Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

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**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

- AND -

**IN THE MATTER OF
ARGOSY SECURITIES INC.
and KEYBASE FINANCIAL GROUP INC.**

REASONS AND DECISION ON A STAY MOTION

Hearing:	November 6, 2015	
Decision:	November 12, 2015	
Panel:	Timothy Moseley	Commissioner and Chair of the Panel
Appearances:	Kevin Richard	For Argosy Securities Inc. and Keybase Financial Group Inc.
	Brooke Shulman	For Staff of the Commission

REASONS AND DECISION ON A STAY MOTION

I. OVERVIEW

[1] On August 18, 2015, a Deputy Director of the Ontario Securities Commission (the "**Commission**") issued a decision (the "**Director's Decision**") in which she imposed terms and conditions upon the registrations of Argosy Securities Inc. ("**Argosy**"), an investment dealer, and Keybase Financial Group Inc. ("**Keybase**"), a mutual fund dealer and exempt market dealer. Among other things, the terms and conditions required each of Argosy and Keybase to retain, at its expense, an independent consultant to prepare, and assist the firms in implementing, plans to improve each firm's "compliance system"[1] and to review and report upon the firms' progress against the plans.

[2] On September 14, 2015, Argosy and Keybase requested a hearing and review of the Director's Decision. A date for that hearing and review (the "**Review**") has not yet been set.

[3] Argosy and Keybase (together, the "**Moving Parties**") also applied for a stay of the Director's Decision until disposition of the Review. For the reasons that follow, I order that:

a. the Review be held by January 15, 2016;

b. the Director's Decision be stayed until January 18, 2016, or further order of the Commission; and

c. until the disposition of the Review, the Moving Parties operate under certain terms and conditions, more particularly described below.

II. PROCEDURAL HISTORY

A. The Director's Decision

[4] In March 2015, Staff of the Commission ("**Staff**") wrote to the Moving Parties and advised them that as a result of reviews of the Moving Parties conducted by Staff a year earlier, Staff had recommended to the Director that terms and conditions be imposed upon the Moving Parties' registrations.

[5] The terms and conditions recommended by Staff included, among other things, the following:

a. each of Argosy and Keybase shall, at its own expense, retain a consultant approved by Staff, to prepare and assist each firm in implementing a plan to strengthen its compliance system, to review progress of implementation and to submit written progress reports to Staff and to either the Investment Industry Regulatory Organization of Canada ("**IIROC**") or the Mutual Fund Dealers Association ("**MFDA**"), as the case may be;

b. the Ultimate Designated Person and Chief Compliance Officer of Argosy and Keybase must review, approve and sign the plan and progress reports;

[1] Within the meaning of section 11.1 of National Instrument 31-103, *Registration Requirements, Exemptions and Ongoing Registrant Obligations*.

c. the consultant shall submit progress reports to Staff and to either IIROC or the MFDA every thirty days following approval of the plan until it has been fully implemented;

d. the consultant shall submit an attestation letter verifying that recommendations have been implemented and tested and are working effectively; and

e. the consultant shall return one year after full implementation of the plan, at the firm's expense, to complete a review of the firms' compliance systems.[2]

[6] The Moving Parties exercised their right to be heard, as provided for in section 31 of the *Securities Act*[3] (the "**Act**"). The Opportunity to be Heard ("**OTBH**") was held before the Deputy Director on July 20, 2015, and on August 18, 2015, the Deputy Director issued the Director's Decision, in which she listed a number of concerns about the Moving Parties' past compliance with applicable regulatory requirements.

[7] The Deputy Director acknowledged that the Moving Parties had taken steps to respond to concerns that had been raised, and to otherwise improve their compliance program. However, the Director decided that an independent consultant would be "best placed to determine the effectiveness of these recent changes".[4] As a result, the Deputy Director decided to impose the terms and conditions recommended by Staff, as set out in paragraph [5] above. The Director's Decision required that the independent consultant be retained by September 15, 2015, and that the consultant provide a compliance plan to Staff by October 15, 2015.[5]

B. Request for a hearing and review

[8] On September 14, 2015, the Moving Parties wrote to the Secretary of the Commission to request:

a. a hearing and review of the Director's Decision, pursuant to subsection 8(2) of the Act; and

b. a stay of that decision pending the disposition of the hearing and review, pursuant to subsection 8(4) of the Act.

