In the Court of Appeal of Alberta

Citation: Bahcheli v. Alberta Securities Commission, 2007 ABCA 166

Date: 20070518
Docket: 0601-0127-AC
Registry: Calgary

Between:

Tumer Salih Bahcheli

Appellant

- and -

Alberta Securities Commission and
The Investment Dealers Association of Canada

Respondents

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Ronald Berger
The Honourable Mr. Justice Clifton O'Brien

Reasons for Judgment Reserved of the Honourable Mr. Justice O'Brien
Concurred in by the Honourable Madam Justice Conrad
Concurred in by the Honourable Mr. Justice Berger

Appeal from the Whole of the Decision by
the Alberta Securities Commission
Dated the 24th day of April, 2006
Filed on the 26th day of April, 2006
(Docket: F/00300)

Reasons for Judgment Reserved of
The Honourable Mr. Justice O'Brien

INTRODUCTION

[1] The Alberta District Council of the Investor Dealers Association of Canada (IDA) dismissed a disciplinary charge brought by the IDA against the appellant, Bahcheli. The IDA seeks to appeal the dismissal of the charge to the Alberta Securities Commission (ASC). The ASC has ruled that the IDA is entitled to do so.

ISSUES

[2] This appeal raises the following issues:

(a) Does the IDA have a right to appeal a decision of its District Council to the ASC?

(b) If so, was the appeal served on a timely basis?

DECISION

[3] The *Alberta Securities Act*, R.S.A. 2000, c. s-4 (the "*Act*") does not grant the IDA a right of appeal from either its own decision or a decision of its Council. Section 73 of the *Act* allows a person or company directly affected to appeal "...a decision... of a ... self-regulatory organization". There is no provision for an appeal from a decision of a committee, council or other body of the IDA. Thus, for appeal purposes, the decision of the District Council must be treated as a decision of the IDA itself. Here, the IDA would be appealing its own decision, which it cannot do. On a proper construction of the *Act*, I am satisfied that the IDA is not a person or company directly affected with the right to appeal its own decision. In any event, the appeal was served out of time.

[4] As a result, the appeal of Bahcheli is allowed.

FACTS

[5] The facts and background are set out in detail in the decision of the ASC, dated April 24, 2006, *Re Bahcheli*, 2006 ABASC 1293. For the purposes of this appeal, the facts are briefly summarized below.

[6] The IDA charged Bahcheli, a registered representative with a securities dealer, with breaching an IDA by-law by "engaging in business conduct or practice unbecoming and not in the public interest". On November 19, 2003, a hearing panel of the Alberta District Council (the District Council) of the IDA conducted a proceeding on this matter.

[7] In a subsequent written decision, the hearing panel dismissed the charge against Bahcheli. That decision is undated. The staff of the IDA received the decision on February 2, 2004. Bahcheli first learned of the decision on March 15, 2004 through a bulletin posted on the IDA website. He later obtained the decision as a result of inquiries made by his counsel.

[8] The staff of the IDA delivered a Notice of Appeal to the ASC on March 2, 2004. In the style of cause and throughout that document, the applicant is consistently referred to as the "staff of the [IDA]". For instance, the style of cause names the "staff of the [IDA]" as the applicant; the document commences with the statement "Staff of the Investment Dealers Association of Canada ('Association Staff') requests an appeal to the [ASC]"; the prayer for relief recites that the "Association Staff respectfully requests" the relief; and the Notice of Appeal is signed on behalf of the "Staff of the [IDA]" by a solicitor who identifies herself as "Solicitor for the Applicant Staff of the [IDA]".

[9] A covering letter on IDA letterhead, dated March 2, 2004 and signed by the IDA Enforcement Counsel, accompanied this Notice of Appeal. The letter states, amongst other things, "the Investment Dealers Association is appealing the Prairie District Council's Decision with respect to Mr. Tumer Bahcheli". The letter was addressed to the attention of the "Secretary of the Alberta Securities Commission".

[10] At that time, this Notice of Appeal was not served, or otherwise forwarded, to either Bahcheli or his counsel.

[11] On March 15, 2004, the IDA delivered a further document entitled: "Notice of Appeal" to the ASC. That document was an exact repetition of the earlier Notice of Appeal but for the deletion of all references to the Staff of the IDA. Accordingly, the IDA is named and shown throughout as the applicant. The second Notice of Appeal discloses, by use of caret marks, that deletions had been made to a prior version of the document albeit not every deletion is identified by a caret mark. The IDA has subsequently referred to this Notice as its "Amended Notice of Appeal", notwithstanding that the document, on its face, is not described as such.

