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 INDUSTRY REGULATORY ORGANIZATION OF CANADA PURSUANT TO SECTIONS 8 AND 21.7 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

- AND -

IN THE MATTER OF DISCIPLINE PROCEEDINGS PURSUANT TO DEALER MEMBER RULE 20 OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

- BETWEEN -

STAFF OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

- AND -

JULIUS CAESAR PHILLIP VITUG

REASONS AND DECISION ON A STAY MOTION
(Subsection 9(2) of the *Securities Act*, Rule 3 of the of the Ontario Securities Commission *Rules of Procedure* (2009), 32 O.S.C.B. 10)

Hearing:	May 5, 2010	
Decision:	May 14, 2010	
Panel:	Mary G. Condon	- Commissioner and Chair of the Panel
	Paulette L. Kennedy	- Commissioner
Counsel:	Alistair Crawley Jocelyn Loosemore	- For Mr. Vitug
	Natalija Popovic Tamara Brooks Milton Chan	- For IIROC
	Jon Feasby	- For Staff of the Ontario Securities Commission

REASONS AND DECISION ON A STAY MOTION

I. INTRODUCTION

[1] On April 26, 2010, the Ontario Securities Commission (the "**Commission**") issued a decision dated April 23, 2010 (the "**Commission Decision**") dismissing the application of Julius Caesar Phillip Vitug ("**Vitug**" or the "**Applicant**") for a hearing and review of a decision of a hearing panel of the Ontario District Council (the "**Hearing Panel**") of the Investment Industry Regulatory Organization of Canada ("**IIROC**") dated March 31, 2009 (the "**Hearing Panel Decision**").

[2] The allegation brought by IIROC Staff before the Hearing Panel was that "In or about April 2003 to August 2005, [Vitug] engaged in business conduct or practice which is unbecoming or detrimental to the public interest in that he had an undisclosed financial interest and undisclosed financial dealings in accounts, including accounts held at another member firm, of two of his clients, in violation of IDA By-law 29.1." In the Hearing Panel Decision, the Hearing Panel concluded that the allegation had been made out and ordered that a penalty hearing be scheduled.

[3] The penalty hearing was held on June 24, 2009 and the Decision and Reasons as to Penalty was issued on July 7, 2009 (the "**Penalty Decision**"). The Hearing Panel ordered that Vitug be permanently banned from approval in any category under IIROC's rules, and that he pay a fine of $350,000 to IIROC. Vitug was also ordered to pay $80,000 to IIROC towards its costs. The Hearing Panel dismissed Vitug's motion to stay the penalty hearing pending the outcome of Vitug's application to the Commission for a hearing and review of the Hearing Panel Decision pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "**Act**"). However, with the consent of IIROC Staff, the Hearing Panel stayed the implementation of the penalties ordered until the termination of the Commission hearing.

[4] Immediately upon receipt of the Commission Decision dismissing Vitug's application for a hearing and review of the Hearing Panel Decision, IIROC moved to implement the Penalty Decision by terminating Vitug's registration.

[5] On April 27, 2010, Vitug brought a motion for a stay of the Commission Decision on an interim basis pending the outcome of a stay motion to be scheduled during the following week (the "**Interim Stay Motion**"). IIROC opposed the Interim Stay Motion. Staff of the Commission ("**Commission Staff**") took no position. After a hearing on April 28, 2010, the Commission ordered a stay of the Commission Decision on an interim basis (the "**Interim Stay**") pending the outcome of a motion to stay the Commission Decision pending an appeal (the "**Stay Motion**").

[6] Upon considering the written and oral submissions of Vitug and IIROC, Staff having taken no position at the hearing of the Stay Motion on May 5, 2010, we find that the public interest is best served by granting a short extension of the Interim Stay for the limited purpose of allowing Vitug sufficient time to commence an appeal and bring a stay motion before the Divisional Court. The Stay shall terminate upon the expiry of the 30-day appeal period following the release of the Commission Decision if Vitug has not commenced an appeal by that time. If Vitug brings a timely appeal, our Order extends the Interim Stay for sixty (60) days following

the release of this decision, subject to further order of the Commission, to allow for a stay motion to be brought before the Divisional Court, should the Applicant wish to do so.

[7] Our reasons are as follows.

II. POSITIONS OF THE PARTIES

A. Vitug

[8] Vitug submits that a stay of a decision pending an appeal is the usual course followed by administrative tribunals. He notes that subsection 25(1) of the *Statutory Powers and Procedure Act*, R.S.O. 1990, c. S. 22 ("**SPPA**") states:

> An appeal from a decision of a tribunal to a court or other appellate body operates as a stay in the matter unless,
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> (a) another Act or a regulation that applies to the proceeding expressly provides to the contrary; or
>
> (b) the tribunal or the court or other appellate body orders otherwise.

