Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8
CP 55, 19e étage
20, rue queen ouest
Toronto ON M5H 3S8

IN THE MATTER OF

AN APPLICATION FOR A HEARING AND REVIEW OF A DECISION OF THE ONTARIO DISTRICT COUNCIL OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA PURSUANT TO SECTION 21.7 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF DISCIPLINE PROCEEDINGS PURSUANT TO BY-LAW 20 OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

BETWEEN

STAFF OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

JEFFREY BRADFORD KASMAN AND CLINTON ANDERSON

Hearing:	July 16, 2008		
Reasons:	November 28, 2008		
Panel:	James E. A. Turner	–	Vice-Chair and Chair of the Panel
	David L. Knight, FCA	–	Commissioner
Counsel:	Emily Cole	–	For the Ontario Securities Commission
	Andrew Pilla	–	For the Investment Dealers Association
	Alistair Crawley	–	For Jeffrey Bradford Kasman and Clifton Anderson

REASONS AND DECISION

I. BACKGROUND

[1] On November 13, 2007, a disciplinary hearing panel of the Ontario District Council of the Investment Dealers Association of Canada (the "Hearing Panel") issued its decision on the merits in the matter of Jeffrey Bradford Kasman and Clinton Anderson (the "Respondents"). The Hearing Panel concluded that the Respondents engaged in manipulative and/or deceptive trading and that their conduct was in violation of By-law 21.9 of the Investment Dealers Association (the "IDA") and was unbecoming and contrary to the public interest. Effective June 1, 2008, the IDA combined its regulatory operations with those of Market Regulation Services Inc. to form the Investment Industry Regulatory Organization of Canada ("IIROC"). The IDA retained IIROC to carry out its regulatory functions. This case concerns the IDA by-laws that were in effect prior to June 1, 2008.

[2] The Hearing Panel issued its sanctions decision (the "Decision") on February 19, 2008. In the Decision, the Hearing Panel imposed on the Respondents a two-month suspension, a fine of $25,000 each and a cost award of $40,000 on a joint and several basis. The Hearing Panel also concluded that the Respondents should rewrite the Conduct and Practices Handbook examination within one year from the date of the Decision.

[3] On March 28, 2008, Staff of the Investment Dealers Association ("IDA Staff") filed a Notice of Request for a Hearing and Review of the Decision by the Ontario Securities Commission (the "Commission") pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act").

[4] The Respondents moved for an order that IDA Staff does not have standing to bring an application under section 21.7 of the Act. The standing motion was heard on July 16, 2008. The following are our reasons and decision on that motion.

II. THE ISSUE

[5] The issue before us is whether the IDA or IDA Staff has standing, under section 21.7 of the Act, to apply for a hearing and review of a decision of an IDA hearing panel. Subsection 21.7(1) of the Act provides as follows:

> The Executive Director or 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 or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling.

III. THE POSITIONS OF THE PARTIES

A. The Respondents

[6] The Respondents recognize that the IDA, as an unincorporated association, is a "person" as defined in subsection 1(1) of the Act. However, the Respondents submit that the applicant in this matter is not the IDA, but IDA Staff, and that IDA Staff is not a "person" or other legal entity distinct from the IDA. The Respondents submit, in any event, that the IDA does not have standing to apply for a hearing and review under section 21.7 of the Act because that would amount to the IDA appealing its own decision, something the IDA should not be permitted to do.

[7] The Respondents rely on the decision in *Bahcheli v. Alberta Securities Commission*, [2007] A.J. No. 520 ("*Bahcheli*"). In that case, the Alberta Court of Appeal, considering a similarly worded provision of the Alberta *Securities Act*, R.S.A. 2000, c. S.4 (the "Alberta Act") concluded that "at best the IDA may disagree with the reasons [of the hearing panel] or the result, and have a concern for the precedent, but it has not demonstrated that it is directly affected . . . ." The Respondents submit that *Bahcheli* is authority for the proposition that the IDA cannot appeal its own decisions and is not "directly affected" by a decision of an IDA hearing panel.