[12] This second Notice of Appeal was forwarded to Bahcheli's counsel and received by him on March 16, 2004. On that same date, Enforcement Counsel for the IDA sent a letter to Bahcheli advising him that the IDA had "served a Notice of Appeal with the Alberta Securities Commission on March 15, 2004". Bahcheli's counsel wrote to the IDA pointing out that the time for appeal had expired prior to the filing of the March 15, 2004 Notice of Appeal. It was only then that the earlier March 2 Notice of Appeal was brought to Bahcheli's attention.

[13] Bahcheli ultimately brought an application before the ASC putting in issue the matters now before this Court.

DECISION OF THE ASC

[14] The ASC first dealt with the related issues of: (a) whether the IDA was itself the "decision maker" in this matter and; (b) whether it was entitled to appeal the decision of the District Council. The ASC reviewed the by-laws and practices of the IDA and found that, within the IDA, there was a separation of roles. It concluded that there was "a distinct separation between the investigation and prosecutorial roles of the IDA and the adjudicative role of the District Council hearing panels in enforcement or discipline proceedings" (para. 41). On that basis, the ASC distinguished this matter from legal authorities holding that a decision maker is not entitled to appeal its own decision absent an express statutory provision allowing it to do so. The ASC then determined that the IDA was a person "directly affected" by the decision of the District Council of the IDA, within the meaning of section 73(1) of the *Act* and therefore entitled to appeal the decision of the District Council.

[15] The ASC went on to conclude that the applicable time period for appeal was 30 days from the date the IDA received notice of the decision of the District Council. It further held that the document filed on March 2, 2004, constituted an appeal served by the IDA and that the "Amended Notice of Appeal" filed on March 15, 2004, "was not a new appeal". These findings rendered the fact that the second notice was served outside of the appeal period immaterial. Finally, the ASC found that use of the "Staff of the IDA" was merely a misnomer that could be corrected by naming the "IDA" in its place and that this correction did not mislead or substantially injure Bahcheli (paras. 95 and 96).

STANDARD OF REVIEW

[16] The issues raised in this appeal do not involve findings of fact as such. No party suggests that the standard of review should be patent unreasonableness. The choice in this case lies between correctness or reasonableness *simpliciter*.

[17] The applicable standard of review is determined by using the pragmatic and functional approach. Four factors must be considered: (1) the presence or absence of a privative clause or statutory right of appeal; (2) the relative expertise of the tribunal to that of the reviewing court on the issue in question; (3) the purpose of the legislation and its applicable provisions; and (4) the nature of the question presented, whether of law, fact or mixed fact and law: *Pushpanathan v. Canada (Minister of Employment and Immigration)*, [1998] 1 S.C.R. 982 at paras. 29-38. No factor by itself is determinative. Each must be considered and weighed in order to determine the proper level of deference for the issue in question: *Pushpanathan* at para. 27.

A. No privative clause

[18] Here, there is no privative clause and there is an automatic right of appeal to the Court of Appeal for those who have standing. Unlike in British Columbia, no leave is required for this appeal to proceed. This factor thus suggests that less deference is owed to the decision of the ASC.

B. Expertise

[19] The reviewing court must consider the expertise of the tribunal both generally and specifically with respect to the issue determined by it. A comparison of the expertise of the court and of the tribunal then follows. The court should show deference only when the tribunal has, in the area in question, greater expertise than the court and its determination was within the ambit of this expertise: *Alberta (Workers' Compensation Board) v. The Appeals Commission*, 2005 ABCA 276 at para. 36.

[20] Generally speaking, the ASC has great expertise in securities matters and, in particular, in determining what is in the public interest with respect to capital markets. As a result, deference should generally be given to securities commissions in the interpretation of their constituent statutes when those interests are engaged. The identification of a tribunal's general or specific expertise is examined in relation to the nature of the question presented to the decision-making body. For instance, in *Cartaway Resources Corp. (Re*), 2004 SCC 26, [2004] 1 S.C.R. 672, the issue was to determine "when an order is in the public interest" and, in particular, whether the Commission was entitled to have regard to general deterrence in the exercise of its public interest jurisdiction. Clearly, the expertise of the Commission was engaged and it held that the Commission was called upon to apply its expertise (para. 41). The reasonableness standard flowed therefrom.

