Canadian Securities Law News

February 2018
Number 289

Canadian Securities Administrators 3

ICE Futures Canada 3

TSX Company Manual............. 3

Provincial Updates 4

Recent Cases...... 4

INSIDER TRADING AND TIPPING: ONTARIO COURT OF APPEAL SETS BOUNDARIES FOR THOSE IN A "SPECIAL RELATIONSHIP"

— By Alan P. Gardner, Joseph N. Blinick, and Douglas Fenton. © Bennett Jones LLP. Reproduced with permission.

A recent decision by the Ontario Court of Appeal has provided a powerful reminder to capital market participants to exercise caution before trading on a tip or discussing material non-public information—lest they run afoul of the prohibitions on insider trading and tipping in the *Securities Act*.

In *Finkelstein v. Ontario Securities Commission*, 2018 ONCA 61 [*Finkelstein*], the Ontario Court of Appeal considered the definition of a "person in a special relationship with an issuer," as it applies to an individual who learns of material non-public information from "successive tippees." In particular, the decision provides guidance as to when an individual who receives material non-public information will be found to be in a special relationship on the basis that they "ought reasonably to have known" that the source of that information was in a special relationship with the issuer.

Insider Trading and Tipping Under the *Securities Act*

The *Securities Act* prohibits any person in a "special relationship" with an issuer from trading in securities of the issuer while in possession of material non-public information ("insider trading") or from informing any other person of the material non-public information, except in the necessary course of business ("tipping").

Under the *Securities Act*, a "person in a special relationship" is defined to include insiders, directors, officers, and employees of the issuer. As a result, these persons are automatically captured by the insider trading and tipping prohibitions. The definition of a "person in a special relationship" also captures any person who learns of material non-public information from someone the individual "knows" or "ought reasonably to know" is in a special relationship with the issuer. Importantly, this can capture not only an individual who gets a tip directly from an insider, but also those who receive a tip from a successive tippee. The Court of Appeal's decision in *Finkelstein* provides important guidance as to whether a tippee "ought to have known" that the other person was in a special relationship with the issuer and clarifies the outer boundaries of liability for those down the "tipping chain".

Prior Proceedings

In 2014, the Ontario Securities Commission (OSC) commenced proceedings against five individuals for alleged violations of the insider trading and tipping prohibitions in the *Securities Act* by recommending to family, friends and clients that they purchase shares

LexisNexis

of Masonite International Corporation, prior to the disclosure of a pending takeover bid. The OSC alleged that information about the proposed takeover bid (which was material non-public information) flowed through a chain of five people, beginning with a lawyer (Finkelstein) who was acting as Masonite's counsel with respect to the bid Finkelstein conveyed material facts about the takeover bid to an investment advisor friend (Azeff), who in turn informed an accountant (L.K), who passed the information on to another investment advisor (Miller), who conveyed the information to his associate (Cheng). Azeff also conveyed the material non-public information to another investment advisor (Bobrow). The OSC commenced proceedings against each individual, other than L.K, the accountant.

The OSC hearing panel found that each were in a special relationship with Masonite and had engaged in illegal insider trading and tipping. All five appealed to the Divisional Court, where only Cheng was successful. Since Cheng was the furthest removed from the source of the material non-public information (having received the information fourth-hand), the Divisional Court's decision suggested it may be more difficult to establish that a tippee was in a "special relationship" with an issuer the further they are down the "tipping chain." The OSC appealed the Divisional Court's decision to the Court of Appeal.

The Court of Appeal

The issue for the Court of Appeal was whether OSC had properly identified the circumstances in which an individual that learns of material non-public information "ought reasonably to have known" that the tipper was in a special relationship with the issuer.