[8] The Respondents also rely on *Corp. of the Canadian Civil Liberties Assn. v Ontario (Canadian Commission on Public Services)*, [2006] O.J. No. 4699 ("*Canadian Civil Liberties*"), a case referred to and considered in *Bahcheli*. In *Canadian Civil Liberties*, the Ontario Court of Appeal stated: "'Directly affected' has been interpreted to mean a personal and individual interest as distinct from a general interest that pertains to the whole community" (para. 8). The Ontario Court of Appeal also approved the comment of the Ontario Divisional Court that "mischievous results" could arise from allowing the applicant in that case (who witnessed what he believed was an unprovoked police assault on an unknown woman) to file a public complaint under the *Police Services Act*, R.S.O. 1990, c. P.15.

[9] The Respondents submit that the Commission has adopted a similar view of the "directly affected" requirement of section 21.7 of the Act in *Re Instinet Corp.* (1995), 18 O.S.C.B. 5439 ("*Instinet*") and *Re Reuters Information Services (Canada) Ltd.* (1997), 20 O.S.C.B. 2277, among other cases.

[10] The Respondents note that IDA By-law 20.50(1) states:

> The Association and a Respondent may appeal a disciplinary decision by a Hearing Panel to an Appeal Panel.

[11] IDA By-law 33.1 states:

> Any Member or other person directly affected by a decision of the Board of Directors, a District Council, Hearing Panel, Board Panel or Appeal Panel (other than a decision in respect of which the time for review or appeal under the By-laws has elapsed) in respect of which no further review or appeal is provided in the By-laws may request any securities commission with jurisdiction in the matter to review such decision and notice in writing of such appeal shall be given forthwith to the National Hearing Coordinator.

[12] The Respondents submit that By-law 33.1 [now IIROC's Rule 33.1] contemplates a request for a Commission hearing and review only after the IDA appeal process has been exhausted because an appeal to the Commission is permitted only where "no further review or appeal is provided in the By-laws."

[13] On June 6, 2007, the IDA Board resolved to eliminate the right to appeal to an Appeal Panel of the IDA and to amend the relevant IDA by-laws to reflect that change. The proposed amendments include revoking By-laws 20.50 to 20.54, which concern appeals, and deleting the words "or Appeal Panel" from By-law 33.1. Those by-law amendments have been published for comment by the Commission.

[14] On May 21, 2008, the Board of Directors of IIROC resolved to approve as IIROC rules all IDA by-laws, regulations and rules submitted for approval prior to June 1, 2008, including the proposed amendment to By-law 33.1.

[15] The Respondents note that, regardless of the proposed amendment, By-law 33.1 allows a "Member or other person directly affected" to request a review by a securities commission, but does not appear to contemplate the IDA or IDA Staff doing so. In contrast, IDA By-law 20.50 expressly allows the IDA to appeal a hearing panel's disciplinary decision to an Appeal Panel. The Respondents submit that this distinction is significant.

[16] In summary, the Respondents submit that IDA Staff is not a "person or company" distinct from the IDA, and that the IDA is not "directly affected" by the Decision. Therefore the IDA cannot bring an application under section 21.7 of the Act. They further submit that, in any event, the IDA is required to appeal the Decision to an IDA Appeal Panel before it can apply for review to the Commission under section 21.7 of the Act.

[17] The Respondents submit that their position is consistent with the principle, stated in section 2.1 of the Act, that the Commission should, subject to appropriate supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations ("SROs"). The Respondents submit that the legislative intent is for the Commission to exercise its supervisory authority pursuant to subsection 21.1(4) of the Act or for the Executive Director to commence a hearing and review of an IDA hearing panel decision under section 21.7. The Respondents submit that the position of the IDA would undermine self-regulation by making the Commission an appellate branch of the IDA.

B. IDA Staff

[18] IDA Staff submits that it makes no difference whether the applicant in this application is styled as the "IDA" or "IDA Staff" because both mean the IDA. The IDA operates through its Staff and the IDA is a "person" as defined in subsection 1(1) of the Act, including for the purpose of section 21.7. Counsel for IDA Staff submits that he represents the IDA. For purposes of these reasons we will refer to the person bringing this application as the "Applicant".

[19] The Applicant submits that the Alberta Court of Appeal interpreted the words "directly affected" too narrowly in *Bahcheli*, and that the case before us is very different from the *Canadian Civil Liberties* case. In the case before us, the Applicant submits that the IDA is "directly affected" by the Decision because the IDA proceeding is a disciplinary proceeding against the Respondents and the Applicant was a party to the hearing before the Hearing Panel and took a position adverse to the Respondents.