[21] On the other hand, the expertise of a tribunal is not likely to exceed or even equal that of a court of law in matters of statutory interpretation, especially those involving the jurisdiction of the tribunal. In *Bell Canada v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1989] 1 S.C.R. 1722, the issue before the court was a question of law and jurisdiction involving the nature of interim decisions and the extent of the powers conferred on the Commission when it makes interim decisions. The court said at 1747:

> ... the decision impugned by the respondent is not a decision which falls within the appellant's area of special expertise and is therefore pursuant to s. 68(1) subject to review in accordance with the principles governing appeals. Indeed, the appellant was not created for the purpose of interpreting the *Railway Act* or the *National Transportation Act* but rather to ensure, amongst other duties, that telephone rates are always just and reasonable.

[22] The same analysis was applied by Bastarache J. in his majority judgment in *Atco Gas and Pipelines Ltd. v. Alberta (Energy and Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, which involved the interpretation of the enabling statutes for the purpose of ascertaining the jurisdiction

of the Board to allocate proceeds of sale to rate-paying customers of a utility. Bastarache J. stated at 161:

> It is an inquiry into whether a proper construction of the enabling statutes gives the Board jurisdiction to allocate the profits realized from the sale of an asset. The Board was not created with the main purpose of interpreting the AEUBA, the GUA or the PUBA in the abstract, where no policy consideration is at issue, but rather to ensure that utility rates are always just and reasonable... In the case at bar, this protective role does not come into play. Hence, this factor points to a less deferential standard of review.

[23] In this instance, the *Act* must be interpreted to determine whether it gives a decision-making body an entitlement to appeal its own decision. This interpretation does not rely upon any technical or scientific expertise of the Commission nor does it involve a policy issue. The question is not whether it would be in the public interest to give the IDA a right to appeal its own decision, but whether the legislature did confer that right. This is a pure question of law that requires the application of principles of statutory interpretation, which is the domain of the courts.

C. Purpose of the Legislation and its particular provisions

[24] The principles guiding analysis under the third *Pushpanathan* factor were described by McLachlin C.J.C. in *Dr. Q. v. College of Physicians and Surgeons of British Columbia*, [2003] 1 S.C.R. 226 at paras. 30 and 32:

> As a general principle, increased deference is called for where legislation is intended to resolve and balance competing policy objectives or the interests of various constituencies...
>
> In contrast, a piece of legislation or a statutory provision that essentially seeks to resolve disputes or determine rights between two parties will demand less deference.

[25] The legislation that is being interpreted in this case identifies the persons who are entitled to appeal decisions from a self-regulatory organization to the ASC. The legislation is not about the balancing of policy issues nor the interests of various constituencies. The issue involves on the one hand the right, if any, of the IDA to appeal its own decision and, on the other, the jurisdiction of the Commission to hear an appeal from the decision-making body. The issue calls for a court interpretation of the statute which, in turn, invites the correctness standard.

D. The nature of the question presented

[26] As has been discussed in the preceding paragraphs, the underlying issue is whether the legislation provided a right of appeal to the IDA, thus, requiring an interpretation of section 73 of the *Act*. The ASC's decision is based primarily on a consideration of law as developed through reported legal cases. This issue, in regard to the entitlement of a decision maker to appeal its own decision, has been before the courts on a number of occasions and depends upon the particular provisions of the statute. The question before the court is a legal one, namely, whether section 73 grants the decision maker an appeal, as distinct from whether that decision maker is a person affected by its own decision. In other words, the specific question is whether the statute gives effect to the divisions of roles and responsibilities within the IDA such that the person directly affected can include the decision maker itself. An ancillary or collateral issue is whether the IDA could be said to be "directly affected" as that term appears in section 73 of the *Act*. Once again, the court is called upon to interpret a term that has no technical aspect and which has been adjudicated by the courts on numerous occasions.

[27] The second issue raised by this appeal is whether the appeal was served on a timely basis. That issue is whether the March 2, 2004 Notice of Appeal was capable of being amended after the expiry of the time for making an appeal, thus preserving the earlier service date of the staff of the IDA for the benefit of the IDA. Once again, an examination of the ASC's decision shows that its analysis was carried out wholly by reference to legal authorities and legal precedents quite apart from any express consideration of public interest related to the capital markets.

