245:

> In the District Council's view the Association's past practice is preferable where the facts are not contested or where, as here, the District Council issues its decision on the merits and then convenes a subsequent hearing to consider the appropriate penalty.

21. On July 24, 2000, Ms. Biggar wrote to Mr. Brian Awad of the IDA as follows:

> I confirm receipt of the ruling of the Ontario District Council dated July 18, 2000. Since the Council chose to rule on the issues raised in my letter dated July 13, 2000 rather than stating that it was functus, in my view, the time period for any appeal of the rulings (collectively) of the Ontario District Council runs thirty days following July 18, 2000.
>
> If you have a different view, I would appreciate it if you would advise me of your position at your very earliest convenience.

22. On August 2, 2000, counsel for Commission staff wrote to Ms. Biggar referring to the Ruling on the Merits, the Penalty Ruling and the Refusal to Re-Open Ruling. The letter went on to state:

> Staff of the Commission have not been provided with any material relating to any application for a request for review of a decision or decisions made by the IDA in respect of DSI and Kyle.
>
> If such material is filed in support of any such application, Commission Staff will consider our position as to whether the respondents have made an application within the time requirements prescribed by the CFA.

23. On August 8, 2000, the Applicants requested a hearing and review by the Commission of the following rulings of the Council:

i) the Preliminary Motion Ruling (June 28, 1999);
ii) the Scheduling Ruling (December 13, 1999);
iii) the Ruling on the Merits (May 5, 2000);
iv) the Penalty Ruling (June 29, 2000); and
v) the Refusal to Re-Open Ruling (July 18, 2000).

24. Shortly before this hearing, an amendment to the request for hearing and review was received. This amendment is also dated August 8, 2000.

25. On May 18, 2001, Commission staff filed a notice of motion returnable May 28, 2001 to dismiss the request for a hearing and review as it related to the first four rulings.

Standing of Commission Staff

26. At the commencement of this hearing, counsel for the Applicants raised the question of whether Commission staff should be allowed standing at the hearing.

27. Counsel for Commission staff pointed out that this should not be an issue since Commission staff had been involved without challenge by counsel for the Applicants in the hearing resulting in the Earlier Commission Decision and in all preliminary matters leading up to this hearing, and that if there was an issue on standing, it was waived long ago. In addition, counsel for Commission staff observed that staff had been served with all the materials in this hearing.

28. Counsel for Commission Staff referred to *Re Reuters Information Services (Canada) Ltd.* (1997), 20 OSCB 1584. *Reuters* was a hearing and review by the Commission of a decision of the IDA with respect to an application by Reuters for recognition as a market transparency organization. The Commission, at page 1584, determined that:

> The hearing and review will be on the record that was before the IDA Board, supplemented by such evidence, written and oral, as IDA, Reuters or Commission staff may wish to present, and the panel of the Commission admit, with respect to the question that was before the IDA Board on the application...
>
> At least 10 days before the commencement of the hearing and review, each of IDA, Reuters and

> staff shall advise the others, and the entities given "Torstar-type" standing below, as to the substance of the evidence it proposes to adduce, and shall deliver to the others and those entities copies of all new documents to be relied on by it at the hearing and review

It is clear in *Reuters* that Commission staff had full standing before the Commission.

29. Commission staff, observing that it was not suggesting it should be given only intervenor status, also referred to the Commission's decision in *Re George Albino* (1991), 14 OSCB 365, for a guiding principle in determining standing for third party intervenors. *Albino* concerned a proceeding under a predecessor to section 127 of the Securities Act and considered, among other issues, whether or not a certain incentive plan constituted a security. A lawyer from the firm of Blake Cassels & Graydon wanted to appear and be given standing to deal with the importance of the issue for his clients, unrelated to the specific facts before the Commission. The Commission stated at page 425:

> In conclusion, it seems to us that on requests for standing the Commission must first and foremost consider the nature of the issue and the likelihood that intervenors will be able to make a useful contribution without injustice to the immediate parties (the MacMillan Bloedel test, adopted in Torstar).

30. In its written submission in the matter before us in this hearing Commission staff stated:

> With respect to the various factual and legal issues raised by the Applicants, Staff will address some but not all of the issues outlined in the Applicants' Factum. Staff's submissions are intended to be supplementary to the submissions of the Counsel for the IDA. In particular, Staff will address the submissions that follow as they relate to the decision of the District Council, dated June 28, 1999, **[*Applicant's Book of Documents at Tab 27*];**
>
> i) whether there has been a sub-delegation of authority of Commission to the IDA under subsection 15(2) [now 16(3)] of the CFA;
>
> ii) whether By-law 19 is invalid;
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> iii) whether the District Council has jurisdiction to determine the constitutionality of By-law 19;
>
> iv) whether the *Charter* applies to By-law 19;
>
> v) whether IDA By-law 19.5 violates section 8 of the *Charter*;
>
> vi) whether the *Statutory Powers Procedures Act* ("SPPA") and the *Evidence Act* apply to the IDA; and
>
> vii) whether the doctrine of duress applies to the contract between the IDA and DSI.