[20] The Applicant also submits that the IDA is "directly affected" by the Decision because its mandate is to protect the investing public by ensuring appropriate regulation of member firms and the approved persons employed by them, which includes imposing appropriate disciplinary sanctions where a member or approved person has breached an IDA by-law.

[21] The Applicant relies on the decision in *Global Securities Corp. v. British Columbia (Securities Commission)*, [2006] B.C.J. No. 2075, ("*Global Securities*") in which the British Columbia Court of Appeal held that the TSX Venture Exchange [then the Canadian Venture Exchange] (the "Exchange") had standing, under a provision worded similarly to section 21.7 of the Act, to apply for a hearing and review of the relevant decision.

[22] In this case, the Applicant submits that the language of section 21.7 is broad enough to give either the IDA or IDA Staff standing to apply to the Commission for a hearing and review of a decision of an IDA hearing panel.

[23] Further, the Applicant submits that its position is consistent with the Commission's decisions addressing standing before it. In *Instinet*, the Commission considered subsection 8(2) of the Act, which allows "any person or company directed affected by a decision of the Director" to apply for a hearing and review of the decision. The Commission stated:

> The words "directly affected" in subsection 8(2) of the Act should be interpreted in light of all of the relevant circumstances. The interpretation to be given to the words in the context of a decision relating to a take-over bid may well be different than in the context of a registration decision. In each case under subsection 8(2), in determining standing, the Commission must look at the nature of the power that was exercised, the decision that was made, the nature of the complaint being made by the person requesting the hearing and review and the nature of that person's interest in the matter. (at p. 12)

[24] Applying these factors in this case, the Applicant makes the following submissions:

1. The nature of the power that was exercised was adjudicative – a decision of a disciplinary hearing panel at arm's length from the IDA.

2. The decision that was made was a public and formal one, based on published rules, administrative law and the principles of natural justice.

3. The right of the IDA to make this application is based on established legal precedent reflected in the case of *Boulieris v. Investment Dealers Association of Canada*, [2005] O.J. No. 1984 ("*Boulieris*").

4. The request for review was initiated by the IDA, which is a party to the disciplinary action with an interest adverse to the Respondents. The IDA's mandate is to protect the investing public by ensuring appropriate regulation of its members including through the imposition of disciplinary sanctions on member firms or their approved persons who have breached an IDA by-law.

[25] In arguing that the IDA has standing to bring an application for a hearing and review of a decision of an IDA hearing panel, the Applicant places particular emphasis on the IDA by-laws that ensure the independence of IDA hearing panels from the IDA and IDA Staff. The IDA filed an affidavit by Aleksandar Popovic, the Vice President, Enforcement of IIROC and former Vice President, Enforcement of the IDA, which addresses, among other things, the composition and role of IDA disciplinary hearing panels and which states, in effect, that:

1. The members of a hearing panel are drawn from the members of the Hearing Committee.

2. IDA Staff has no role in the election of Ontario District Council members or in the nomination and appointment of Hearing Committee members.

3. The selection of a hearing panel is made by the IDA National Hearing Coordinator, who is independent of IDA Staff.

4. Internal guidelines require that the National Hearing Coordinator randomly select members of a hearing panel by rotation, resulting in the use of different members each time a hearing panel is required.

5. Members of the Hearing Committee are compensated *per diem*. They neither maintain offices at the IDA nor receive a salary from the IDA.

6. Members of the Hearing Committee never directly communicate with IDA Staff on IDA matters, except on the record during the course of disciplinary hearings.

7. Hearing Committee members have no role in the policy-making functions of the IDA.

[26] Accordingly, the Applicant submits that this is not a case of the IDA attempting to appeal its own decision. It is an appeal of a decision of an IDA hearing panel.

[27] The Applicant submits that as a policy matter, the IDA should have standing under section 21.7 of the Act because otherwise the Commission would be deprived of the participation of a sophisticated and knowledgeable party that has a significant regulatory interest in decisions of IDA hearing panels.

[28] The Applicant submits that *Boulieris* supports the proposition that the IDA has standing under section 21.7 of the Act to bring the application. In that case, the Ontario Divisional Court heard an appeal of a Commission decision that was originally brought by the IDA under section 21.7. While the

parties did not raise the issue of IDA standing before the Commission or the Divisional Court, the Applicant submits that the case reflects tacit acceptance that the IDA has standing under section 21.7.