The Court of Appeal expressly endorsed the framework applied by the OSC hearing panel for determining whether "a person standing in the shoes of the tippee would reasonably assume that the material non-public information passed on to him originated from a person" in a special relationship with the issuer. While not purporting to outline an exhaustive list of factors, the Court of Appeal found it relevant to consider:

- the relationship between the tipper and tippee;
- the professional qualification of the tipper (and, in particular, whether the tipper works in a setting where transactions and material non-public information are discussed);
- the professional qualifications of the tippee (and, in particular, whether the tippee's profession puts the tippee in a position to know that he/she cannot take advantage of confidential information);
- the nature and detail of the material non-public information;
- the time between the tippee receiving the material non-public information and trading;
- any intermediate steps taken by the tippee before trading to verify the material non-public information (with the absence of any steps to verify the information suggesting that the tippee believed the tipper to be in a special relationship);
- whether the tippee had ever owned the particular stock before; and
- whether the trade was significant, given the size of the tippee's portfolio.

In weighing these factors, the Court of Appeal indicated that the inference that the tippee "ought reasonably to have known" that the tipper was in a special relationship will be stronger where the tippee is a market registrant. In this regard, the Court of Appeal adopted the OSC's view that "a higher standard of vigilance and inquiry must be expected from a registrant than from someone who is a retail investor."

Applying these factors, the Court of Appeal determined the OSC hearing panel had properly found Cheng to be in a special relationship with Masonite at the time he traded in securities of the company. The Court of Appeal therefore overturned the Divisional Court, and restored the OSC hearing panel's decision.

Takeaways

In establishing a framework for when a tippee "ought reasonably to have known" that the tipper was in a special relationship with the issue, *Finkelstein* clarifies the outer boundaries of liability for insider trading and tipping down the "tipping chain." The decision also provides a powerful reminder that market participants must exercise caution before acting on a tip or discussing material non-public information. In particular, *Finkelstein* suggests that before trading on a

tip, one should make reasonable inquires as to the source of the tip—with a view to identifying if the information is material non-public information and if the source of the tip is in a special relationship with the issuer. Simply being far removed from the original source of the material non-public information will not protect a market participant from liability for insider trading or tipping under the *Securities Act*.

Alan Gardner *is the Head of Securities Litigation, practising in the areas of securities and commercial litigation, with a focus on securities and other regulatory investigations. Alan represents clients that include investment banks, broker-dealers, technology companies, resource companies and manufacturers, as well as board members, senior management and special committees of public companies involved in regulatory investigations or shareholder litigation.*

Joseph Blinick *is a litigation associate with a practice focused on complex corporate commercial disputes, securities litigation, class actions as well as bankruptcy and insolvency matters. He has motion (including injunction), application and trial experience before the Ontario Superior Court of Justice, the Commercial List and a number of administrative and regulatory boards and tribunals.*

Doug Fenton *is an articling student, having previously summered with the firm. After completing his articles, he will be clerking at the Ontario Court of Appeal. He is a graduate of the University of Toronto (Juris Doctorate) and Queen's University (Bachelor of Arts (Honors), Politics).*

CANADIAN SECURITIES ADMINISTRATORS

CSA Staff Notice 21-322

The CSA has published CSA Staff Notice 21-322 *Applicability of Regulation to the Operations of MTFs or OTFs in Canada* to advise that the operations of a number of platforms operating in the European Union, as of January 3, 2018, will become trading venues offering Canadian participants the ability to trade equities and certain derivatives. The CSA recommends that trading venues should contact relevant jurisdictions to discuss the applicability of the local regulatory framework to their operations. For more information, please see CSA Staff Notice 21-322, which will be reproduced in Volume 1 of the *Canadian Securities Law Reporter* at ¶ 2152.

ICE FUTURES CANADA

Rules 1, 2, 3, 4, 8, 9, 10, 11, 12, 15, and 24 Amended

The amendments to the Rules have been incorporated in Volume 1 of the *Canadian Stock Exchanges Manual* starting at ¶ 900-713.

TSX COMPANY MANUAL

Appendix A: Original Listing Application Replaced

The amendments to the Appendix were incorporated in Volume 2 of the *Canadian Stock Exchanges Manual* starting at ¶ 1450-001.

