

Re Ziaian

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada**

and

Bardya Ziaian

2020 IIROC 34

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District)

Heard: September 23, 2020 in Toronto, Ontario

Order: September 24, 2020

Reasons for Decision: October 5, 2020

Hearing Panel:

Donna Campbell, Chair, Debbie Archer and Mary Savona

Appearance:

Andrew Werbowski, Enforcement Counsel

Sylvia Samuel, Enforcement Counsel

Joseph Groia, for Bardya Ziaian

Kevin Richard, for Bardya Ziaian

Manon Landry, for Bardya Ziaian

Bardya Ziaian (present)

REASONS FOR DECISION

OVERVIEW

¶ 1 The hearing on the merits in this matter is set to begin on October 13, 2020.

¶ 2 At a Pre-hearing Conference (PHC) on September 2, 2020, the Panel determined that, in light of the ongoing pandemic, it would not be an oral hearing but rather an electronic hearing using videoconference technology.

¶ 3 On September 23, 2020, the Respondent argued a motion seeking an order that the hearing on the merits be conducted as an oral hearing, or alternatively, an order staying the proceeding permanently.

¶ 4 On September 24, 2020, after considering the written and oral submissions of the Respondent and Staff of IIROC (Staff), the Panel issued an order dismissing the motion, and ordering that the matter proceed as an electronic hearing on the dates scheduled. The Panel advised that reasons for the dismissal of the motion would follow. These are the reasons.

BACKGROUND

¶ 5 On July 31, 2019, Staff filed a Statement of Allegations alleging the Respondent engaged in improper trading activity by obtaining allocations of new issues for the purpose of proprietary trading, and not for the purpose of allocating the new issues to the Dealer Member's clients, contrary to Dealer Member Rule 29.1.

¶ 6 On August 1, 2019, a Notice of Hearing (NOH) was issued by the National Hearing Coordinator (NHC) which stated that pursuant to Section 4809, the hearing on the merits would be conducted as an oral hearing. In the *Rules of Practice and Procedure* (Rules), an oral hearing is defined as "a hearing at which the parties or their counsel or agents attend before a hearing panel in person."¹

¶ 7 By the end of March 2020, the pandemic caused by the Covid 19 virus began to restrict most human interaction in most forums. Those restrictions continue and have varied, and will continue to vary, for the foreseeable future.

¶ 8 Since March 2020, no oral hearings have been held by IIROC and the IIROC offices remain closed, with a possible reopening date of January 2021.

¶ 9 On August 26, 2020, the NHC advised the parties that the hearing on the merits could take place by way of Webex (videoconference) or in-person at the offices of Atchison & Denman. In oral submissions, Staff advised the Panel that no in-person hearings have been held at Atchison & Denman.

¶ 10 On September 2, 2020, at the PHC, the parties advised the form of the hearing on the merits was in dispute. Staff argued that, in light of the ongoing pandemic, it should be an electronic hearing by way of videoconference. The Respondent argued that he was entitled to an oral hearing, which could be held at Atchison & Denman, had proceeded on the assumption that he would have one until Staff's recent advice that they opposed such a hearing, and that if one could not be held safely in October, the matter should not proceed until IIROC could do so. The Panel determined that in all the circumstances the hearing on the merits should proceed by way of videoconference.²

¶ 11 On September 15, 2020, IIROC published *Best Practices for Electronic Proceedings (Best Practices)* advising that due to the pandemic, in-person oral hearings were postponed or converted to electronic proceedings, either by telephone or videoconference, and that electronic hearings are 'the preferred form of hearing until such time as in-person hearings become feasible.'³

¶ 12 *Best Practices* directed parties who object to an electronic proceeding to state reasons for the objection, including any prejudice an electronic hearing may cause and the facts on which the party relies, accompanied by evidence to substantiate the objection.⁴

¶ 13 *Best Practices* was published after the Respondent's motion was brought but before it was argued.

THE CONTEXT IN WHICH THIS DECISION IS MADE

¶ 14 At the time of the writing of this decision, the pandemic continues to affect most physical human interactions. A significant and steady increase of reported cases in Toronto throughout September, particularly following the argument of the motion, have led to the re-imposition of some restrictions which were lifted during the summer. There appears to be a consensus among health officials that fall and winter will see further increases and likely further restrictions.