[29] Finally, with regard to the Respondents' argument that the internal IDA appeal process contemplated by the IDA by-laws has not been exhausted, the Applicant notes that the IDA is in the process of amending its by-laws to eliminate that right of appeal. In any event, the Applicant submits that, notwithstanding IDA By-law 33.1, section 21.7 of the Act does not require the IDA appeal process to be exhausted before an application can made to the Commission.

C. OSC Staff

[30] Staff of the Commission ("Staff") submits that the IDA has standing to apply for a hearing and review under section 21.7 of the Act because:

1. The Commission permitted an application brought by the IDA under section 21.7 in *Boulieris*.

2. The Act must be interpreted in a purposive manner that fulfills the twin purposes of the Act (protecting investors from unfair, improper or fraudulent practices, and fostering fair and efficient capital markets and confidence in the markets), that is consistent with the scheme of the Act (which contemplates that the Commission should rely on SROs to assist in enforcing securities law), and that provides remedial flexibility in the enforcement of securities laws.

3. The Commission retains overriding supervisory power under the Act over the IDA.

4. The IDA was a party to the proceeding before the Hearing Panel.

5. The IDA is a person "directly affected" by the Decision of the Hearing Panel because the Decision engages the duties and powers assigned to the IDA by the Commission.

[31] Staff's submissions focus on the Commission's public interest mandate. In Staff's submission, the Respondents' position is absurd because it would, in effect, protect IDA member firms and their approved persons but not investors, which is contrary to the Commission's mandate.

[32] Staff also submits that the source of the Commission's authority to review an IDA decision is the Act, not the IDA by-laws. Addressing the Respondents' submission that the application is an attempt by the IDA to appeal its own decision, Staff submits that the Commission's supervisory jurisdiction over the IDA distinguishes this case from the jurisprudence concerning the appropriate role of a tribunal on appeal or judicial review of its own decision. Staff submits that the IDA is directly affected by a decision that imposes an inappropriately low sanction for a serious infraction, as IDA Staff submits in this case. Staff submits that the IDA has a responsibility and duty to bring an application under section 21.7 of the Act if the decision by a hearing panel is inconsistent with its mandate to protect investors.

[33] Finally, Staff submits that the IDA's application must be heard in order for the Commission to fulfill its public interest mandate and provide appropriate supervision of the IDA.

IV. ANALYSIS

A. Case Law in Other Jurisdictions

[34] It is appropriate to discuss in some detail the decisions in *Global Securities* and *Bahcheli* because they involve the interpretation of statutory provisions that are similar to section 21.7 of the Act. A central question addressed by both cases is whether the relevant SRO (the Exchange in the case of *Global Securities* and the IDA in the case of *Bahcheli*) is different and distinct from its disciplinary hearing panels. As a result, while the two cases are not binding on us, their reasoning is relevant to the matter before us.

(i) *Global Securities*

[35] In *Global Securities*, the Exchange alleged certain infractions by Global Securities Corporation ("Global") and three of its registered representatives in relation to options trading. Global admitted two of the allegations but denied the third allegation, that it had failed to diligently supervise the options trading. A disciplinary hearing panel of the Exchange found against the three representatives but dismissed the third allegation against Global. The Exchange and the Executive Director of the British Columbia Securities Commission (the "BCSC") applied for a hearing and review of that decision by the BCSC pursuant to subsection 28(1) of the British Columbia *Securities Act*, R.S.B.C. 1996, c. 418 (the "BC Act").

[36] Subsection 28(1) of the BC Act provides as follows:

> The executive director or a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a self regulatory body, an exchange, a quotation and trade reporting system, or a clearing agency may apply by notice to the commission for a hearing and review of the matter under Part 19, and section 165(3) to (8) applies.

[37] Subsection 165(8) of the BC Act states "an exchange is a party to a hearing and review under this section of its decision." Accordingly, the Exchange had standing in the proceeding commenced by the Executive Director, whether or not it was a "person directly affected." However, the BCSC considered the latter issue, even though it was moot.