Forms 4, 4B, and 11 Replaced

The amendments to the Forms were incorporated in Volume 2 of the *Canadian Stock Exchanges Manual* starting at ¶ 1450-301.

Notices of Approval Dated December 14, 2017 and February 1, 2018 Added

The Notices of Approval were incorporated in Volume 2 of the *Canadian Stock Exchanges Manual*.

PROVINCIAL UPDATES

Ontario

OSC Staff Notice 11-739

The OSC has revised its list of new instruments in OSC Staff Notice 11-739 *Policy Reformulation Table of Concordance and List of New Instruments*. The revised notice will be reproduced in Volume 3A of the *Canadian Securities Law Reporter* at ¶ 490-128l.

OSC Staff Notice 11-742

OSC Staff Notice 11-742 *Securities Advisory Committee* has been revised to publish the names of the new members of the SAC. For further information, please refer to OSC Staff Notice 11-742 (Revised), which will be reproduced in Volume 3A of the *Canadian Securities Law Reporter* at ¶ 490-128o.

OSC Staff Notice 21-711

The OSC has published OSC Staff Notice 21-711 *Multilateral Trading Facilities—Exemption from Requirement to be Recognized as an Exchange* to advise that Bloomberg MTF has applied for, and the Commission has issued, an interim order exempting Bloomberg MTF from the requirement to be recognized as an exchange, subject to the terms and conditions set out in the order. The Consultation Paper will be reproduced in Volume 3A of the *Canadian Securities Law Reporter* at ¶ 490-241.

RECENT CASES

Administrative Monetary Penalties

British Columbia Court of Appeal, December 1, 2017

Rashida Abdulrasul Samji (the "Appellant"), a notary public, began operating a classic Ponzi scheme in 2003. She told investors their funds would be used in connection with a private winery and they would receive a 12% annual return. In reality, the Appellant was using the funds for personal expenses and repaying old investors with new investors' money. The Appellant took over $100 million from 200 investors over a period of nine years. In July 2014, a Panel of the British Columbia Securities Commission (the "Commission") found that the Appellant had perpetrated fraud contrary to paragraph 57(*b*) of the British Columbia *Securities Act,* RSBC 1996, c. 418 (the "Act"). In January 2015, the Commission imposed various sanctions against the Appellant pursuant to sections 161 and 162 of the Act, including: permanent market participation bans; prohibitions from acting as a director or officer of any issuer; and an administrative monetary penalty of $33 million (the "AMP") to reflect the seriousness of the misconduct. In January 2012, the RCMP commenced an investigation into the Appellant's activities and charged her with 14 counts of theft over $5,000 and 14 counts of fraud over $5,000 under the *Criminal Code*, RSC 1985, c. C-46 (the "Code"). The Appellant sought a stay of the criminal proceedings pursuant to subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, 1982, c. 11 (the "Charter"). Among other things, she argued that the AMP was a "true penal consequence" and therefore paragraph 11(*h*) of the Charter precluded prosecution against her under both the Act and the Code. A judge of the British Columbia Provincial Court dismissed the Appellant's application (see 2016 CSLR ¶ 900-646), and subsequently imposed a sentence of six years' imprisonment for the fraud convictions (see 2016 CSLR ¶ 900-663). The Appellant appealed to the British Columbia

Court of Appeal (the "Court") on the grounds that the trial judge erred in law by finding, among other things, that the AMP did not constitute a true penal consequence and that subsection 11(*h*) of the Charter did not preclude the criminal proceedings.