[9] As was acknowledged at the hearing before me of this application for a stay, held on November 6, 2015, no steps have been taken to comply with the Director's Decision. In particular, no consultant has been proposed to Staff for consideration.

[10] Counsel for the Moving Parties advised at the hearing that discussions had been underway with Staff with respect to appropriate terms and conditions that might apply to the Moving Parties pending the disposition of the Review. Staff did not dispute this assertion.

III. LEGAL FRAMEWORK

A. The test for a stay

[11] Subsection 8(4) of the Act, which authorizes the Commission to grant the stay sought by the Moving Parties, does not prescribe the test to be applied by the

[2] Director's Decision, para 1.
[3] RSO 1990, c S-5.
[4] Director's Decision, para 17.
[5] Director's Decision, para 1.

Commission in deciding whether or not a stay is appropriate. It says simply that "the decision under review takes effect immediately, but the Commission may grant a stay until disposition of the hearing and review."

[12] As the parties submitted, the test on an application such as this is that set out in the Supreme Court of Canada's decision in *RJR – MacDonald Inc. v. Canada (Attorney General)*[6] ("***RJR-MacDonald***") and applied by this Commission in numerous cases.[7] That test provides that a party seeking a stay in these circumstances bears the onus of demonstrating that:

a. based upon a preliminary assessment of the merits of the case, there is a serious question to be tried;

b. the moving party would suffer irreparable harm if the stay were refused; and

c. the "balance of convenience" favours the moving party, following "an assessment… as to which of the parties would suffer greater harm from the granting or refusal of [a stay]."[8]

[13] I review each of the three prongs of the test in more detail below.

B. Interim terms and conditions

[14] At the hearing of this application, Staff submitted that if I were to grant a stay, I should impose terms and conditions on the Moving Parties pending the disposition of the Review. Without conceding that terms and conditions would be necessary, counsel for the Moving Parties did propose terms and conditions, narrower than those sought by Staff, should I be inclined to grant a stay.

[15] Unlike other sections of the Act that grant the Commission the authority to make an order,[9] subsection 8(4) does not explicitly give the power to add terms and conditions. Staff submitted that section 16.1 of the *Statutory Powers Procedure Act*[10] grants the necessary power. Counsel for the Moving Parties agreed with that submission. That section provides, in subsections (1) and (2) respectively, that a tribunal "may make interim decisions and orders" and "may impose conditions on an interim decision or order."

[16] I am satisfied, for the purposes of this application, that if I am to grant a stay, I have the authority to impose conditions.

IV. ISSUES

[17] This application presents three issues, each of which is a prong of the three-part *RJR-MacDonald* test:

1. Have the Moving Parties raised a serious question to be tried?

2. Would the Moving Parties suffer irreparable harm if a stay is not granted?

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[6] [1994] 1 SCR 311.
[7] See, *e.g.*, *Marchment & MacKay Ltd. (Re)*, (1999) 22 OSCB 7659; *Investment Industry Regulatory Organization of Canada v. Vitug*, (2010) 33 OSCB 4601; *Sterling Grace and Co. (Re)* (2013), 36 OSCB 11637.
[8] *RJR-MacDonald*, *supra* note 6 at 334.
[9] See, *e.g.*, subsections 1(12), 2.2(4), 17(4) and 127(2) of the Act.
[10] RSO 1990, c S-22.

3. Does the balance of convenience favour the Moving Parties? More specifically, is the harm that might be suffered by the Moving Parties (principally, the cost of retaining the consultant) greater than the harm that might be suffered by Staff as guardian of the public interest (principally, the risk that clients of the Moving Parties would be harmed)?