[38] The BCSC held that the Exchange, which is a corporation, is a "person" as that term is defined in the BC Act. Further, it held that the Exchange's hearing panel is independent and separate from the Exchange, and "is a purely adjudicative body, with no role in directing Exchange staff or setting policy priorities." The BCSC also concluded that the Exchange was "directly affected" by the decision of the hearing panel because it was a party to the hearing adverse in interest to Global. Accordingly, the BCSC concluded that the Exchange was a "person directly affected" by the decision of the hearing panel. As a result, the BCSC upheld the right of the Exchange to apply for a hearing and review pursuant to subsection 28(1) of the BC Act.

[39] Global appealed the decision of the BCSC to the British Columbia Court of Appeal, which found that the decision of the BCSC was not unreasonable. Specifically, the Court of Appeal found it reasonable to conclude that the Exchange's hearing panel operated independently of the Exchange and was "entirely limited in function to its adjudicative role." The Exchange was a "contesting party" before the hearing panel, and it was the Exchange, not the hearing panel, that sought a review of the decision. The Court concluded that the Exchange qualified as a person "directly affected" by the decision of the hearing panel. Accordingly, the Court upheld the decision of the BCSC.

(ii) *Bahcheli*

[40] In *Bahcheli*, the IDA alleged that Bahcheli, a registered representative with a securities dealer, had breached an IDA by-law and had acted contrary to the public interest. A disciplinary hearing panel of the Alberta District Council of the IDA dismissed the matter. The IDA issued two notices of appeal to the Alberta Securities Commission (the "ASC"), the first notice in the name of "Staff of the IDA" and a subsequent one in the name of the "IDA".

[41] The ASC found that the decision of the BCSC in *Global Securities* was applicable to the case before it, and concluded that the IDA had the right to appeal the decision of the hearing panel to the ASC under subsection 73(1) of the Alberta Act.

[42] Subsection 73(1) of the Alberta Act provides as follows:

> A person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a bylaw, rule, regulation, policy, procedure, interpretation or practice of a recognized exchange, recognized self-regulatory organization, recognized clearing agency or recognized quotation and trade reporting system may appeal that direction, decision, order or ruling to the Commission.

[43] Bahcheli appealed the decision of the ASC to the Alberta Court of Appeal.

[44] The Alberta Court of Appeal distinguished *Global Securities* on two grounds. First, while subsection 165(8) of the BC Act gave the Exchange an express right to apply for a hearing and review of a hearing panel's decision, the Alberta Act includes no such provision granting standing to the IDA. Second, the Court noted that the BC Act, unlike the Alberta Act, expressly grants standing to the executive director of the BCSC, which implies that the executive director is not "a person directly affected."

[45] The Alberta Court of Appeal also considered subsection 35(1) of the Alberta Act, which permits "a person or company directly affected by a decision of the Executive Director" to appeal to the ASC. The Court viewed this provision as suggesting that if the legislature had intended that the IDA should have a right of appeal, it would have conferred that right expressly in subsection 73(1).

[46] The Court concluded that section 73 of the Alberta Act does not recognize any distinction between the IDA and its hearing panels, and therefore the decision of the IDA hearing panel must be considered a decision of the IDA. Since the IDA cannot appeal its own decision, it could not appeal

under subsection 73(1) of the Alberta Act. Indeed, it could not be "directly affected" by such a decision to begin with, as it had no personal or separate interest in the matter.

(iii) Conclusion on *Global Securities* and *Bahcheli*

[47] Although we are not bound by either *Global Securities* or *Bahcheli*, we prefer the analysis of the British Columbia Court of Appeal in *Global Securities* because, among other things, we conclude that the Hearing Panel was carrying out a purely adjudicative function and was independent of the IDA and IDA Staff. Accordingly we do not accept that the IDA is seeking a hearing and review of its own decision in bringing the application. Moreover, as discussed more fully below, we have concluded that the IDA may be directly affected by a disciplinary decision of a hearing panel and that recognizing its right to apply for a hearing and review in such cases is consistent with and furthers the legislative objectives underlying section 21.7 of the Act.

B. Statutory Interpretation

[48] We accept that in interpreting section 21.7 of the Act, we should adopt a purposive approach, reading the words of the Act "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (*Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.J. No. 2; *R. v. Wilder*, [2001] O.J. No. 1017 (C.A.), at para. 19). Accordingly, the words of section 21.7 should be interpreted in a contextual manner in light of all the circumstances before us in this matter (*Instinet*, at para. 12).