The appeal was dismissed. The Court began by, among other things, reviewing the key legislation, including paragraph 11(*h*) of the Charter which prohibits "any person charged with an offence" to be tried for the same offence twice. The key issue before the Court, as it was before the trial judge, was whether the Appellant was a person "charged with an offence". As a question of law, the applicable standard of review was correctness. The Court noted that the case of *R. v. Wigglesworth*, [1987] 2 SCR 541 ("*Wigglesworth*"), was binding and instructive. There, the Supreme Court of Canada developed a two-part test to determine if a person was "charged with an offence", finding that "a matter can fall within s. 11 because (1) it is a criminal proceeding by its nature, or (2) a conviction in respect of the offence may lead to a true penal consequence." In the case at bar, there was no dispute that the section 161 proceeding was not criminal in nature. Instead, the Appellant's argument was that the AMP was a "true penal consequence", and this required the Court to take a retrospective approach in assessing this claim. Further from *Wigglesworth*, a "true penal consequence" could be "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity." In *Guindon v. R*., 2015 SCC 41, the Supreme Court of Canada established additional factors to consider in determining whether a sanction was a true penal consequence, including: the magnitude of the penalty; what the penalty would be used for; sentencing principles; and stigma. The Appellant argued the AMP was a "true penal consequence" because the magnitude was so excessive it was punitive, criminal sentencing principles were used by the Commission in fashioning the sanctions, and the AMP stigmatised the Appellant and was a "virtual life sentence in debtor's prison with no hope of escape". The Court found, among other things, that: while the AMP was large, the Appellant's misconduct was substantial and therefore the AMP was not out of proportion, and sizable penalties were sometimes necessary to deter non-compliance and not just be a "cost of doing business" (see *Rowan v. Ontario Securities Commission*, 2012 ONCA 208); when fashioning the sanctions, including the AMP, the Commission had applied the established factors to consider to achieve protection of the markets and investors and prevention of misconduct—general deterrence was one of the accepted factors, and while it was also used in criminal sanctions, in this case, it was to deter similar conduct, not to denounce the Appellant's conduct and reflect the extent of her moral blameworthiness; and the trial judge was correct in finding that the stigma resulted from the Commission's findings rather than the AMP and that the Appellant would not be imprisoned if she was unable to pay the AMP, and that she was also free to appeal the amount. Accordingly, the Court concluded that the trial judge was correct in finding the AMP was not a true penal consequence and therefore the Appellant was not entitled to Charter protections.

Justice Hunter, while agreeing with the Court that the appeal should be dismissed, wrote separately that he would have done so on a prospective basis. He essentially argued that under the *Wigglesworth* test, the only question to be answered was whether the administrative penalties available to the Commission could constitute "true penal consequences", and there was no need to specifically review the AMP. A review of case law demonstrated that numerous courts have found that administrative penalties available to commissions were not "true penal consequences" (see *Lavallee v. Alberta Securities Commission*, 2010 ABCA 48), because, among other things, they would be used towards the purposes of the commissions. Accordingly, Justice Hunter would have disposed of the appeal on the basis that the administrative monetary penalties available to the Commission could not result in "true penal consequences", and therefore the Appellant was not "a person charged with an offence" and not entitled to the protection of paragraph 11(*h*) of the Charter.

R. v. Samji, 2018 CSLR ¶900-717

Review of Sentence

Alberta Court of Queen's Bench, December 12, 2017

On February 8, 2016, Jeremy James Peers (the "Appellant") pleaded guilty to 11 counts of breaches of the Alberta *Securities Act,* RSA 2000, c. S-4 (the "Act"). The Appellant did not dispute that his misconduct included: acting as a dealer of and advisor in securities without registration under the Act; distributing securities without a prospectus; making statements he knew or reasonably ought to have known were misleading or untrue; and participating in an act or course of conduct that perpetuated a fraud on investors. In sentencing submissions, the Appellant sought a conditional sentence order in the range of 18 months, while the Crown recommended incarceration in the range of two to two-and-a-half

years, plus other orders under the Act. The sentencing judge ordered incarceration of three-and-a-half years, as well as other orders under the Act as requested by the Crown. Specifically, he ordered that three groups of concurrent sentences be served consecutively: for two counts of fraud—two years on each count to be served concurrently; for three counts of non-registration and prospectus violations—six months on each count to be served concurrently; for six counts of misrepresentation—one year on each count to be served concurrently. The sentencing judge had differed from the Crown's recommendation of one year for each fraud count, finding that two years of incarceration was necessary for deterrence and denunciation. He also found that the lack of a criminal record and absence of prior violations of the Act were neutral factors, and he provided no warning in advance to the parties that he was considering going beyond the Crown's recommendations. The Appellate appealed to the Alberta Court of Queen's Bench on the basis that the sentencing judge erred: in principle by refusing to treat the absence of a criminal record as a mitigating factor; and by failing to alert counsel that his decision could exceed the Crown recommendations to an extent that could merit appellate review.