¹ Rule 8400, *Rules of Practice and Procedure*, Rule 8402(1)

² In argument, the Respondent took issue with the outcome of the PHC, suggesting that the Panel did not have the authority to consider the form of the hearing at that moment. Rules 8416(vi),(viii) and (ix) allow the panel to consider the form of a hearing at a PHCC that may assist in a just and expeditious resolution of the proceeding and any other procedural or substantive matters, and make any procedural order that will further the just and expeditious conduct of the proceeding.

³ IIROC Hearing Committee, *Best Practices for Electronic Proceedings* (September 2020), A(1) and (3)

⁴ *Ibid.*, A(9)

¶ 15 In a pre-pandemic world, this matter would proceed to an oral hearing with all parties and participants allowed to be physically present in the same room, with varying degrees of proximity to one another. That is not the world in which this hearing will take place, and it is against that backdrop that this decision is made.

THE RESPONDENT'S MOTION

¶ 16 The Respondent argues that he is entitled to an oral hearing on the merits at which he and his counsel attend before the Panel in person. The contractual nature of IIROC's jurisdiction and the plain and ordinary interpretation of the applicable Rules do not permit the Panel to order an electronic hearing in the face of the Respondent's objection. To do so exceeds IIROC's jurisdiction, is an abuse of process and requires the Panel to issue a permanent stay of the proceedings.

¶ 17 Additionally, the Respondent argues that an electronic hearing on the merits is an unfair hearing which is inherently prejudicial to him. Aside from technological problems which are likely to occur, hearings in which there are multiple witnesses, time consuming evidence and issues of credibility require an in-person oral hearing. The right to fully and fairly cross-examine witnesses is a critical component for a fair hearing and the Respondent's right to have witnesses fully and fairly cross-examined would be lost in an electronic hearing. The Respondent is entitled to be personally present and face those bringing allegations against him. If the Panel orders an electronic hearing, it will have engaged in an abuse of process and ought to stay the proceedings.

Staff's Response

¶ 18 On the matter of jurisdiction, Staff argued that this was not an issue of true jurisdiction but rather one of procedure. The Panel's control over its own process and the Rules provided the Panel with the authority to order a hearing on the merits proceed by way of an electronic proceeding.

¶ 19 The sole issue to be decided by the Panel was whether an electronic hearing by way of videoconference was procedurally fair. Staff submitted it was.

ANALYSIS

IIROC's Control over its Own Processes

¶ 20 The broader issue underlying this motion is the ability of IIROC and its Hearing Panels to conduct hearings during a pandemic, and to fashion a hearing process which will allow a just determination of a proceeding on its merits, in an expeditious manner, protecting the legal and procedural rights of all parties while ensuring the safety of all participants and those who may come into contact with them.

The Respondent's Argument on Jurisdiction

¶ 21 The essence of the Respondent's argument is that the Respondent has an absolute right to an in-person oral hearing before the Panel, and the Panel's control over its process, once an oral hearing is scheduled and a Respondent withholds his consent to another form of hearing, is limited to holding an oral hearing or delaying the proceeding indefinitely until such a time as it is possible to do so safely.

¶ 22 The foundation of the argument is that IIROC derives its authority over its members from a mutual contract⁵ to be bound by IIROC's By-laws and Rules, rather than a statute. The terms of the contract are the By-laws and Rules, and any exercise of an IIROC Panel's authority must be done within the strictures of those terms. There is no jurisdiction if the Rules are silent.

¶ 23 The Respondent argues that Rule 8423(2)(i)⁶ states one of the entitlements of a Respondent subject to

⁵ *Deutsche Bank Securities Limited, Re*, 2012 ONSC 1576, paras. 4-5.

⁶ At a hearing on the merits, other than a written hearing, a respondent is entitled (i) to attend and be heard in person,

a hearing on the merits is the right to an in-person attendance before the Panel, which on a plain reading of the Rules requires an oral hearing (defined as a hearing at which parties or their counsel attend before a hearing panel in person). The Panel may not order an electronic hearing as it is defined as a hearing at which persons may hear one another⁷, which does not meet the Respondent's entitlement to attend and be heard in person by the Panel. The Panel may order an electronic hearing if the Respondent consents, which he does not.⁸ Without the consent of a respondent, the Rules limit the Panel to holding an oral hearing or delaying hearings on the merits for an indeterminate time, pending the end of the pandemic.

The Panel Concludes It has Control Over the Hearing Process and its Form

¶ 24 To accept the argument put forward by the Respondent would be to conclude that the ultimate control of the hearing process for hearings on the merits lies with the Respondent, not the Panel. The Panel rejects the argument.