[49] Section 1.1 of the Act states that the purposes of the Act are:

> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient capital markets and confidence in markets.

[50] Further, section 2.1 of the Act states that in pursuing the purposes of the Act, the Commission "shall have regard" to a number of "fundamental principles," including that:

> The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.

[51] The legislative rationale for self-regulation is to harness the expertise of SROs, such as the IDA, "in order to reduce the need for and avoid the costs of governmental involvement in the day-to-day regulation of the industry." An SRO may establish standards of conduct for its members which exceed those imposed by the Commission and "which may bring to bear on technical issues and other matters a deeper understanding of industry practices, both in its rulemaking and in disciplinary and approval proceedings." Further, compliance is likely to be higher where the rules are established and enforced by self-regulation, "with the government riding shotgun to ensure that they remain on the correct path" (*Re Derivative Services Inc.*, [1999] I.D.A.D.C. No. 29, at pp. 13-14).

[52] As noted by the Supreme Court of Canada in *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] S.C.J. No. 58, SROs are part of Canada's "framework of securities regulation":

> It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system: David L. Johnston, Canadian Securities Regulation (1977), at p. 1.
>
> Within this large framework of securities regulation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers. The VSE falls under this head. Having regard to this rather elaborate framework, it is not surprising that securities regulation is a highly specialized activity which requires specific knowledge and expertise in what have become complex and essential capital and financial markets. (at paras. 59-60)

[53] The IDA is a specialized SRO that understands the capital markets and the role its members play in those markets. The IDA has established by-laws that impose appropriate standards of conduct on its member firms and their approved persons. These rules have been approved by the Commission and form part of the fabric of securities regulation in this province. The IDA plays a crucial role in ensuring that its members and their approved persons comply with these regulatory requirements. One of the means by which it does so is through constituting independent hearing panels to interpret and apply IDA rules and, where appropriate, impose sanctions.

[54] In our view, the Applicant's interpretation of section 21.7 of the Act is consistent with the remedial regulatory flexibility contemplated by the Act. The Ontario Court of Appeal addressed this issue in *R. v. Wilder*, [2001] O.J. No. 1017 (at para. 23) in discussing the enforcement options available to the Commission under sections 122, 127 and 128 the Act. The Court concluded:

> To the extent one can discern a legislative intention from this scheme, it seems to me that the overwhelming message is one of remedial variety and flexibility, rather than one that creates hived-off areas of remedial exclusivity. A Court should be loath to prefer a rigidly narrow and literal interpretation over one that recognizes and reflects the purposes of the Act.

[55] Accordingly, we accept that section 21.7 of the Act should be interpreted in a purposive way that gives effect to the overarching regulatory objectives of the *Act* and the important role of the IDA in attaining those objectives. In our view, it is consistent with the IDA's self-regulatory role that it should have standing to apply to the Commission under section 21.7 of the Act for a hearing and review of a decision of a hearing panel that directly affects its ability to fulfill its regulatory mandate.

C. "Person"

[56] In our view, nothing turns on whether the application is styled as an application by the IDA or IDA Staff. The IDA is an unincorporated association that acts through IDA Staff and the acts of IDA Staff constitute the acts of the IDA. IDA Staff is subject to supervision by the IDA Board and, in our view, we are entitled to presume, absent evidence to the contrary, that IDA Staff brings the application in accordance with authority granted by the IDA Board. In our view, the application should be properly styled as an application by the IDA, not IDA Staff, although as we say, nothing turns on that distinction.

[57] In our view, as an unincorporated association, the IDA is a "person" as defined in the Act including for purposes of section 21.7.

D. Appeal of Own Decision

[58] At the core, the interpretations applied in *Global Securities* and *Bahcheli* appear to differ on whether a decision of an IDA hearing panel is a decision of the IDA. *Bahcheli* holds that the Alberta Act recognizes no distinction between the IDA and an IDA disciplinary hearing panel and therefore an appeal by the IDA from a decision of a disciplinary hearing panel is, in effect, an appeal of its own decision. *Global Securities* recognises that there is a distinction between an IDA hearing panel and the IDA itself and concludes that there is nothing offensive or untoward in the IDA having a right to apply for a hearing and review of a hearing panel's decision. As noted above, we agree with the reasoning in *Global Securities* on this issue. An IDA hearing panel consists of three individuals who act independently of the contesting parties (IDA Staff and the respondent IDA member firm(s) or approved person(s)) in deciding the matter before them. A hearing panel is established to ensure fairness to members and their approved persons in applying the IDA by-laws. But the independence of hearing panels also means that a hearing panel can interpret and apply IDA by-laws in a manner that the IDA itself, acting through the IDA Board, considers to be inconsistent with appropriate market conduct and its regulatory mandate. A decision of an IDA hearing panel may have potentially significant regulatory implications that go beyond the interests of the parties to the proceeding.