V. ANALYSIS

A. Have the Moving Parties raised a serious question to be tried?

[18] The Supreme Court of Canada held in *RJR-MacDonald* that the threshold on this branch of the inquiry "is a low one" and that while "a preliminary assessment of the merits of the case" should be carried out, the test is satisfied so long as "the application is neither vexatious nor frivolous".[11]

[19] The Moving Parties contend that this application presents a serious question to be tried. They submit, among other things, that the Deputy Director overlooked material evidence, failed to give due consideration and weight to material evidence, and failed to consider the harm that would be caused to the Moving Parties as a result of her decision.

[20] While Staff does not concede that the Moving Parties should succeed on any of these submissions at the Review itself, Staff did not dispute the Moving Parties' contention on this point for the purposes of this application.

[21] The grounds asserted by the Moving Parties could establish a basis for substituting a decision different from the Director's Decision, and there is no suggestion that the Moving Parties' application is either frivolous or vexatious. Without expressing a view as to their prospects of success on the Review, I therefore conclude that the Moving Parties' application raises a serious question to be tried.

B. Would the Moving Parties suffer irreparable harm if a stay is not granted?

[22] The Moving Parties submit that if a stay is not granted, the Review will be rendered moot and they will incur unnecessary costs that cannot be recovered if they are successful in overturning the Director's Decision.

[23] Staff submits in response that the evidence adduced by the Moving Parties in support of the claim of irreparable harm is vague and insufficiently detailed.

[24] In the circumstances of this case, no detailed evidence is necessary. For harm to be "irreparable", it need not be significant. To satisfy this element of the test, a party seeking a stay need establish only that whatever harm would be caused cannot be cured.[12]

[25] If I do not grant a stay, the Moving Parties will continue to be in default of the Director's Decision, which required them to retain the consultant by September 15. Assuming that the Moving Parties would then proceed to comply with the Director's Decision, they would at a minimum incur the cost of retaining a consultant. If the panel of the Commission that hears the Review ultimately determines that the Moving Parties need not retain a consultant, then the cost will already have been incurred and will not be recoverable.

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[11] *RJR-MacDonald*, *supra* note 6 at 337.
[12] *RJR-MacDonald*, *supra* note 6 at 341.

[26] It therefore follows, even in the absence of detailed evidence as to what costs might be incurred, that the Moving Parties would suffer some irreparable harm if a stay is not granted.

C. Is the harm that might be suffered by the Moving Parties (principally, the cost of retaining the consultant) greater than the harm that might be suffered by Staff as guardian of the public interest (principally, the risk that clients of the Moving Parties would be harmed)?

[27] The task of assessing whether it is the Moving Parties or Staff who would suffer greater harm is complicated by the fact that with respect to both the Moving Parties and Staff, the amount of harm that might be suffered would depend directly upon the length of time the harm continues.

[28] If a stay is granted, then for the duration of the stay there would be a continually increasing number of interactions between the Moving Parties and their clients, some of which interactions, Staff submits, could be unnecessarily harmful to the clients. However, the harm to the Moving Parties would not exist.

[29] If a stay is not granted, and the Moving Parties retain the consultant as required by the Director's Decision, then the harm to the Moving Parties (the cost of the consultant and of implementing any recommendations) will increase as time passes.

[30] Retaining a consultant satisfactory to Staff would take some time, as would the consultant's review once the consultant was retained. In the meantime, the risk of potential harm to the investors would continue to exist, even if the stay were not granted, since the benefits, if any, of the consultant's work would begin to be realized only once the Moving Parties begin to implement the consultant's recommendations. In my view, it is unlikely that the first implementation of a recommendation could occur any earlier than approximately two months from the date of this decision.

[31] If the hearing of the Review can be concluded within two months and appropriate terms and conditions are imposed to protect the Moving Parties' clients for the duration of the stay, then the balance of convenience favours the Moving Parties. I must consider, then, what terms and conditions would be appropriate.