¶ 25 The Panel does not accept that because IIROC's jurisdiction over its members is contractual rather than based in statute, it is without the authority to respond to the unanticipated and the unexpected. It concludes that the general principles framing the Rules lead to the opposite conclusion, that the Panel's control over its process is clear.

¶ 26 Three of the general principles framing the Rules are of particular importance in reaching that conclusion:

- The Rules shall be interpreted and applied to secure a fair hearing and just determination of a proceeding on its merits and the most expeditious and least expensive conduct of the proceeding;
- A hearing panel has authority to control the process of a proceeding before it and may exercise any of its powers on its own initiative, subject to a requirement in the Rules.⁹
- At the request of a party, a hearing panel may provide for any procedural matter that is not provided for in IIROC requirements or the Rules of Procedure by analogy to the Rules of Procedure or by reference to the rules of practice or procedure of another self-regulatory organization or professional association or to the rules applicable to a securities regulatory authority or superior court in the District in which the proceeding occurs.¹⁰

¶ 27 A hearing panel requires control of its own process in order to secure a fair hearing and just determination of a proceeding on its merits, particularly when faced with the challenge of continuing to conduct enforcement proceedings in the face of unanticipated and extraordinary circumstances of an uncertain duration.

¶ 28 The fact the definition of 'electronic hearing' omits the word 'videoconference' does not bar the Panel from ordering an electronic hearing by way of videoconference if it concludes that a hearing on the merits in that form will be fair and safe. Similarly, the Respondent's objections do not form an immovable barrier to the ordering of a videoconference, provided those objections are considered, evaluated and form part of the Panel's considerations in arriving at a decision as to the fairest form of a hearing on the merits. In this instance, these reasons set out the objections and take them into account when assessing the form of the

⁷ Rule 8409(1): "electronic hearing means a hearing held by conference telephone or another form of electronic technology that allows person to hear one another."

⁸ Rule 8409(9)(ii).

⁹ Rule 8403(1)(3).

¹⁰ Rule 8403(4).

hearing.

The Panel's Control of its Process Extends to the Form of a Hearing

¶ 29 It is clear that the Rules give the Panel significant powers to shape and control all procedural steps leading to and including the conduct of a hearing on the merits. The Panel's control of its processes extends to the form of a hearing.¹¹

¶ 30 When determining the form of a hearing on the merits, the Panel must balance the rights and entitlements of the Respondent with the public interest in having the hearing on the merits in a form which minimizes the health risk to all participants while proceeding in an expeditious manner.

Is an Electronic Hearing by way of Videoconference a Procedurally Fair Hearing?

¶ 31 The issue to be addressed is whether a hearing on the merits using videoconferencing technology is responsive to the Respondent's procedural right to a fair hearing.

¶ 32 At a hearing on the merits, other than a written hearing, a respondent is entitled:

- i. to attend and be heard in person,
- ii. to call and examine witnesses and present documentary and other evidence, and
- iii. to cross-examine witnesses as reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding.¹²

¶ 33 When determining whether to hold a hearing as an oral, electronic or written hearing, a hearing panel may consider any relevant factors, including

- i. The nature of the hearing, the subject matter of the hearing and the issues to be addressed, including whether they are issues of fact, law or procedure,
- ii. The evidence to be presented, including whether facts are in dispute and credibility is an issue,
- iii. The cost, efficiency and timeliness of the hearing or the proceeding,
- iv. The fairness of the hearing process to, and the convenience of, each of the parties, and
- v. Accessibility to the public.¹³

¶ 34 It is the conclusion of the Panel that an electronic hearing by way of videoconference offers the Respondent all of the entitlements enumerated in Rule 8423(2). The sole difference between it and an in-person hearing is the physicality of attending. The Respondent and his counsel will be in attendance every day at the hearing, and they will see and hear, and be seen and heard, by the Panel, as will their witnesses. Their right to call and examine witnesses and present documentary and other evidence remains, and their right to cross-examine witnesses as reasonably required for a full and fair disclosure of all matters relevant to the issues in the proceeding may be fully exercised in an electronic hearing.

Consideration of the Factors in Rule 8409(3)

¶ 35 In coming to its conclusion, the Panel considered the nature and subject matter of the hearing and the issues to be addressed. The allegations deal with trading activity regarding allocations of new issues between August 2013 and December 2013. The parties disagree as to whether there are significant issues of credibility and whether the trading activities were improper. The Panel concludes the nature, subject matter and issues

¹¹ Rule 8409.