[59] The British Columbia Court of Appeal in *Global Securities* made a similar finding concerning the hearing process at issue in that case:

> Global's argument is predicated on the assumption that the Hearing Panel's decision is a decision made by the Exchange itself. The assumption does not withstand scrutiny. The Exchange is responsible for conducting the investigation of infractions and prosecuting them whereas the Hearing Panel is entirely limited in function to its adjudicative role. It is the Exchange, not the Hearing Panel, which sought a review and hearing under s. 28(1) of the ***Act*** and it is the Exchange, not the Hearing Panel, that wishes to make submissions on the merits of the decision of the Hearing Panel.
> . . . .
>
> While the Hearing Panel was constituted under the rules and by-laws of the Exchange, its sole task in the regulatory scheme was to act as an independent tribunal in relation to the particular disciplinary hearing for which it was selected. There is no evidence to

> show that the Hearing Panel stepped beyond its role as an adjudicative body independent of the Exchange. (at paras. 55 and 57)

[60] In our view, a decision of an IDA hearing panel, acting in its independent adjudicative role, is not a decision of the IDA. Accordingly, we reject the suggestion that an application by the IDA under section 21.7 of the Act is an appeal by the IDA of its own decision, something that would be untoward or inappropriate. To the contrary, as discussed above, interpreting section 21.7 to permit an appeal by the IDA is, in our view, consistent with the IDA's regulatory responsibilities.

E. "Directly Affected"

[61] In our view, the fact that the IDA applied for Commission review of an IDA hearing panel's decision without objection in *Boulieris* is not an answer to the legal question whether section 21.7 of the Act, properly interpreted, permits such an application. It does, however, suggest that the IDA's reading of section 21.7 is consistent with the expectations of the parties to IDA regulatory proceedings and their assumptions about the appropriate role of the IDA. It also suggests, to paraphrase the British Columbia Securities Commission, that there is "nothing untoward" in permitting the IDA to make arguments before the Commission about the merits of the Hearing Panel's Decision (*Global Securities*, para. 26). We note that *Boulieris* was a case, like this one, where the IDA alleged that the hearing panel had imposed inadequate sanctions for serious misconduct.

[62] IDA Staff initiated the disciplinary proceeding against the Respondents and took a position adverse to the Respondents, essentially acting as prosecutor. In our view, it is not appropriate from a regulatory perspective that a respondent to an IDA proceeding should have a right to apply for a hearing and review by the Commission of a decision of a hearing panel where the IDA cannot bring such an application. While a decision of an IDA hearing panel may affect the respondents and the IDA in different ways, it is important that both have standing to apply to the Commission for a hearing and review of a decision that directly affects them.

[63] In *Global Securities*, the Court concluded that the Exchange was directly affected by a decision of one of its disciplinary hearing panels because that decision could affect the Exchange's prosecution of infractions under its by-laws. While we agree with that, we would go further and say that the IDA may be directly affected by an interpretation of its by-laws because an interpretation may directly affect the regulatory role of the IDA and the future market conduct and relationship of its members. From our perspective, if the IDA disagrees with a hearing panel's decision and considers the relevant conduct to be contrary to its by-laws and the public interest, it should have the right to bring that matter before us on an application under section 21.7 of the Act.

[64] The IDA proceeding in this matter involves an allegation of market manipulation brought by IDA Staff. Market manipulation is one of the most serious types of misconduct for which an IDA member can be disciplined, and providing protection to investors from market manipulation is one of the primary goals of the Act. IDA Staff takes the position that the sanctions imposed by the Hearing Panel were inappropriately light, thereby undermining the ability of the IDA to fulfill its public interest mandate. Whether or not the Commission ultimately agrees with the position taken by the IDA or the Respondents in this matter, we believe that the IDA should have the right to put its position to the

Commission for consideration by way of a hearing and review of the Decision under section 21.7 of the Act.