31. In summary, Commission staff submitted that it would be able to make a useful contribution to the hearing without injustice to either party and that staff participation in hearings of this nature is well established as a practice of the Commission. In the event that it should be found to be necessary for a motion for standing to be made by Commission staff, Commission staff so moved.

32. Counsel for the Applicants argued that the question of standing of Commission staff was not something that had been waived by the Applicants.

33. The principal issue, in the words of Applicants' counsel, "was whether or not OSC Staff had full, automatic standing as a party or whether they needed to apply to this panel for intervenor status. I do acknowledge that it might well be appropriate that the OSC Staff have intervenor status, which is what I understand the Torstar-type standing to be. The point was just that the OSC Staff had to take some steps."

34. The Commission ruled, for the reasons submitted by Commission staff, that Commission staff had standing to participate in this hearing and that no separate motion for standing was necessary.

Procedural or Substantive?

35. Canadian courts have frequently recognized that administrative bodies must strictly adhere to the limitation periods provided in their empowering legislation where there is no express power provided to extend the same. (See *Leclair* v. *Manitoba (Residential Care, Director*), [1999] M.J. No. 38(QL) (Man.C.A.); *Parker* v. *British Columbia (Police Commission)*, [1999] B.C.J. No. 1532 (QL) (B.C.C.A.); *Simpson* v. *Blacks Harbour*, [1995] N.B.J. No. 56 (QL) (N.B.C.A.); *Perrott* v. *Storm*, [1985] 18 D.L.R. (4th) 473 (N.S.S.C.); *Cessland Corporation Ltd.* v. *Fort Norman Explorations Inc.* (1979), 25 O.R. (2D) 69 (Ont. H.C.J.); *Vialoux* v. *Registered Psychiatric Nurse Association of Manitoba* (1983), 23 Man.R. (2d) 310 (Man. C.A.).

36. Counsel for Commission Staff referred us to subsection 4(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c.S.22 ("SPPA"), which provides:

> 4(1) Any procedural requirement of the Act, or of another Act or a regulation that applies to a proceeding, may be waived with the consent of the parties and the tribunal.

37. Counsel for Commission staff, counsel for the IDA, and counsel for the Applicants all indicated that they would give any necessary consents to extend the 30-day limit if the time limit in subsection 4(2) of the CFA was procedural.

38. Counsel for Commission Staff referred us to the Commission's recent decision in *Re Hamilton Airlines (2000) Inc.* (2001), 24 OSCB 3295. In that case the Commission dealt with the issue of its jurisdiction to proceed with the hearing and review of a decision of the director in circumstances in which the applicant failed to request his application for a hearing within the requisite 30 days. In that case, Commission staff indicated it would not consent to waive the time limit for the sending of the notice requesting the hearing and review; therefore, the Commission did not need to decide whether the time limit requirement was procedural or substantive.

39. Subsection 4(2) of the CFA (set out in paragraph 5 of these reasons) provides that a person will "be entitled to a hearing and review" where "by notice in writing sent by registered mail to the Commission within 30 days after the mailing of the notice of the decision" the person requests the hearing and review.

40. The CFA, like subsection 8(2) of the Securities Act does not provide for an extension of time in which to request the hearing and review, and does not authorize the Commission to exercise its discretion to extend the time requirement.

41. By comparison, subsections 25(1) and (2) of the *Securities Act* (Alberta) S.A. 1981, c. S-6.1, as amended, expressly provide the Alberta Securities Commission with the power to extend the 30-day limitation period in certain circumstances, but only if the extension is made within the 30-day limitation period. Subsections 25(1) and (2) state:

> 25(1) To commence an appeal to the Commission, the applicant shall, within 30 days from the day on which the written notice of the decision is served on the appellant, serve a written notice of appeal on the Secretary either personally or by registered mail.
>
> (2) Notwithstanding subsection (1), the Commission may, on application by the appellant during the appeal period prescribed in subsection (1) extend the appeal period if the Commission considers that it would not be prejudicial to the public interest to do so.