[32] Staff points to a number of alleged current or historical compliance deficiencies at the Moving Parties and submits that I should grant a stay only if I also impose the following terms and conditions:

> a. Argosy and Keybase, and/or their registered dealing representatives, are prohibited from acting in furtherance of trades involving the use of money borrowed after the date of this decision for the purpose of investing, with the following exceptions:
>
> > i. Argosy's clients may continue to operate margin accounts in accordance with the margin account agreements executed between Argosy and its clients;
> >
> > ii. Clients of Argosy and Keybase may make investments through either of Argosy and Keybase using funds borrowed after the date of this decision through a personal loan issued by a Canadian bank, trust company or credit union for the exclusive purpose of allowing clients to make a contribution to an individual or spousal Registered Retirement Savings Plan held at the firm; and

iii. Argosy and Keybase may, where required to accommodate changed family circumstances, rewrite existing loans between related parties, provided that the total amount outstanding between those parties may not increase;

b. Argosy and Keybase are prohibited from opening any new branch locations (but Keybase may create new sub-branch locations provided Keybase branch managers conduct appropriate supervision, including periodic visits, in respect of all sub-branches as required by MFDA by-laws, rules and policies); and

c. Argosy and Keybase may not sponsor any new dealing representatives, except so as to replace dealing representatives that depart each dealer subsequent to the date of this decision such that the aggregate number of dealing representatives at each dealer as of the date of this decision does not increase.

[33] The Moving Parties submit that the terms and conditions proposed by Staff go beyond those requested by Staff at the OTBH and beyond those imposed by the Director's Decision. The Moving Parties further submit that Staff's proposed terms and conditions are unnecessarily broad and onerous.

[34] As noted above in paragraph III.[14], while the Moving Parties do not concede that any terms and conditions are required, the Moving Parties do propose the following terms and conditions while a stay is in effect:

a. Argosy will add no more than five net new dealing representatives to its current complement of approximately eighteen representatives;

b. Argosy will not open any new branch locations;

c. Keybase will add no more than nineteen net new dealing representatives to its current complement of approximately 193 representatives;

d. Keybase will not open any new branch locations but may create new sub-branch locations provided Keybase branch managers conduct appropriate supervision, including periodic visits, in respect of all sub-branches as required by MFDA by-laws, rules and policies;

e. any Keybase advisor who currently has 20% or more of his/her total clients' assets under administration as leveraged investments will not engage in further leveraged activity; and

f. any Keybase advisor who currently has less than 20% of his/her total clients' assets under administration will not exceed 20% leverage.

[35] In my view, it would be appropriate to impose the Moving Parties' proposed terms and conditions for the short time until the Review. Without deciding whether the Moving Parties' compliance program is deficient, a stay pending the hearing of the Review, expediting that hearing, and imposing the Moving Parties' proposed terms and conditions would avoid any harm to the Moving Parties and would minimize the harm to Staff.

VI. CONCLUSION AND ORDER

[36] Pursuant to subsection 8(4) of the Act, I order that the Director's Decision be stayed effective immediately until further order of the Commission and, in any event, not later than January 18, 2016, subject to the following conditions:

a. the hearing of the Review shall be held no later than January 15, 2016, on a date or dates to be fixed by the Office of the Secretary to the Commission;

b. the parties shall serve and file memoranda of fact and law with respect to the Review in accordance with Rule 14.9 of the Commission's *Rules of Procedure;*[13] and

c. Argosy and Keybase shall be subject to the following conditions:

1. Argosy will add no more than five net new dealing representatives to its current complement of approximately eighteen representatives;

2. Argosy will not open any new branch locations;

3. Keybase will add no more than nineteen net new dealing representatives to its current complement of approximately 193 representatives;

4. Keybase will not open any new branch locations but may create new sub-branch locations provided Keybase branch managers conduct appropriate supervision, including periodic visits, in respect of all sub-branches as required by MFDA by-laws, rules and policies;

5. any Keybase advisor who currently has 20% or more of his/her total clients' assets under administration as leveraged investments will not engage in further leveraged activity; and

6. any Keybase advisor who currently has less than 20% of his/her total clients' assets under administration will not exceed 20% leverage.

Dated at Toronto this 12th day of November, 2015.

"Timothy Moseley"

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Timothy Moseley

[13] (2014) 37 OSCB 4168.