[65] In *Canadian Civil Liberties*, the Ontario Court of Appeal held that being directly affected means having a personal and individual interest as distinct from a general interest. The Court's concern in that case was that an overly broad interpretation of "directly affected" could result in too many people being able to bring a complaint. Our interpretation of section 21.7 of the Act is consistent with the decision in *Canadian Civil Liberties* because we do not believe that the IDA's interest in this matter is a general interest. In our view, the IDA has a specific and direct interest in the interpretation, application and enforcement of its by-laws in this case. Our interpretation will not result in a flood of inappropriate applications under subsection 21.7(1).

[66] We recognize that if the IDA were only incidentally or indirectly affected by the Decision, it would have no right to a hearing and review under section 21.7 of the Act: *Re Canada Malting Corporation* (1986), 9 O.S.C.B. 3565. We also believe that our interpretation of section 21.7 of the Act is consistent with the principles enunciated in *Instinet*. We have interpreted section 21.7 in light of all of the relevant circumstances before us in this case.

[67] We note that section 21.7 of the Act expressly authorizes the Executive Director of the Commission to bring an application for a hearing and review. As a general matter, it seems to us that it would be difficult to conclude that the Executive Director of the Commission is directly affected by a decision of an IDA hearing panel. Accordingly, it is necessary that section 21.7 specify the Executive Director as a person entitled to bring an application under that section, if the Executive Director is to have that right. Accordingly, we do not accept that, by specifically including the right of the Executive Director to apply under section 21.7, there is a necessary implication that the IDA is not intended to have a right to apply under that section. Nor is it sufficient, in our view, to say that the Executive Director of the Commission has a right to bring an application under section 21.7 and, accordingly, the IDA does not need one. The IDA may well have a different perspective than the Executive Director and there are practical impediments to the Executive Director bringing an application within the time allowed by section 21.7.

[68] Accordingly, based on a purposive and contextual interpretation of section 21.7 of the Act, we find that the IDA is directly affected by the Decision and has standing to apply for a hearing and review of it by the Commission under section 21.7. We would add that, in our view, in reaching that conclusion we are interpreting the words of section 21.7 in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the objectives of the Act and the intention of the legislature.

F. The IDA's Internal Appeal Process

[69] The Respondents submit that IDA Staff should have exhausted the internal IDA appeal process before bringing a section 21.7 application before the Commission. The IDA takes the position that it may appeal a disciplinary decision to an IDA Appeal Panel, but is not obligated to do so prior to seeking a review under section 21.7 of the Act.

[70] On its face, IDA By-law 33.1 appears to require that the internal IDA appeal process be exhausted before a section 21.7 application is brought. Nothing in section 21.7 of the Act, however, requires an applicant to have first exhausted the internal appeal processes of the SRO concerned. We do not accept that completion of the appeal process under By-law 33.1 should limit our ability to hear an application under section 21.7 if we conclude that it is appropriate for us to do so. Section 21.7 provides for an application for a hearing and review of a "decision" of the IDA, and does not require the decision to be a decision of an IDA appeal panel. The Decision, in our view, is a decision that falls within the language of section 21.7.

[71] In the circumstances, we are reluctant to refer this matter back to the IDA to follow an appeal process that the IDA has concluded is no longer useful or appropriate and that the IDA is in the process of eliminating. Accordingly, we have concluded that we should hear the application being brought by the IDA to the Commission for a review of the Decision under section 21.7 of the Act. We believe that we have legal authority to do that under section 21.7 of the Act and pursuant to our regulatory power of oversight of the IDA.

V. CONCLUSION

[72] Accordingly, based on our view of the proper interpretation of section 21.7 of the Act, we find that the IDA is directly affected by the Decision and has standing to apply for a hearing and review of the Decision by the Commission under that section.

VI. ORDER

[73] For the reasons given above, we order that:

1. The Respondents' motion is dismissed. The IDA may apply for a hearing and review of the Decision by the Commission under section 21.7 of the Act.

2. The Office of the Secretary shall set a date for the hearing of the application.

DATED in Toronto this 28th day of November, 2008.

"James E. A. Turner" *"David L. Knight"*

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James E. A. Turner David L. Knight, FCA