42. Counsel for Commission staff, in oral argument and in its written submission referred to several cases.

43. In *Pagee* v. *Manitoba (Director, Winnipeg Central),* [2000] M.J. No. 180 (QL) (Man.C.A.), the Director ordered the continuance of income assistance to the applicant under *The Employment and Income Assistance Act of Manitoba,* C.C.S.M., c. E98. The applicant appealed the Director's order to the Social Services Advisory

Committee which dismissed the appeal. She then sought leave to appeal against the order of the Committee dismissing her appeal from the Director's order. The applicant's appeal to the Committee of the Director's order was filed at least 57 days after the applicant received notice of the Director's order. Philip J.A. (in Chambers) refers to subsection 9(4) of *The Employment and Income Assistance Act* which states that:

> 9(4) A person who receives a notice under subsection (2) and who desires to appeal a decision or order for any of the reasons set out in subsection (1), may within 15 days after receiving the notice, file a written notice of appeal with the appeal board setting out the grounds of the appeal.

44. Philip J.A. observed that there was no power under the act to extend the time limit period. He adopted the reasoning of Millett L.J. in *Petch* v. *Gurney (Inspector of Taxes)*, [1994] 3 All E.R. 731 (C.A.), stating as follows (page 2):

> A review of those authorities is not necessary in order to conclude that the time requirement in s.9(4) of the Act is absolute. I reach that conclusion by a liberal and purposive interpretation of the scheme of the Act, the interpretive tool endorsed by the Supreme Court of Canada. (See, by way of example, the Court's recent decision in R. v Gladue, [1999] 1 S.C.R. 688, and Nanaimo (City) v. Rascal Trucking Ltd., 2000 S.C.C. 13, [2000] S.C.J. No. 14). That is the kind of approach Millett L.J. applied and explained in Petch v. Gurney (Inspector of Taxes), [1994] 3 All E.R. 731 at 738 (C.A.), leave to appeal refused [1994] 4 All E.R. xix. He wrote:
>
> > Where statute requires an act to be done in a particular manner, it may be possible to regard the requirement that the act be done as mandatory but the requirement that it be done in a particular manner as merely directory. In such a case the statutory requirement can be treated as substantially complied with if the act is done in a manner which is not less satisfactory having regard to the purpose of the legislature in imposing the requirement. But that is not the case with a stipulation as to time. If the only time limit which is prescribed is not obligatory, there is no time limit at all. Doing an act late is not the equivalent of doing it in time. That is why Grove J. said in Barker v. Palmer (1881) 8 Q.B.D. 9 at 10 - "provisions with respect to time are always obligatory, unless a power of extending the time is given to the court". This probably cannot be laid down as a universal rule, but in my judgement it must be the normal one. Unless the court is given a power to extend the time, or some other and final mandatory time limit can be spelled out of the statute, a time limit cannot be relaxed without being dispensed with altogether; and it cannot be dispensed with altogether unless the substantive requirement itself can be dispensed with.
> >
> > I adopt that reasoning. The Act sets out a scheme whereby the recipient of income or other assistance can challenge in a timely and structured way the Director's decision or order discontinuing, reducing, or suspending his/her assistance. To conclude that the time requirement of s. 9(4) of the Act is not obligatory would, in effect, ignore the ordinary and grammatical sense of the words and leave the statutory scheme in disarray.

45. He continued on page 3:

> > It is trite law that waiver or consent will not bestow jurisdiction upon a tribunal where none exists. That principle, more recently explained and applied in the leading case of Essex Incorporated Congregational Church Union v. Essex County Council, [1963] A.C. 808(H.L.(E.)), has been affirmed in Canada by courts and legal commentators. See, for example, Jacmain v. Attorney General (Can.) et al., [1978] 2 S.C.R. 15 at 38, and R. Dussault & L.Borgeat, Administrative Law: A Treatise, 2ed., vol. 4 (Toronto: Carswels, 1990) at 212.

46. Counsel for Commission staff referred to *K.C.* v. *College of Physician Therapists of Alberta*, [1998] A.J. No.

99; 1998 A.B.C.A. 213 (QL) (Alta. C.A.). The case concerned a physical therapist who had disciplinary proceedings brought against him for a variety of matters on which he was found guilty of professional misconduct. He appealed and filed his notice of appeal within the prescribed 30 days but, through a mistake of his lawyer, failed to serve it on time. He sought leave to extend the period of time set out in the statute and that leave was denied. He appealed that decision. The respondent argued that the right to appeal was conditional on the time limits being met. The issue in the case was whether the provision of subsection 64(2) of the applicable statute set out requirements that are better characterised as substantive or as procedural. Conrad J.A. quoted section 64 of the *Physical Therapy Profession Act*, S.A.1984 c. P-7.5, which provided, in part, as follows:

> 64(1) An investigative person or the College may appeal to the Court of Appeal any finding or order made by the Council under section 63.
>
> (2) An appeal under this section shall be commenced
>
> a) by filing a notice of appeal with the Registrar of the Court at Edmonton or Calgary, and
>
> b) by serving a copy of the notice of appeal
>
> i) on the Council when the investigative person is the appellant, or
>
> ii) on the investigated person when the College is the appellant.
>
> both within thirty days from the date on which the decision of the Council is served on the appellant.