E. Conclusion on the standard of review

[28] In my view, the court is in the best position to make a decision on the two legal issues now before it. The legal questions raised do not specifically involve the expertise of the Commission but rather, engage the functions of the court. Taking all the factors into account, the standard of review for each issue is correctness.

ANALYSIS

A. IDA's entitlement to appeal the decision of its District Council

[29] The right of appeal, if it exists, must be found in the legislation. The IDA relies upon section 73(1) of the *Act*, which provides:

> 73(1) A person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a bylaw, rule, regulation, policy, procedure, interpretation or practice of a recognized exchange, recognized self-regulatory organization, recognized clearing agency or recognized quotation and trade reporting system may appeal that direction, decision, order or ruling to the Commission.

[30] The IDA is a "person" as defined by section 1(mm) of the *Act.* It is also a "recognized self-regulatory organization" as that term is defined by section 1(yy) of the *Act.*

[31] Section 73 grants an appeal to a person directly affected by a decision of, *inter alia*, a self-regulatory organization. The statute does not designate an appeal from a council or other committee within that organization. If the IDA is entitled to appeal, it is only on the basis that the decision of the District Council is a decision of the self-regulatory organization, i.e., the IDA itself.

[32] In my view, section 73(1) grants a right of appeal to a person directly affected by the decision of the decision maker, not to the decision maker itself. The statute cannot reasonably be construed as permitting a decision maker to appeal its own decision, especially having regard to the context of section 73.

[33] The Manitoba Court of Appeal has dealt with two analogous situations. In *Re Law Society of Manitoba and McRoberts* (1990), 69 D.L.R. (4th) 601, the judicial committee of the law society struck out a number of counts in a citation issued by the standards committee of the law society. The standards committee then brought an application for mandamus and other relief to require the judicial committee to hear the charges in the citation. The court held that the standards committee was not an aggrieved person, and therefore unable to seek prerogative relief.

[34] Philp J.A., in delivering the judgment of the court noted at 604, that neither counsel for the parties nor the court's own research had "turned up any case in which a public or statutory authority has sought prerogative relief against itself." He concluded by stating at 604-05:

> In this case the standards committee is not an aggrieved person. It has not shown that it has a legal right in the performance or non-performance of the duties of the judicial committee, or that it has an immediate interest great than that of members of the public generally. It cannot say that it has suffered some legal grievance *or that the decision of the judicial committee directly affected it.*
> [emphasis added]

[35] In *Manitoba Chiropractors Association v. Alevizos* (2003), 228 D.L.R. (4th) 583, the Manitoba Chiropractic Association sought a judicial review of a decision of an "inquiry committee" of that Association, which had determined that a member's conduct did not amount to professional misconduct. The court held that the Association lacked status to make the application.

[36] Twaddle J.A., in delivering the judgment of the court, stated at para. 16:

> A right of appeal from a disciplinary decision of a professional association can only exist if conferred by statute and can only be

> exercised by those on whom the right has been expressly conferred. Under that Act no right of appeal is conferred on anyone from a decision of an inquiry committee on a charge of professional misconduct. No doubt that is why the Association in this case sought a remedy by way of judicial review.

and at para. 21:

> A professional association incorporated by statute is a person in the eyes of the law. Like a human being, such an association has but a single personality. Absent an express statutory provision to the contrary, it cannot sue itself directly or through the medium of one of its committees. Nor, by way of extension of that principle, can it seek a court review of its own decision or that of a committee.

[37] Twaddle J.A. then reviewed and contrasted other legislation which expressly confers a right of appeal by associations or societies to the court. He pointed out in para. 27 that in the case before him, the "statute does not provide for a review of the inquiry committee's finding by the governing body of the association or by a court." The same can be said in the case before this Court.

[38] Twaddle J.A. concluded his judgment on this issue by commenting at para. 29:

> I am, of course, aware of the decisions and dicta in *Attorney-General of the Gambia v. N'jie*, [1961] 2 All E.R. 504 (P.C.), and *Cook v. Southend Borough Council*, [1990] 1 All E.R. 243 (C.A.C.D.), and fully accept the exhortation to liberally construe the words "a person aggrieved." In neither case, however, nor in any other I could find, were the words construed so liberally as to enable a body with statutory powers to seek review of its own decision.