The appeal was dismissed. The Court began by noting that the parties had agreed that the standard of review on sentencing decisions was deference – judges at first instance had broad discretion to impose the sentence they considered appropriate and within the law (see *R. v. Lacasse*, [2015] 3 SCR 1089). A court could vary a sentence if it was found to be "demonstrably unfit, where the sentencing judge erred in principle, failed to consider a relevant factor or over-emphasized appropriate factors" (see *R. v. M.(C.A.),* [1996] 1 SCR 500). Turning to the first ground of appeal, the Court noted that the lack of a criminal record or prior violations was always a relevant consideration, but to what extent it was a mitigating or aggravating factor depended on the specific circumstances. In this case, the sentencing judge's treatment of no criminal record as neutral did not amount to an error in principle, as it was within his discretion to do so. On the second ground, the Crown conceded that the failure of the sentencing judge to notify counsel of the potential for a sentence exceeding the Crown's recommendation typically merited some appellate review, since an accused was entitled to reasonable notice of the penalty he faced and an opportunity to make submissions on the same, just as the Crown was entitled to explain its position (see *R. v. Keough*, 2012 ABCA 14, "*Keough*"). However, in *Keough*, the Court also found that a sentencing judge was obliged to impose a fit sentence, and exceeding a recommendation and failing to give notice was not, on its own, a reviewable error. The Court found that *Keogh* was binding, and in reviewing the sentences imposed in analogous cases where fraud was involved (where ranges of two to three years was typical), the sentencing judge's decision to impose a term on the higher end was justified given that the Appellant's fraud involved several vulnerable victims, breaches of trust, substantial investor losses, the personal gain of the Appellant and his family members, and the lack of restitution. Ultimately, although the Court would have preferred that the sentencing judge alerted counsel to his concerns, the sentence imposed was "neither unreasonable nor demonstrably unfit in all of the circumstances" and the appeal was dismissed.

R v. Peers, 2018 CSLR ¶ 900-718

Definition of "Security"

Alberta Court of Appeal, December 11, 2017

Rand Tyler Stevenson (the "Appellant") was charged with several offences under the Alberta *Securities Act*, RSA 2000, c. S-4 (the "Act") flowing from his raising of funds from the public through "Loan Agreements". He was acquitted at trial as the judge found that the Loan Agreements were "simply contracts between the parties and should be enforced in accordance with the intention of the parties and the normal rules of contract law" (see *R. v. Stevenson*, 2015 ABPC 96). The Loan Agreements, entered with 24 Alberta residents, provided that after a term of six months, a return ranging from four to 200 times the original amount advanced would be returned from "OCI". The investors understood that OCI and the Appellant were using the funds to assist an individual in obtaining a large inheritance in the Philippines, and the promised returns would come from the estate proceeds owed as a result of the assistance. More specific clauses of the Loan Agreements included that in the event of the expiry of the six-month term, any outstanding principle would become a liability of OCI, and the investment was a loan and "not subject to any securities law, regulation, rules or forms of conduct … [and] does not constitute the transaction of any form of securities, stocks, bonds, or other financial instrument subject to regulation by Government under securities law." On appeal, the Alberta Court of Queen's Bench reversed the trial judge's decision, finding, among other things, that the Loan Agreements fit into four of the definitions of "security" in the Act—these being: "(ii) any document constituting evidence of title to or interest in the capital, assets, property,

profits, earnings or royalties of any person or company; ... (v) any bond, debenture, note or other evidence of indebtedness; ... (ix) any profit-sharing agreement or certificate; ... (xiv) any investment contract"—and that there was no blanket exemption for "private transactions" (see *R. v. Stevenson*, 2015 ABQB 740). The Appellant appealed to the Alberta Court of Appeal (the "Court").