¹² Rule 8423(2).

¹³ Rule 8409(3)

to be addressed may be properly dealt with at an electronic hearing.

¶ 36 The efficiency and timeliness of an electronic hearing in all of the circumstances is obvious. With the pandemic moving into what is termed a second wave, in-person hearings present risks to all participants. A videoconference will be efficient, and permit the hearing on the merits to move forward in a timely manner despite the pandemic. Cost is also a factor to be considered, and the Respondent raised concerns that technological difficulties might slow down the hearing, increasing the cost to the Respondent. Obviously, as the hearing has not begun, there is no evidence that will happen. It is very difficult to assess the cost of speculative events, however, the Panel is mindful of the concerns raised and will be responsive to specific instances of technological issues as they arise.

¶ 37 Other factors are the fairness of the hearing process to, and convenience of, each of the parties. It is the Panel's conclusion that the hearing process is fair to all parties. All will have an equal opportunity to participate and any limitations of an electronic proceeding will be experienced by all participants. Fairness issues specific to the Respondent are dealt with in some detail, immediately following this discussion.

¶ 38 In arriving at its conclusion, the Panel considered the fairness and convenience to all participants, including witnesses and those who participate in the hearing in an administrative capacity, and their families. The Panel cannot order a hearing process without considering the health risks inherent in an in-person oral hearing. While social distancing and other precautions may be taken, the only risk-free hearing is electronic. It is not fair to require witnesses from out of town or from other countries to take the risk of traveling and exposure to the virus in order to provide in-person testimony.¹⁴ Similarly at risk will be all those who enter and leave the hearing room, and those who come into contact with those who were in the hearing room.

¶ 39 The Panel also considered the subtle pressure that a participant may feel if an in-person hearing is ordered. Those with certain medical conditions may be at greater risk yet feel uncomfortable disclosing such personal information. Others may simply feel the risk is one which they do not wish to take but may feel compelled to do so because of the requirements of their employment or the pressure placed upon them by others to attend. An electronic hearing removes that pressure and the need to make such a decision.

¶ 40 Our decision is also precautionary. Anyone, included Panel members, could be forced to self-isolate at any point before or during the hearing. An in-person hearing would be delayed; an electronic hearing would not.

¶ 41 With regard to the accessibility of the hearing to the public, the Panel understands that the National Hearing coordinator (NHC) will provide the information as requested.

Is an Electronic Hearing Procedurally Fair to the Respondent?

¶ 42 What constitutes a fair hearing is dependent upon many factors. As stated in *Baker v. Canada (Minister of Citizenship and Immigration)*:

...the duty of procedural fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected....the purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.¹⁵

¶ 43 In analyzing the fairness of a videoconferencing hearing, the Panel considered the concerns raised by

¹⁴ It is accepted that Staff's witnesses are located in the United Kingdom, Montreal, London, Ontario, and possibly Florida. There are also quarantine requirements applicable to those traveling from outside the country.

¹⁵ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, paras 22,28.

the Respondent regarding various aspects of a merits hearing held by videoconference.

Is an in-person hearing the ‘gold standard?’

¶ 44 The context for the statement that an oral hearing is ‘the gold standard’ was a motion before a labour arbitrator who was faced with a motion to continue what had previously been an oral in-person hearing by way of video conference, due to the need to observe social distancing. After stating: “I agree with the TTC that an in-person hearing is *preferable*— it is *at least* the gold standard – and ought to be followed wherever possible” the arbitrator found that “an in-person hearing is not possible and may not be possible for some considerable time”.¹⁶ An order was issued to continue the hearing by way of videoconference.

¶ 45 While the Panel does not accept this decision as conclusive authority for an in-person hearing being the ‘gold standard’, it does accept its conclusion that when an in-person hearing is not possible and may not be for some considerable period of time, an electronic hearing is a viable and fair alternative.

Is an In-Person Hearing Required in a Complex Matter with Multiple Witnesses?

¶ 46 The Respondent cited two decisions by a Chair of the Labour Board, one of which cites the conclusion of another Board decision: “that hearings by way of video conference are not appropriate where there are multiple witnesses, the evidence is likely to be time consuming and there are issues of credibility to be determined.”¹⁷ The reasons supporting that conclusion are not included.