47. He also quoted subsection 65(2) of the same act:

> 65(2) The procedure in an appeal shall be the same, with the necessary changes, as that provided in the Rules of Court for appeals from a judgement of a judge of the Court of Queen's Bench to the Court of Appeal.

48. Conrad J.A. determined that although ambiguous, the wording of the statute suggested that the time limits in subsection 64(2) were procedural. He reasoned at page 3:

> Section 64(1) provides that there is a right of appeal. It does not make that right conditional on the happening of any other event. The statute then provides for the commencement of an appeal and contains, within that provision, the time limit for filing and service....
>
> The question is whether the statute intends the time limits in s.64(2) to be a condition of the right of appeal in s.64(1), or whether the time limits are intended to be directive only, and thereby subject to the extension rights under the Rules of Court.
>
> Like Kierans J.A. in Re Wolski, I accept that, at best, the meaning is ambiguous. The right to appeal is not clearly conditional as it was in Yorkshire Trust....

49. Conrad J.A. distinguished *Yorkshire Trust Co. v. Mallett* (1986), 71 A.R. 23 (Alberta C.A.) as follows at page 2:

> The Respondent relies on the reasoning of this Court in Yorkshire Trust, supra. That case referred to the Reciprocal Enforcement of Judgements of Act, R.S.A. 1980, c.R - 6, 6(1)(b) which provided that:
>
> > "When a judgement is rendered pursuant to an ex-parte order, ...the judgement debtor, within one month after he has had notice of the registration, may apply to the court to have the registration set aside."

The Application was not made within the prescribed limit and the Court held at p. 24, that:

> [C]onditions set for the exercise of an enabling provision constitute a statutory prescription on the right...

It held further that, absent any explicit statutory authority, this Court has no power to relieve against a statutory prescription....

50. The right to appeal in *College of Physical Therapists of Alberta* was not clearly conditional as it was in *Yorkshire Trust*.

51. There is a similarity in structure and wording between subsection 4(2) of the CFA and the applicable statutory provision in *Yorkshire Trust*. Subsection 4(2) of the CFA makes it clear that the entitlement to a hearing and review is conditional upon a request by notice in writing being sent by registered mail to the Commission within 30 days after the mailing of the notice of the decision. There is no unconditional entitlement to a hearing and review.

52. Because performance of the requirement to make a request for a hearing and review by sending notice within 30 days after the mailing of the decision creates the entitlement to the hearing and review, it is a substantive and conditional aspect of the hearing. It is not procedural and cannot be waived pursuant to subsection 4(1) of the SPPA.

Commencement of the 30-Day Time Limit

53. Counsel for Commission staff argued that the computation of time for making a request for a hearing and review of the first four rulings started from June 30, 2000, being the day the Penalty Ruling was mailed to the Applicants, and that, since the application for a hearing and review was in fact filed on August 8, 2000, it was too late for a hearing and review of any ruling other than the Refusal to Re-Open Ruling.

54. Applicants' counsel argued that the Refusal to Re-Open Ruling somehow kept the other rulings alive for the purposes of a hearing and review because, in her words, until July 18 the Council was not *functus officio.*

55. Counsel for the Applicants referred to *Chandler* v. *Association of Architects Alberta,* [1989] 2 S.C.R. 848. That case dealt with the extent to which the principle of *functus officio* applies to an administrative tribunal. It is relevant, however, to whether a tribunal itself may continue or revisit proceedings on which the tribunal has ruled. It does not deal with the question of a hearing and review by or an appeal to another tribunal of the lower tribunal's ruling.

56. We do not find the principle of *functus officio* helpful in determining the issues before this hearing.

57. What we are required to determine is whether the Commission has jurisdiction under the CFA to hold a hearing and review of the *rulings* of the Council, not of the *arguments* that were before the Council.