[39] The IDA relies upon some British Columbia cases which, at first blush, appear to take a different approach to that taken by the Manitoba Court of Appeal. Upon closer scrutiny, however, these cases are not only distinguishable from this matter, but, in our view, are consistent with the law as stated in the Manitoba cases.

[40] In *Association of Professional Engineers and Geo-scientists of British Columbia v. Visser,* 2004 BCSC 700, [2004] B.C.J. No. 1053, the Professional Association made application to quash a decision of the discipline committee of the Association. The committee had summarily dismissed a Notice of Inquiry alleging that Visser, a member of the Association, had breached a duty imposed on him by the Association's code of ethics.

[41] The member in *Visser* argued that the Association had no standing and was in essence attempting to appeal its own decision. In support of this argument, he cited the Manitoba cases discussed above.

[42] Cullen J. extensively reviewed the provisions of the enabling statute, the *Engineers and Geo-scientists Act*, R.S.B.C. 1996, c. 116. He pointed out at para. 35 that in that case the legislation separated the investigative, prosecutorial and adjudicative functions within the Association. The power to impose discipline resided exclusively in the discipline committee. Section 39 of the statute, under the heading "Appeal", specifically provided that:

> Any person who feels aggrieved by an order of the *discipline committee*...may appeal from the order...to the Supreme Court... [emphasis added]

[43] Cullen J. also reviewed an earlier decision of Drost J. in *Findlay v. College of Dental Surgeons of British Columbia*, 2000 BCSC 1311, [2000] B.C.J. No. 1785. The court in that case allowed the college status to appeal a decision of an inquiry panel dismissing certain charges brought against Findlay, a registrar of the college. Section 55 of the *Dentists Act*, R.S.B.C. 1996, c. 94, specifically provided for an appeal in these terms:

> A person aggrieved by an order, determination, finding, action or decision of *the council, the registrar, a committee, a panel of a board or examiners*...may appeal to the Supreme Court... [emphasis added]

[44] Once again, the enabling legislation specifically contemplated an appeal of a decision made by a specific committee of the College, thus giving effect to the separation of roles within the organization. On this basis, Cullen J. determined that the Association had standing to appeal.

[45] Here, the situation is different from those considered in *Visser* and in *Findlay*, as the relevant appeal provisions do not recognize a distinction between the self-regulatory organization and its internal committees. Any division within the IDA by-laws is not determinative. It is not the IDA that grants the appeal to the Commission, and the relevant question is not whether the professional regulatory body has created divisions within its own organization for the purpose of discipline. Rather, we must determine whether the *Act* itself grants an appeal from a sub-committee or council of the IDA. Section 73 does not do so and the relevant right of appeal is from a self-regulatory organization, not from a committee thereof. Thus, to the extent there may be an organizational difference between a self-regulatory body and that of its own discipline committee, that distinction is not recognized for the purposes of appeal.

[46] The IDA further cited the recent decision of the British Columbia Court of Appeal in *Global Securities Corp. v. British Columbia (Securities Commission)*, 2006 BCCA 404, [2006] B.C. W.L.D.

5704, 2006 CarswellBC 2260. In that case, a disciplinary hearing panel of the TSX Venture Exchange Inc. (the Exchange) found a dealer to have committed two infractions relative to an options trading agreement, but dismissed a third allegation that the dealer failed to supervise trading in the client's option account. The Exchange and the Executive Director of the British Columbia Securities Commission applied to the Commission under section 28 of the *Securities Act*, R.S.B.C. 1996, c. 418 (the *BC Act*) for a hearing and review of the decision of the hearing panel. The dealer raised two preliminary issues including whether the Exchange could bring an application for a hearing and review of the hearing panel's decision to dismiss the third infraction alleged against the dealer.

[47] Of fundamental importance is the difference in wording between the *BC Act* and the *Alberta Securities Act*, section 73. The *BC Act* considered in *Global* provided as follows:

> 28(1) the *executive director or a person directly affected by a decision*, ...of a ....exchange may apply by notice to the commission for a hearing and review of the matter under....
> [emphasis added]

[48] Thus, the statute explicitly granted a right of appeal to both the "executive director" and "a person directly affected by a decision". In addition, the *BC Act* expressly designated that an Exchange "is a party to a hearing and review...of its decision" (section 165(8)). Similar language is not found in section 73.