¶ 47 In assessing this particular issue, the Panel was helped by *First Global Data Ltd (Re)*¹⁸, the most recent decision of the OSC on holding a merits hearing via videoconference. In a similar motion, a similar argument was made, reliant upon some of the same authorities, regarding the need for an in-person hearing for complex matters of some length. The First Global matter involves 25 witnesses and 40 days of hearing. This matter involves nine witnesses and nine days of hearing.

¶ 48 Vice Chair Mosley noted:

When pressed, the respondents were unable to identify anything about a long or complex hearing that would make it less suitable for a videoconference hearing than a shorter or less complex hearing. When compared to a shorter hearing, a longer hearing is simply more of the same, whether in person or by videoconference. As for complexity, the respondents asserted that complex issues should be addressed in an in-person hearing, but they provide no reason why that should be so.

Indeed, as the Superior Court of Justice held in *Miller v FSD Pharma, Inc.*, “[t]here is nothing about a remote procedure, whether large, complex, and potentially final, or small, straightforward, and interim, that is inherently unfair to either side. This is particularly so now that the legal community has had time to digest the use of virtual hearing technology.”¹⁹

¶ 49 The evidence filed on this motion, consisting of an affidavit from one of the Respondent’s counsel, does not provide clear examples of why in this instance—a hearing involving nine witnesses over nine days regarding trading activity—this matter is too complex to be dealt with by videoconference. The Panel concluded that it can be dealt with by videoconference and it is fair to do so.

Does a videoconference impair defence counsel’s function as an advocate and place barriers restricting

¹⁶ *Toronto Transit Commission v Amalgamated Transit Union Local 113*, 2020 CanLII 28646 (ON LA) at para.15 (emphasis in the original).

¹⁷ *Velimir Raskovic v Bend All Automotive Inc.*, 2018 CanLII 107003 (ON LRB) at para. 4; *Jose Carvalho Aguiar v. Wesdome Gold Mines Ltd.*, 2018 CanLII 1487 (ON LRB).

¹⁸ *First Global Data Ltd (Re)*, 2020 ONSEC 23

¹⁹ *First Global Data, (Re)*, *supra*, paras. 41-42.

the Respondent's participation and relationship with his counsel to such an extent that the hearing becomes unfair?

¶ 50 In the evidence filed on the matter, the affiant set out his personal observations on the difficulties of acting as an advocate through the medium of videoconference. They were addressed in the written argument and Mr. Groia echoed those experiences and concerns in his oral submissions. In summary form, they are as follows:

- The assessment of the credibility of a witness, through observations of body language and cross examination, makes an oral hearing absolutely necessary. Cross examination with a screen interposed between the advocate and the witness poses a significant detriment to the ability to fully and fairly cross examine a witness.
- Similarly, a respondent loses the ability to be personally present at his own hearing, which imposes a barrier. It is a fundamental right to be present at his hearing which an electronic hearing does not permit.
- Technological issues have the potential to compromise the Respondent's ability to defend himself.
- Counsel's ability to effectively defend the Respondent is impeded which in turn impedes the Respondent's right to participate in the hearing. Videoconference significantly hampers the right of counsel and the Respondent to confer.

Assessment of Credibility

¶ 51 Dealing first with the issue of credibility and the importance of an in-person hearing to assess that credibility, the Panel notes that the parties disagree on whether credibility is in issue. Staff is of the view that the issue before the Panel is the proper interpretation of what consequences may or not flow from certain transactional activity. The regulatory consequences of participation in those transactions is disputed. It is the view of Staff that the disputed matters are matters of argument rather than credibility.

¶ 52 Counsel for the Respondent disagrees strongly and maintains that credibility issues are central to the Respondent's defence, which increases his need for an in-person hearing.

¶ 53 The Respondent cited *Law Society of Upper Canada v Fausto Boniferno*, a 2008 decision to support the proposition that an oral hearing was necessary when credibility was in issue. That case dealt with a licensee's motion to recover the costs he incurred in successfully defending himself before the Law Society.²⁰ While the Law Society urged the need for an oral hearing when credibility was in issue, contrary to the written argument put forward by the Respondent, the Panel notes the decision of the Tribunal is silent on the issue.

¶ 54 Also cited was *Maple Leaf Investment Fund Corp. et al.*,²¹ a decision of the OSC in which the Panel found that conducting a hearing on the merits by video conference would present many challenges, including difficulties cross examining and submitting documents to the respondent, and would affect the Panel's ability to assess the respondent's credibility. The Panel was also concerned about the 'significant risk' that the hearing would be disrupted or delayed by technological issues.