[9] However, as Vitug acknowledges, by virtue of subsection 9(2) of the Act, the automatic stay provision in the SPPA does not apply to Commission proceedings. Subsection 9(1) of the Act states that a person directly affected by a final decision of the Commission "may appeal to the Divisional Court within 30 days after the later of the making of the final decision or the issuing of the reasons for the final decision." Subsection 9(2) states:

> Despite the fact that an appeal is taken under this section, the decision appealed from takes effect immediately, but the Commission or the Divisional Court may grant a stay until disposition of the appeal.

[10] Vitug submits this provision was introduced in 1973, in response to the Act becoming subject to the SPPA, and reflected a concern that an automatic stay of a cease trade order would frustrate the Commission's effort to stop the distribution of a security that is contrary to the public interest, and that an issuer might commence an appeal, without any intention of proceeding with it, for the purpose of obtaining a stay (Ontario, Legislative Assembly, *Official Report of Debates (Hansard)*, 3 April, 1973, at 472-474).

[11] Vitug submits that granting a stay of the Commission Decision pending the outcome of an appeal to the Divisional Court is consistent with both the procedural protections set out in the SPPA and the Commission's mandate to act in the public interest. He notes that a stay pending appeal was granted in *Re Rex Diamond et al.* (2009), 32 O.S.C.B. 10302 and *Re Rowan et al.* (unreported decision of Ont. Div. Ct., January 12, 2010, Court File No. 615/09).

[12] Vitug notes that in *RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at para. 43 ("***RJR MacDonald***"), the issue was whether to stay the effect of facially valid legislation pending a constitutional challenge, and he submits that the principles set out by the Supreme Court of Canada in that case should not be rigidly applied when the issue is whether to stay a disciplinary decision pending the outcome of an appeal. Vitug submits that the

Commission should consider the factors set out in *RJR MacDonald* with a view to determining whether granting a stay is appropriate in the public interest.

[13] In *RJR MacDonald*, the Supreme Court of Canada summarized the test for a stay as follows:

> Metropolitan Stores adopted a three-stage test for courts to apply when considering an application for either a stay or an interlocutory injunction. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.
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> (*RJR MacDonald*, *supra*, at para. 43, referring to *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110)

[14] With respect to the first criterion (serious question to be tried), Vitug did not address his grounds for appeal in his written submissions. At the hearing of the Stay Motion, he submitted that his appeal of the Commission Decision is likely to focus on three main areas: (i) continued application of the standard of review set out in the Commission's decision in *Canada Malting Co.* (1986), 9 O.S.C.B. 3565 and discussed at paras. 43-51 of the Commission Decision, despite the elimination of the internal IIROC appeal from decisions of District Council hearing panels; (ii) adequacy of the Hearing Panel's reasons for decision, in light of further developments in the law on the adequacy of reasons in the disciplinary context, for example, in *Law Society of Upper Canada v. Neinstein* (2010), 99 O.R. (3d) 1 (Ont. C.A.); and (iii) specific findings in the Hearing Panel Decision that were not addressed or that received deference in the Commission Decision.

[15] With respect to the second criterion, Vitug submits that he will suffer irreparable harm if the stay is not granted, because if his registration is terminated, he will lose his job, which is predicated on his being registered, and suffer irreparable damage to his reputation and career. If he is ultimately successful on appeal, he will already have lost his clients, who will have transferred to other investment advisors. Vitug also states that his clients will be adversely affected as they will "have to find a new investment advisor and transfer their accounts."

[16] On the other hand (turning to the balance of convenience), Vitug submits that granting a stay pending appeal poses no risk to the public for the following reasons:

(a) Vitug has been subject to strict supervision since July 2009, which means that all trades must be pre-approved by his branch manager and that any handling of client securities and payment and the issuance of cheques be approved by management.

(b) The conduct underlying the Hearing Panel Decision occurred before August of 2005, nearly five years ago.

(c) The findings in the Hearing Panel Decision were that Vitug had an undisclosed financial interest and undisclosed financial dealings in accounts of his aunt and father-in-law, who are at non-arm's length to

Vitug, and neither client complained about his conduct. The Hearing Panel Decision included no findings of harm to the public.

(d) The Hearing Panel itself stayed the penalty decision pending the outcome of these proceedings, and took no steps to lift the stay prior to release of the Commission Decision.

(e) Vitug has been working in a registered capacity without incident for more than a year since the Hearing Panel Decision was released on April 7, 2009.

[17] Vitug submits that nothing has changed since the Hearing Panel stayed the Penalty Decision, and that the stay he seeks in this motion will simply maintain the status quo to allow him a meaningful exercise of his statutory right of appeal. At the time of the April 28, 2010 hearing of the Interim Stay Motion and the May 5, 2010 hearing of the Stay Motion, he had not yet commenced an appeal, but he notes that subsection 9(2) gives him 30 days to do so.

B. IIROC Staff

[18] IIROC Staff oppose the Stay Motion. They submit that a stay is an extraordinary remedy that should only be granted in the clearest of cases, and that Vitug has not satisfied the legal test.