The appeal was dismissed. The Court began its analysis by noting that none of the facts surrounding the Loan Agreements were in dispute. The only question was whether the Loan Agreements constituted "securities" as defined in the Act, which meant the standard of review was correctness (see *R. v. Shepherd*, 2009 SCC 35). The Court's analysis then turned to each of the points raised by the Appellant. On the Appellant's argument that the Loan Agreements were "simply contracts between the parties and should be enforced in accordance with the intention of the parties and the normal rules of contract law", the Court found that this definition was unhelpful in determining the application of the Act, because when "viewed in isolation", a distribution or sale of securities was always a contract. In the Court's view, the Act was intended to be "broadly worded legislation, designed to cover virtually every method by which money could be raised from the public." The Court rejected the Appellant's argument that a "more realistic interpretation of the Act was needed, or else all sorts of routine transactions would be caught by it," opining that the Act and its regulations "have numerous provisions designed to deal with overbreadth". These examples included exemptions from prospectus requirements, and exemptions for trades of securities to close friends or business associates of the issuer's directors or officers. The Appellant also attempted to rely on the U.S. case of *Reves v. Ernst & Young*, 494 US 56 (1990) ("*Reves*"), which involved the interpretation of the term "any note" in the definition of "security" in the *Securities Exchange Act of 1934*. In that case, the U.S. Court held that all notes were presumed to be securities, but this presumption was rebuttable if certain factors were considered, including: if the motivation was investment with a view to a profit and not short term financing, it was likely a security; if there was a plan of distribution and common trading, it was likely a security; if there was a public expectation the notes were securities, they were likely securities; and if there was another regulatory scheme that reduced the risk of the instruction, then the application of securities legislation may be unnecessary. Although noting there was no apparent need for any judicially created exemptions to the securities regime in Alberta, the Court found that if *Reves* did apply to the case before it, the Loan Agreements would have been found to be securities under the *Reves* test. The Loan Agreements expressly stated that the loans were understood to result in a profit flowing from the corporation's activities, and if the profit was delayed, the loans would be placed on the books and become a long-term investment. The Court also noted that, even if it was wrong on the application of the *Reves* test, the Loan Agreements also met the other components of the definition of "securities": i.e., "evidence of indebtedness"; "profit-sharing agreement"; and "investment contract". The Court also held that the terms in the Loan Agreements stating they were not securities or subject to the Act were ineffective and irrelevant because it was "impossible for those raising funds from the public to contract themselves out of the [Act]".

R. v. Stevenson, 2018 CSLR ¶ 900-719

Definition of "Client"

Ontario Securities Commission, December 4, 2017

Earl Marek (the "Applicant") worked for Macquarie Private Wealth Inc. ("Macquarie") and was registered with the Investment Industry Regulatory Organization of Canada ("IIROC"), a self-regulatory organization ("SRO"). In January 2012, the Applicant met with two brothers, PL and DL (the "L Brothers"), to discuss the purchase of Facebook shares prior to the initial public offering, which the Applicant purportedly had access to. The Applicant indicated that the purchases would go through Macquarie, which would charge an administration fee. The L Brothers each agreed to purchase 1,000 shares for USD $28 per share. In February 2012, the Applicant instructed the L Brothers to send their funds directly to New Economy Holdings Limited via Cayman Institutional Bank, a company set up to broker the transaction with a Facebook representative. The Applicant subsequently met with the L Brothers to discuss the performance of the Facebook shares and other investments. In late 2012, PL opened an account at Macquarie in the name of the company he owned, and DL provided the Applicant with a completed new client account form. By June 2013, neither of the L brothers had received any confirmation of receipt of the Facebook shares. After numerous inquiries, the Applicant advised the L Brothers that the Facebook share purchases were an "off-book opportunity" that had nothing to do with Macquarie. The L Brothers never received their shares nor the return of their funds. In October 2016, an IIROC hearing panel found that the Applicant had contravened an IIROC rule by facilitating off-book share purchases for two clients without the