¶ 55 *Maple Leaf* was decided in 2010, and dealt with a respondent who was resident in China, a hearing of multiple days and with multiple witnesses. While there is no evidence concerning the technology being used, it is safe to assume that it was less sophisticated and reliable than that which is currently available. It is worth

²⁰ *Law Society of Upper Canada v. Fausto Boniferno*, 2008 ONLSP 56 (CanLII), paras 6 and 19.

²¹ *Maple Leaf Investment Fund Corp. et al.*, 2010 33 OSCP 9851, para 37.

noting that seven years after *Maple Leaf*, in 2017, the OSC heard *Sino Forest* by videoconference²², which was a hearing involving multiple respondents in China, with many months of hearing days. That is not to say that the concerns outlined in *Maple Leaf* were not valid at the time, but simply that the OSC has moved to hold electronic hearings on the merits in matters posing similar issues.

¶ 56 The Panel found the cases set out in *First Global Data* helpful. The OSC did not accept the argument that if credibility was in issue, an in-person hearing was required and noted a line of authorities that emphasized the diminishing importance of demeanour in assessing credibility.²³

¶ 57 In *R v Rhayel*, a criminal case in which the trial judge relied heavily upon his observations of the demeanour to find an accused guilty of sexual assault, which finding was overturned on appeal, the Ontario Court of Appeal noted:

Cases in which demeanour evidence has been relied upon reflect the growing understanding of the fallibility of evaluating credibility based on the demeanour of witnesses....It is now acknowledged that demeanour is of limited value because it can be affected by many factors including the culture of the witness, stereotypical attitudes, and the artificiality and pressure of the courtroom."²⁴

¶ 58 Also helpful was the following observation of the British Columbia Court of Appeal in *R. v Pressley* were cited with approval by the Ontario Superior Court in *Springer v. Aird & Berlis LLP*:

The judge is not given a divine insight into the hearts and minds of the witnesses appearing before him. Justice does not descend automatically upon the best actor in the witness-box. The most satisfactory judicial test of truth lies in its harmony or lack of harmony with the preponderance of probabilities disclosed by the facts and circumstances in the conditions of the particular case.²⁵

¶ 59 From its review of the authorities, the Panel concludes that credibility is assessed on the basis of many factors. The Panel notes that *First Global Data*, in which all agree that credibility is a central issue, will proceed by videoconference and that as part of its review of authorities on the matter, cited two Superior Court cases which rejected the proposition that testimony by videoconference would affect the court's ability to make findings about the credibility of a witness.²⁶

¶ 60 While cross examination with a screen interposed between counsel and the witness may not be ideal in the eyes of the Respondent's counsel, the Panel finds it is not unfair.

The Right of the Respondent to be Present at His Own Hearing is Compromised

¶ 61 The Respondent cited the Court's statement in *R. v Fecteau* that it is a fundamental principle of law that an accused has the right to be personally present at his trial and argued that a lack of an in-person hearing denied this right to the Respondent.²⁷

¶ 62 As the personal liberty of an accused is at risk in a criminal trial, traditionally all criminal trials are in-person. This is an administrative hearing before an administrative tribunal. The Panel is of the view that the Respondent's right to be present at the hearing on the merits is not compromised by an electronic hearing at which he is virtually present in person.

²² As noted in *First Global Data*, *supra*, para 40

²³ *First Global Data*, *supra*, para 44.

²⁴ *R v Rhayel*, 2015 ONCA 377, para 85.

²⁵ *Springer v. Aird & Berlis LLP* 2009 CanLII 15661, para 14.

²⁶ *First Global Data*, (Re), *supra*, para 49, citing *Davies v The Corporation of the Municipality of Clarington*, 2015 ONSC 7353 at para. 35; *Chandra v. CBC*, 2015 ONSC 5385 at paras 20-25.

²⁷ *R. v Fecteau*, 1989 CanLII 7144 (ON SC) para 18.

Technological Issues Could impede the Respondent's Right to a Fair Hearing

¶ 63 Concerns were expressed that a videoconference hearing will be plagued by technological issues. Significant descriptions of problems which have not yet occurred, such as lagging, freezing and sound drops, are in the evidence. The potential for technological issues is not a basis on which to conclude that an electronic hearing is not suitable for a hearing on the merits. Should issues actually occur during the hearing, the Panel will address them at that time.