[49] Further, the specific inclusion of the "executive director" is a clear indication that absent that inclusion, the words "a person directly affected" would not confer the right of appeal on the executive director. The statutory language chosen recognizes the difference between an executive director and a person directly affected, and supports a finding that the latter does not automatically encompass the former.

[50] Further, section 73 of the *Act* requires that an appellant be "directly affected" by the decision or ruling of the self-regulatory organization. Even if the *Act* gave effect to the separation of roles within the organization, which it does not, it is difficult to conclude that the IDA was "directly affected" by the decision of its District Council.

[51] In my view, the phrase "directly affected" is narrower than the expressions "person who feels aggrieved" and "person aggrieved" appearing in the *Visser* and *Findlay* cases. A proposed appellant must demonstrate a direct effect of a decision and not mere dissatisfaction with the decision and the reasons for arriving at that decision. The words, "directly affected", have been interpreted by the Ontario Court of Appeal to mean a personal and individual interest, as distinct from a general interest: *Corp. of the Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)*, [2006] O.J. No. 4699 at para. 8; leave denied, [2007] S.C.C.A. No. 40. Bahcheli is a person directly affected by the District Council's decision. At best, the IDA may disagree with the

reasons or the result, and have a concern for the precedent, but it has not demonstrated that it is directly affected, notwithstanding the finding of the ASC, which appears largely to rest on the separation of roles within the IDA and upon the reasoning in *Global*.

[52] In *Global*, it was noted at para. 22, that the issue of whether or not the Exchange could bring an application for a hearing and review of its decision was "moot" because the Exchange Director had applied for a hearing and review. The decision of the British Columbia Commission on this issue was not disturbed as the court applied the reasonableness standard to the whole of the decision because of the intertwining of the issues (para. 35). With regard to the specific issue, the court concluded at para. 68 that while it had "some reservations" about the Commission's conclusions, it was supported by a "tenable explanation" so that in the circumstances, it was not unreasonable (para. 68). The differences between the governing legislation in the two provinces render the decision of limited assistance. As earlier noted, the British Columbia statute designates the Exchange as a party so that it may, for that reason, be considered to be a person directly affected. In any event, I am unable to conclude that a self-regulatory organization can both be a person making the decision and a person directly affected by it.

[53] Unlike the legislation considered in these other cases, section 73 does not differentiate between the self-regulatory organization and separate committees created within that broader structure. The statute grants the right of appeal only to a person directly affected by the decision of the self-regulatory organization. Thus, the decision of the District Council must be recognized as being a decision of the IDA itself, for the purpose of triggering an appeal.

[54] It follows that the IDA does not have a right of appeal, as it would be appealing its own decision. This interpretation is supported by consideration of other provisions of the *Act* that make it clear that an appeal by the decision maker of its own decision was never contemplated.

[55] For example, section 36 of the *Act* applies to a person having a right of appeal under section 73. Section 36(1) provides:

> To commence an appeal to the Commission, the appellant shall, within 30 days from the day on which the written notice of the decision is *served on the appellant*, serve a written notice of appeal on the Secretary either personally or by registered mail.
> [emphasis added]

The appeal to the ASC is triggered by written notice of the decision being "served on the appellant". In usual parlance, service is carried out on a person separate and apart from the decision maker. No service is required, nor in fact made, upon the decision maker as the decision is already known to the person making it.

[56] The IDA relied, in this regard, on its by-law 20.29, which provides:

> Any decision of a District Council at a hearing held pursuant to By-laws 20.6 or 20.11 shall be in writing and shall contain a concise statement of the reasons for the decision. Notice of a decision shall be delivered to the Secretary who shall then promptly give notice, in the case of an individual, to the individual and to the Member concerned, or in the case of a Member, to the Member. A copy of the decision shall accompany the notice.

[57] It is a forced and unnatural construction to equate the delivery of the decision by the IDA's Council to the IDA's secretary with service upon the IDA itself. In point of fact, there was no evidence in this case of service upon the IDA, pursuant to the above by-law or otherwise, apart from the evidence that the District Council provided its decision to the Staff of the IDA. This lack of evidence of service is to be expected as it is not usual and probably impossible, to serve a document upon one's self. It is contrary to the connotation of service. The circulation of documents within an organization does not constitute service upon that organization. Section 36 does not contemplate that an appeal will be brought by the decision maker, but rather by a person served with its decision.