58. The Commission has already held a hearing and review of the Preliminary Motion Ruling and determined to let that ruling stand. The reason the Commission decided to let the ruling stand was that it would be premature at that time to decide on the issues raised by the Applicants' preliminary motion before the Council for the reasons the Commission gave in its decision. In its Earlier Commission Decision, the Commission stated at page 6445:

> We clearly had the discretion to proceed with the Applicants' motion....We are satisfied that the proper course is for us to dismiss the Applicants' motion and permit the Council to proceed with the hearing on the merits. If, after this has been completed, and the Council has made its determination, the Applicants wish to seek a hearing and review by the Commission of the Council's decision, then that will be the appropriate time for the Commission to deal with the arguments raised in the Applicants' motion, and any other matters they may then wish to raise.

59. In other words, the arguments raised in the preliminary motion of the Applicants before the Council could be

made on a hearing and review of any decision by the Council flowing from the Hearing on the Merits. Indeed, we have considered those arguments to the extent they may be relevant to our review of the Refusal to Re-Open Ruling.

60. In conclusion, the 30-day time limit referred to in subsection 4(2) of the CFA commenced with respect to each of the five rulings of the Council with the first of the days referred to in the subsection, namely the day after "the mailing of the notice of the decision".

Decision on Jurisdiction

61. Since the request for this hearing and review so far as it applies to the first four rulings was not made within the applicable time period for any of the Preliminary Motion Ruling, the Scheduling Ruling, the Ruling on the Merits, or the Penalty Ruling, and since the time limit requirement is not procedural and capable of being waived under the SPPA, the Commission does not have jurisdiction to review any of those rulings.

Refusal to Re-Open Ruling

62. On July 18, 2000, Council issued the Refusal to Re-Open Ruling, stating at page 5244:

> The District Council has determined not to grant the request to re-open the hearing to re-consider its costs order. The practice in Association disciplinary proceedings has been to address costs at the same time as the penalty; see, e.g., *In the Matter of James Hill* (2000), 23 O.S.C.B. 3348 (May 5); *In the Matter of Edward Richard Milewski* (1999), 20 O.S.C.B. 5404 (August 27).

63. The Council then reviewed practice before securities commissions in Canada and noted that practice varies. The ruling went on to state at page 5245:

> In the District Council's view the Association's past practice is preferable where the facts are not contested or where, as here, the District Council issues its decision on the merits and then convenes a subsequent hearing to consider the appropriate penalty.

64. The ruling concludes by stating that the Council could see no reason to exercise a discretion to re-open the hearing with respect to costs (p. 5245):

> The Respondents had notice that costs would be addressed in the penalty hearing; counsel for the Association provided a written submission containing a request for costs, a draft of which was sent to counsel for the respondents prior to the penalty hearing, as both counsel acknowledged at that hearing. The respondents thus were aware that costs would be addressed at the penalty hearing and had an opportunity to make submissions on them. That they did not do so does not provide a reason to re-open, especially in view of the relatively nominal award of costs for proceedings of the length and complexity of this one. Indeed, had the Association requested a greater amount of costs, the District Council would have seriously considered a larger award.

65. In *Wilkinson v. Toronto Stock Exchange* (1993), 16 OSCB 3545, the Commission reviewed and set out the principles it considered applicable on a hearing and review of a decision of a self-regulatory organization. The five possible grounds on which the Commission might interfere with a decision of a self-regulatory organization were said to be:

i) the self-regulatory organization proceeded on some incorrect principle;
ii) the self-regulatory organization erred in law;
iii) the self-regulatory organization overlooked material evidence;
iv) new and compelling evidence was presented to the Commission that was not presented to the self-regulatory organization; and
v) the self-regulatory organization's perception of the public interest conflicts with that of the Commission's.

66. Counsel for each party advised the Commission that they had no oral arguments to make on the Refusal

to Re-Open Ruling and that they were each relying on the arguments put forth in their respective written submissions.

67. In her factum, Applicants' counsel argued that the IDA did not have jurisdiction over DSI. The arguments of Applicants' counsel, in her factum and made orally at the Hearing on the Merits, were fully addressed by the Council in the Preliminary Motion Ruling and the Ruling on the Merits considered together. We found no errors in law by the Council that would cause us to come to a conclusion that the Council did not have jurisdiction over the Applicants to issue the Refusal to Re-Open Ruling.

68. We find that in deciding to issue its Refusal to Re-Open Ruling, the Council did not proceed on some incorrect principle, err in law, or overlook material evidence. Furthermore, no new and compelling evidence was presented to the Commission that was not presented to the Council. We find nothing that suggests the Council did not act fairly or in the public interest in making its Refusal to Re-Open Ruling.

69. For the above reasons, the Commission confirms the Refusal to Re-Open Ruling.

July 17, 2001.

"Paul Moore" "John Geller" "Stephen Paddon"