Counsel's ability to defend the Respondent Impeded

¶ 64 The Respondent argued that counsel's ability to effectively defend the Respondent will be impeded at an electronic hearing. Communications between counsel and the Respondent will be affected, particularly when counsel and the Respondent are not physically in the same room.

¶ 65 The Respondent cited *R. v Fecteau* in which the court found that the opportunity to confer privately with counsel is fundamental for an accused to be able to defend himself.²⁸ The Panel notes that the technology available to the accused and his counsel to confer in 1989 was limited to telephone-television contact, which was not private.

¶ 66 The Panel agrees that the right to confer privately is an important element of any solicitor/client relationship. The technology available does allow for private conversations in 'breakout' rooms. Discussions on the best way to foster the right to confer privately may be held with the NHC, who is conversant with the nuances of the technology used. Any need for an extended conference between solicitor and client can be communicated to the Panel.

¶ 67 The Panel notes that the Respondent may determine he is comfortable attending his counsel's office where, with proper social distancing and other preventative measures, he may participate in the hearing in closer proximity to his counsel. That is a decision to be made solely by the Respondent and is dependent upon his preferences and comfort level.

¶ 68 How ever the Respondent attends the hearing, the Panel will be responsive to his need to confer with counsel.

The Respondent has not established an Electronic Hearing would be unfair

¶ 69 The Respondent argues that the deficiencies in an electronic hearing render every aspect of the hearing unfair, as the Panel noted in its examination of the enumerated deficiencies. The Panel is not persuaded that the deficiencies alleged prejudice the Respondent such that an in-person oral hearing must be ordered.

¶ 70 Much of what has been put forward reflects the preferences of the Respondent and his counsel, rather than true prejudice. A hearing by videoconference does not equal the denial to be heard, and cross examination by videoconference is not the loss of the right to fully and fairly cross examine witnesses. The fundamental right to be present at a hearing is not lost because the presence is virtual rather than personal.

¶ 71 In his oral submissions, Mr. Groia stated that an electronic hearing was a form of 'second class justice' which would hamper his ability to create a record on behalf of his client. He also submitted that only in extraordinary cases should a respondent have his rights determined in an electronic hearing.

¶ 72 The Panel disagrees that an electronic hearing provides a substandard form of justice or creates a substandard record. This is an administrative hearing, not a criminal matter. The Respondent is defending allegations made by a regulator, not facing serious charges under the Criminal Code and other penal statutes.

¶ 73 As noted in *Baker v Canada*, the purpose of participatory rights is to ensure administrative decisions

²⁸ R v Fecteau, *supra*, para 18.

are made using a fair and open procedure with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.²⁹ In the Panel's opinion, an electronic hearing will allow the full exercise of those participatory rights before this tribunal.

¶ 74 As stated in *First Global Data*, it should not be presumed, without a persuasive basis for the presumption, that a videoconference hearing on the merits cannot be successfully concluded or that it will be unfair.³⁰ The Panel is of the view that no persuasive basis was given.

Abuse of Process and the Issuance of a Stay

¶ 75 As noted by the Supreme Court of Canada in *Blencoe v British Columbia (Human Rights Commission)*, abuse of process is a common law principle invoked to stay proceedings where to allow them to continue would be oppressive.³¹ For there to be an abuse of process, the proceedings must be unfair to the point they are contrary to the interests of justice. Cases of this nature will be extremely rare.³²

¶ 76 The Panel is not persuaded that the ordering of an electronic hearing is unfair and is an abuse of process warranting the issuance of a stay.

Delaying until an oral hearing can be held safely

¶ 77 The Respondent argues that there is no urgency in proceeding with this matter. He is not currently in the industry and has not been for three years. He notes that there were delays in the investigation by Staff, demonstrating that Staff's position (that the matter must proceed rather than await a time in which oral proceedings might be held safely) is newly held. The Respondent argues that his right to a fair hearing should not be compromised by virtue of Staff's desire to move the matter forward.

¶ 78 The Panel must conduct proceedings in a timely manner, as set out in Rule 8409(3)(iii). As noted previously, at the time of the writing of these reasons, Ontario and particularly Toronto, is in the second wave of the pandemic. There is no means by which to measure the extent of the delay which will occur if this matter was to await a time when an oral hearing might be safely held.