knowledge and approval of his member firm. In February 2017, the IIROC panel ordered that the Applicant to be suspended from registration for one year, and that he pay a fine of $50,000. The Applicant applied to the Ontario Securities Commission (the "Commission") for a review of the decision under section 21.7 of the Ontario *Securities Act,* RSO 1990, c. S.5 (the "Act"). As there was no dispute that the L Brothers' purchases of the Facebook shares were off-book or that the Applicant facilitated the transactions, the only issue in dispute was whether the L Brothers were clients during the impugned transactions.

The application was dismissed. The IIROC Panel's finding that the L Brothers were clients of the Applicant at the time of the Facebook share purchase was correct and supported by the evidence. Since there was no definition of "client" in the Act, and there were no conclusive authorities or regulatory provisions to provide firm guidance on how to establish whether a client relationship existed, the Panel reviewed non-exhaustive factors it considered appropriate, with consideration always given to the twin purposes of the Act. The first factor was whether the impugned activity required registration. The Panel noted that in a client and advisor relationship, the client was typically at a disadvantage by not being knowledgeable in the complexities of securities transactions, and the regulatory code governing registrants mitigated investor risks. The Panel found that, at their initial meetings, the Applicant had engaged in conduct typically performed by an advisor (i.e., offering advice), and this gave rise to a presumption of a client relationship. The second factor was the treatment of the L Brothers' funds. The Applicant argued that since their funds did not go to Macquarie, it should have been clear to them that they were not in a client relationship with Macquarie and by extension the Applicant. However, the L Brothers had been initially told that Macquarie would be facilitating the transaction, and once they received the instructions to direct the funds to the Cayman bank, they were under no obligation to understand the route. It was reasonable for them to infer that the third-party recipient of the funds was merely an agent. The third factor was whether any benefit was obtained. The Applicant argued that "the hallmark of an IIROC client relationship is compensation: if the registered representative does not receive compensation for the investment then there is no client relationship." The Panel found that this proposition was incorrect, but also noted that the Applicant had received a benefit (i.e., the ability to manage the shares in the Macquarie account), and the L Brothers had been told a fee would be paid to Macquarie, which supported an inference that they were clients of the firm. Similarly, the Panel found the fact that the accounts were not opened until later was not indicative of whether a client relationship existed either, because to accept that premise would undermine investor protection (i.e., an advisor could avoid his obligations by delaying the paperwork). Investor belief was another factor, and, while not determinative, it was to be given weight. Given the circumstances, the L Brothers' belief that they were clients at the time of the Facebook share purchase was reasonable, and the Applicant had done nothing until June to disabuse them of that notion. Therefore, having found that the IIROC panel's decision was correct, there was no reason for the Panel to interfere and substitute a decision.

Re Marek, 2018 CSLR ¶ 900-720

CANADIAN SECURITIES LAW NEWS

Published monthly as the newsletter complement to the *Canadian Securities Law Reporter* and the *Canadian Stock Exchanges Manual* by LexisNexis Canada Inc. For subscription information, contact your Account Manager or call 1-800-387-0899.

For LexisNexis Canada Inc.

Jaime Latner, LLB,
Content Development Associate
905-479-2665
email: jaime.latner@lexisnexis.ca

© 2018, LexisNexis Canada. All rights reserved.

Customer Support
Phone: 1-800-387-0899
Email: service@lexisnexis.ca
Customer Service is available from 7 a.m. to 11 p.m. (ET) Monday to Friday, and from 9 a.m. to 11 p.m. (ET) on Weekends.

Notice: *This material does not constitute legal advice. Readers are urged to consult their professional advisers prior to acting on the basis of material in this newsletter.*

LexisNexis Canada Inc.
111 Gordon Baker Road
Suite 900
Toronto, Ontario
M2H 3R1

LexisNexis