[58] Turning to another aspect of service, it seems that neither the *Act* nor any rule made thereunder requires service of any notice of appeal upon Bahcheli. I note that Bahcheli is named as the respondent in the document entitled "Notice of Appeal" that was first filed with the ASC in this case. However, Bahcheli was not served with this document within 30 days or, for that matter, at any time. The ASC, in its decision, expressed concern with this lack of service upon the party named as a respondent (para. 97). The absence of any requirement for service in this situation is another indication that an appeal by the IDA was never contemplated by the legislation.

[59] Support for this interpretation is also found in section 73(3). While that section grants a right to a self-regulatory organization to participate in an appeal brought by a third party appealing its decision, it does not grant the reverse. This means that in the event where the decision maker itself is interpreted to have a right of appeal, there is no provision for participation by the member against whom the charge was dismissed. Section 73(3) of the *Act* provides:

> Notwithstanding section 36(4), where there is an appeal to the Commission of a direction, decision, order or ruling made by a ... recognized self-regulatory organization ... that ... self-regulatory organization may be present and make representations at the appeal.

[60] In this case, if Bahcheli were the appellant, the statute specifically grants the IDA a right to be present and make representations at the appeal. If the statute is construed as granting a right of appeal to the IDA, then no provision is made to ensure that Bahcheli has the right to be present and to make representations. While the ASC may exercise its discretion to grant status, the fact that the *Act* is silent on this issue is significant. Normally, a right of appearance would be granted to both

parties where it is contemplated that both parties have a right to appeal. This is another indication that the legislation does not contemplate an appeal by the decision maker from its own decision.

[61] Section 35 of the *Act* is yet a further indication that the legislature did not contemplate that a decision-making body would have an appeal on the basis that it is a person directly affected by its own decision. This section deals with an appeal from a decision of the Executive Director of the ASC. It provides:

> 35(1) A person or company directly affected by a decision of the Executive Director may appeal that decision to the Commission.
> (2) Notwithstanding subsection (1), the commission may, on its own motion, within 30 days from the day that the executive director made a decision, review that decision.

[62] This section demonstrates two things. Firstly, it draws a distinction between the "person directly affected" and the Commission itself, indicating that the former does not encompass the latter. Second, it also specifically grants a right of appeal, notwithstanding the close relationship between the executive director and the Commission. This indicates that where the legislature intends an organization to have a right of appeal from the decision of its subordinate or delegated authority (be it an officer or a committee within the organization), it knows how to do so and does it by express language.

[63] In short, section 73 does not grant an appeal from a decision of a council of the IDA, but rather only from a decision of the IDA itself as the recognized self-regulatory organization. The IDA is thus unable to appeal these decisions because, for the purposes of appeal, they are deemed to be its own. Nor, in such circumstances, can the IDA be considered as being a person "directly affected" by the decision. Thus, the IDA does not have standing to launch an appeal.

B. Service of the Notice of Appeal

[64] Notwithstanding our conclusion on the first issue, I propose to deal with the issue of service. Bahcheli has submitted that even if the IDA was entitled to appeal, it did not do so as prescribed by the statute, rendering the appeal invalid and of no effect. I agree with this submission for the reasons that follow.

[65] The ASC ruled that the 30-day period prescribed by section 36 of the *Act* is the operative time limitation governing a person entitled to bring an appeal. I agree with the analysis of the ASC in this regard.

[66] The document delivered to the ASC on March 2, 2004 discloses the appellant to be the Staff of the IDA. The Staff is shown as the party not only in the style of cause but throughout the document as the party seeking relief. Indeed, the document asserts that the discipline proceedings

before the Council were "commenced against [Bahcheli] by Association Staff". The document is signed by the District Council on behalf of the Staff.

[67] The Staff of the IDA do not constitute a person or company directly affected by the decision. The document on its face does not constitute an appeal brought by a party entitled to do so under section 73 of the *Act*.

[68] The ASC found that the document delivered on March 15, 2004 (the second document delivered outside of the 30 day period for service), was not a new Notice of Appeal (para. 94), but rather an amendment to the original document.

[69] With respect, the evidence does not support this conclusion. No prior authority was obtained from the ASC to amend the original document, and it was this second document that was served on Bahcheli. It is also telling that the IDA's enforcement counsel informed him that the IDA had "served a Notice of Appeal with the Alberta Securities Commission on March 15, 2004," (E 17) the date the second Notice of Appeal was served. This advice and the fact that the earlier document was not brought to Bahcheli's attention would indicate that the IDA considered, at the time, that its appeal was commenced on March 15, 2004.