¶ 79 As noted by in *First Global Data*, delayed hearings are less timely and more likely to be expensive because of the additional time required to refresh memories of those involved.³³ It also does not serve the public interest to delay matters involving the rules governing capital markets and the allocation of new issues. The Statement of Allegations was issued July 31, 2019, the NOH on August 1, 2019, and the Respondent's Response on September 13, 2019.

¶ 80 It important to have the matter resolved in a timely fashion, which requires the hearing on the merits proceed. The Panel does not accept that doing so will compromise the Respondent's right to a fair hearing.

The Processes being Followed by the Courts and other Tribunals

¶ 81 Both Staff and the Respondent provided information concerning the processes being followed in various courts and tribunals across Canada. While informative they are not determinative. In certain cases, they are simply not applicable. As set out in the evidence, criminal trials are presumptively in-person, unless all parties consent to proceed by way of videoconference. As the liberty of the accused is at stake, the importance of an in-person trial is heightened. While the allegations against the Respondent are serious, they

²⁹ *Baker v Canada, supra*, para 28.

³⁰ *First Global Data, supra*, para 68.

³¹ *Blencoe v British Columbia (Human Rights Commission)*, [2000] ACS no 43, para 116.

³² *Blencoe, ibid.*, para 120.

³³ *First Global Data, supra*, para. 22

are regulatory offences being heard by an administrative tribunal.

¶ 82 It is clear that holding in-person hearings and trials varies across the country. As set out in *Arconti v Smith*³⁴, the Superior Court in Ontario has held a number of different kinds of proceedings by videoconference. While various commissions and IIROC in British Columbia may have scheduled in-person oral hearings, it is not clear that any have occurred. In Toronto, the OSC is not holding any in-person hearings, and as noted in *First Global Data*, will be proceeding with lengthy hearings on the merits by way of videoconference for the foreseeable future.

¶ 83 Ultimately the decision on whether to proceed with an electronic hearing on the merits is that of the Panel. As noted in *Best Practices*, IIROC has determined that hearings will be conducted electronically until such time as in-person hearings become feasible, which means not only possible but safe for all participants. Any party who objects to proceeding by an electronic proceeding may bring a motion, such as this one. A decision will then be made if the prejudice alleged is sufficient to warrant a different form of hearing.

¶ 84 During oral submissions, Mr. Groia emphasized the NHC offer of an in-person hearing at Atchison & Denman, made in August 2020, and the statement in *Best Practices* that hearings be conducted electronically ‘until such time as in-person hearings become feasible.’ Mr. Groia argued that as the NHC offered an in-person hearing, it was feasible, and the presumptive default to an electronic hearing was eliminated.

¶ 85 The ultimate decision on the form of the hearing lies with the Panel. In all of the circumstances currently existing and for the reasons set out in this decision, the Panel has determined that an electronic hearing is the appropriate process to be followed.

CONCLUSION

¶ 86 In summary, the Respondent has failed to establish that an electronic proceeding will cause him prejudice sufficient to order a delay in proceeding until it is safe to hold an in-person oral hearing.

¶ 87 The Panel has concluded that, in the circumstances an electronic hearing by videoconference respects the rights of the Respondent and provides a safe and fair hearing on the merits.

¶ 88 The hearing on the merits will proceed as scheduled as an electronic hearing using videoconference.

Dated at Toronto this 5 day of October 2020.

Donna Campbell

Debbie Archer

Mary Savona

ORDER

WHEREAS on September 23, 2020, a motion was brought by the Respondent, pursuant to Section 8413 of the Consolidated Enforcement, Examination and Approved Rules of IIROC, requesting an Order that the hearing in this matter continue to be conducted as an oral hearing, and alternatively, an Order permanently staying the matter on the grounds that IIROC has no jurisdiction to continue with the hearing in any other form;

AND UPON reviewing the written materials filed by the Respondent and Staff of IIROC, and on hearing the oral submissions of the Respondent and Staff;

³⁴ *Arconti v Smith*, 2020 ONSC 2782

THIS HEARING PANEL ORDERS THAT:

1. The Respondent's motion is dismissed for reasons to follow;
2. The Hearing on the Merits shall proceed by way of videoconference;
3. The Hearing on the Merits shall be heard from October 13 -16 and October 19 – 23, 2020.

DATED at Toronto, Ontario this 24 day of September 2020.

"Donna Campbell"

Donna Campbell, Chair

"Debbie Archer"

Debbie Archer

"Mary Savona"

Mary Savona

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