[19] IIROC Staff submit that pursuant to subsection 9(2) of the Act, a stay pending appeal is not automatic, but may be granted by Commission in the exercise of its inherent jurisdiction. Vitug must satisfy the three-part test in *RJR MacDonald*.

[20] IIROC Staff submit that Vitug has failed to identify any serious question to be tried on appeal. They submit that Vitug has had his hearing before the Hearing Panel, and that an independent panel of the Commission dismissed Vitug's application for a hearing and review of the Hearing Panel Decision. Moreover, Vitug did not seek a hearing and review of the Penalty Decision.

[21] IIROC Staff submit that Vitug has not provided evidence that denying the stay will cause him irreparable harm. He has not, for example, brought evidence as to his financial circumstances. With respect to any alleged harm to his clients, IIROC Staff submit that Vitug has not provided evidence of any steps he has taken to protect the interests of his clients since the Penalty Decision was issued in July 2009.

[22] On the contrary, IIROC Staff submit that staying the Commission Decision will harm the public interest. They submit that in the Hearing Panel Decision, the Hearing Panel made very serious findings about Vitug, including that he "acted deceitfully for his own personal benefit", "evaded member firm scrutiny", that his conduct "placed him in business circumstances that raised a real or apparent conflict of interest to the detriment of others", and that his "acts were intentional and his deceit was motivated by personal financial gain" (Hearing Panel Decision, paras. 155-159). Further, in the Penalty Decision, the Hearing Panel found, amongst other things, that Vitug "does not appear to be concerned about the truth", "has shown no remorse for his actions", and "is not the type of person that anyone should want in the securities industry" (Penalty Decision, paras. 12, 13 and 16). In light of these findings, and particularly the fact that the conduct occurred in accounts held outside the scope of his employment, IIROC Staff submit

that strict supervision by Vitug's employer provides insufficient comfort that the public interest can be protected during the period of a stay.

[23] IIROC Staff also dispute Vitug's claim that he has continued working without complaint since the events that gave rise to the IIROC proceedings, and presented evidence of other client complaints against him. Vitug took strong exception to these allegations, which were not at issue in the IIROC proceedings that resulted in the Hearing Panel Decision and Penalty Decision, or in any other IIROC proceeding.

C. Staff

[24] Commission Staff took no position in the proceeding.

III. ANALYSIS

[25] We have considered the submissions presented by Vitug and IIROC Staff. We note that subsection 9(1) of the Act provides an appeal as of right from a Commission Decision. We also note that, pursuant to subsection 9(2) of the Act, a stay pending appeal is not automatic, but may be granted by the Commission or the Divisional Court. In deciding this Stay Motion, we have considered the three-stage test set out in *RJR MacDonald* in the context of our public interest mandate.

[26] We do not find it appropriate to consider the alleged client complaints about Vitug that were not at issue in the Hearing Panel Decision. It was not brought to our attention that IIROC has commenced any further proceedings against Vitug in respect of the alleged client complaints or that they have been heard by an IIROC hearing panel. We note that the Hearing Panel itself stayed the Penalty Decision in July 2009, on consent, and that IIROC Staff have not sought to terminate that stay or alter the strict supervision under which Vitug has been working since that time.

[27] We are limited in our ability to determine whether there is a serious question to be tried because Vitug had not commenced an appeal by the time of the hearing of the Stay Motion. In any event, the decisive factor for us in this case is that it is for the Divisional Court – not the Commission – to determine the merits of Vitug's appeal from the Commission Decision. We find that in this case the Divisional Court is in a better position than we are to determine whether there is a serious question to be tried and whether a stay should be granted.

[28] Accordingly, while we are not satisfied, based on the limited materials available, that we should grant an indefinite stay pending appeal, we find that the public interest is best served by granting a short extension of the Interim Stay for the limited purpose of allowing Vitug to commence any appeal to the Divisional Court within 30 days of the release of the Commission Decision and, within 60 days of the release of this decision, to bring a motion for a stay before that Court. To emphasize the need for expeditious action, this stay shall terminate automatically at the end of the 30-day appeal period set out in subsection 9(2) if an appeal has not been commenced by that time. Assuming that a timely appeal is commenced, the stay shall nonetheless terminate automatically at the end of 60 days following release of this decision. These orders are subject to such further Order as the Commission or the Divisional Court may find appropriate.

IV. CONCLUSION

[29] Therefore, for the reasons given above, it is ordered that:

1. The Interim Stay ordered by the Commission on April 28, 2010 is extended for 60 days following the release of this Order, and shall terminate immediately thereafter, subject to paragraph 2, below, and subject to any further order of the Commission.

2. The Stay shall terminate upon the expiry of the 30-day appeal period following the release of the Commission decision dated April 23, 2010 if Mr. Vitug has not commenced a timely appeal pursuant to subsection 9(1) of the *Securities Act*, subject to any further order of the Commission.

Dated at Toronto, Ontario this 14th day of May, 2010.

"Mary G. Condon"
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Mary G. Condon

" Paulette L. Kennedy"
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Paulette L. Kennedy