[70] Having concluded that the document of March 15, 2004 was not a new appeal, the ASC then held that the March 2, 2004 document was "capable of correction and was corrected" (para 95). It would thus appear that the ASC confirmed that the IDA was entitled to amend the earlier document, by the filing of the document dated March 15, 2004.

[71] The "amendment" in question is problematic. First, it was done without any application to, or approval from, the ASC. One would expect that no amendment would be made of an existing appeal without the approval, at the time, of the body having jurisdiction over the appeal. It appears that no consideration was given to providing Bahcheli, who was named as the Respondent in the Notice of Appeal filed on March 2, 2004, with notice of an application to amend. He clearly was a person interested in, and potentially affected by, any application for amendment.

[72] The ASC appears to have accepted that the IDA was entitled to make an amendment on the basis that the naming of the Staff was a misnomer. The ASC then applied the law dealing with misnomers in civil cases. With respect, before there can be a "misnomer", it must be shown that the appellant named in the document was named by mistake. The evidence submitted by the IDA, by way of affidavit to the ASC, does not speak to any mistake but rather to an amendment subsequently having been made. The appropriate inference to be drawn from the evidence is that the naming of the Staff as the appellant was not a mistake. It was done with thought and deliberation and with the best of motive, namely, to demonstrate the separateness and division of responsibilities between the Staff and the council making the decision. As the Staff set out that they had commenced the proceedings against Bahcheli, it seems likely that they considered that they were likewise entitled to commence the appeal. In our view, the document filed on March 2, 2004 correctly named the

intended party – the Staff – and a reasonable person receiving the document would have interpreted it as such.

[73] The 30-day appeal period, prescribed by section 36 of the *Act* cannot be extended, except upon application during the prescribed 30-day period: section 36(2). There is no power to extend the time for appeal fixed by statute other than as prescribed by that statute: *Lakevold v. Dome Petroleum Ltd.* (1974), 44 Alta. L.R. (3d) 1 at 3.

[74] The courts have allowed misnomers to be corrected in situations where the other party was not misled or substantially injured. The considerations attached to this question are canvassed by this Court in *Nagy v. Phillips* (1996), 41 Alta. L.R. (3d) 58 at 65-67. The judgment emphasizes that it is necessary to establish that the party named by the amendment was always understood to be the party intended to be named in the first instance. The decision stated at 67:

> ...there is always the possibility that a plaintiff will attempt to use the legal principles in the misnomer cases to avoid the provisions of limitations statutes, or the rules relating to service of a statement of claim, or both. Courts must be diligent in guarding against such abuses.

[75] In the same vein, but specifically related to the requirement of proving service of a document in accordance with statutory provisions, this Court stated in *Nwobosi v. Alberta College of Physicians and Surgeons* (1982), 36 A.R. 67 at para. 5:

> It is argued that service may be "imputed" or that we could find "constructive" service. In matters dealing with the loss of professional status and the necessary consequences thereof, statutory compliance by professional bodies is a fundamental responsibility which should rarely be inferentially removed.

[76] In this case and with respect, it appears that the Staff named as the appellant in the March 2, 2004 document were intended to be named and function as the appellant. Having named a party that was not entitled to appeal pursuant to section 73, the appeal would have been unable to proceed due to lack of standing. If that error was to be cured, it was necessary to join a party entitled to appeal before the 30-day appeal period ran out. The IDA did not do so.

[77] Bahcheli was never served with the original document, nor was he provided with any timely opportunity to oppose the amendment at the relevant time. The 30-day period for appeal had expired before the further Notice of Appeal was filed on March 15, 2004. He was therefore entitled to conduct his affairs on the basis that there had been no appeal.

[78] In short, I am of the view that the document filed on March 15, 2004 was a new filing beyond the 30-day period prescribed by section 36 of the *Act*. I do not accept that the naming of the Staff was a misnomer, nor that it was capable of being cured after the limitation period in the circumstances of his case, without injury to Bahcheli.

CONCLUSION

[79] The appeal is allowed. The IDA is not entitled to proceed with an appeal from the Decision of the Alberta District Council.

Appeal heard on February 13, 2007

Reasons filed at Calgary, Alberta
this 18th day of May, 2007

O'Brien J.A.

I concur:

Conrad J.A.

I concur:

Berger J.A

Appearances:
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