



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

22nd Floor
20 Queen Street West
Toronto ON M5H 3S8

22e étage
20, rue queen ouest
Toronto ON M5H 3S8

Citation: Daley (Re), 2021 ONSEC 12

Date: 2021-04-22

File No. 2019-39

**IN THE MATTER OF
SEAN DALEY AND KEVIN WILKERSON**

**REASONS FOR DECISION
(Rule 29 of the Ontario Securities Commission *Rules of Procedure and Forms*,
(2019) 42 OSCB 9714)**

Hearing: April 9, 2021

Decision: April 22, 2021

Panel: M. Cecilia Williams Commissioner and Chair of the Panel

Appearances: Christopher Horkins For Sean Daley
Sean Daley

Hanchu Chen For Staff of the Commission

No one appearing on behalf of Kevin Wilkerson

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REASONS FOR DECISION

I. BACKGROUND

- [1] Staff, in a Statement of Allegations dated November 18, 2019, alleges that Sean Daley and Kevin Wilkerson obstructed Staff's investigation into a crypto-asset venture. The merits hearing regarding those allegations was scheduled to commence on Monday, April 12, 2021.
- [2] Late in the afternoon of April 6, 2021, Mr. Daley sent an email requesting an adjournment of the merits hearing to a date to be set in July, 2021. Mr. Daley requested the adjournment on the following grounds:
 - a. he recently learned that the Commission proceedings may have implications for his Law Society of Ontario (**Law Society**) license; and
 - b. his family was experiencing some COVID-19-related issues.
- [3] A motion to consider the adjournment request was held on April 9, 2021 by teleconference. I waived the requirement for a formal motion. Rule 3 provides that a panel may waive the requirements in the Rules.¹ With the merits hearing scheduled to begin within days, I concluded that a waiver of the requirement for a formal motion for an adjournment is consistent with the objective of ensuring this matter is conducted in a just, expeditious and cost-effective manner.
- [4] Mr. Wilkerson was copied on all correspondence relating to the motion and its scheduling but he did not participate, although properly served.
- [5] After hearing submissions of the parties, including from LAP counsel representing Mr. Daley and also from Mr. Daley himself, I dismissed the motion with reasons to follow. These are my reasons.
- [6] At the start of the hearing on the adjournment motion Mr. Daley asked that his email correspondence of April 6, 2021 be accepted as evidence in the hearing in lieu of a formal affidavit. Staff did not object and I agreed. The email was marked as an exhibit. This was the only evidence before me. Mr. Daley did not provide testimony and Staff declined the opportunity to cross-examine Mr. Daley about his email.

II. ISSUE AND ANALYSIS

- [7] The only issue I need to determine is whether the grounds on which Mr. Daley seeks an adjournment constitute "exceptional circumstances".
- [8] Rule 29(1) of the Rules provides that every merits hearing shall proceed on the scheduled date unless the party requesting an adjournment "satisfies the Panel that there are exceptional circumstances requiring an adjournment." The standard set out in Rule 29(1) is a "high bar"² that reflects the important objective set out in Rule 1, that Commission proceedings be conducted in an expeditious manner.
- [9] I address each of Mr. Daley's two grounds for adjournment in turn.

¹ *Ontario Securities Commission Rules of Procedure and Forms*, (2019) 42 OSCB 9714

² *Pro-Financial Asset Management Inc (Re)*, 2018 ONSEC 18, (2018) 41 OSCB 3512 (**Pro-Financial**) at para 28

- [10] Mr. Daley's status with the Law Society is that of a non-practising lawyer. On March 8, 2021, in the context of a matter unrelated to the Commission proceeding, Mr. Daley learned that the Law Society had received a complaint that he was currently in contravention of the Law Society's *Rules of Professional Conduct*. On March 12 Mr. Daley had his first substantive discussion with the appropriate Law Society counsel. As set out in Mr. Daley's email correspondence, the subject matter of this complaint did not involve the Commission proceeding.
- [11] Early in the week of April 5, 2021, Mr. Daley learned from the Law Society that he ought to have self-reported the Commission proceeding to the Law Society. He has now made that report. Mr. Daley now submits that the Commission proceeding could have a prejudicial impact on his license, including on his ability to reactivate his license should he wish to do so in the future.
- [12] Mr. Daley submits, with reference to the factors for deciding an adjournment request articulated by the panel in *Pro-Financial*, that this new information constitutes an unforeseen circumstance, for which he needs more time to consult Law Society disciplinary counsel to fully understand the potential impacts.³ Mr. Daley submits that if he is unable to fully understand the potential consequences on his license status before the Commission proceeding continues, he will not be able to make a full answer and defense to the allegations made in the Commission proceeding.⁴
- [13] Mr. Daley also submits that as a lawyer he is held to a different standard by the Law Society than a private citizen. Therefore, certain positions regarding Staff's allegations that he might take as a private citizen would not be appropriate for him to take as a licensee of the Law Society. In this context Mr. Daley raised the decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*⁵ suggesting that the circumstances he finds himself in fit into the category of legal questions involving jurisdictional boundaries between two or more administrative bodies, where the presumption of a reasonableness review will be rebutted.
- [14] I agree with Staff that *Vavilov* is not applicable in this instance. It involves the standard of review to be applied upon a judicial review of an administrative decision. That is not the situation here. Also, this proceeding does not, in my view, involve any jurisdictional issues as between the Commission and the Law Society. Staff's allegations are with respect to Mr. Daley's actions as a private citizen in the capital markets and do not relate to his obligations as a lawyer under the Law Society's *Rules of Professional Conduct* and *By-Laws*.
- [15] Staff submits that, unlike *Pro-Financial*, Mr. Daley's issue with the Law Society is neither new nor unforeseen. The Statement of Allegations was issued over a year and a half ago. The obligation to report to the Law Society and any collateral implications from the Commission allegations, Staff argues, have existed since

³ *Pro-Financial* at paras 29 and 30

⁴ See *Cheng (Re)*, 2018 ONSEC 13, (2018) 41 OSCB 2359 (**Cheng**) at para 6 which states that "In determining whether exceptional circumstances require an adjournment, the dominant factor will usually be the requesting respondent's ability to make full answer and defense in the circumstances."

⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (**Vavilov**)

that time. Staff also submits that the other cases Mr. Daley cites deal with different fact scenarios which can be distinguished from the present situation.

- [16] First, Staff submits *Cheng* can be distinguished because there was a pending appeal before Divisional Court of a motion decision relating to issues of solicitor-client privilege and whether that witness could be called at the merits hearing along with a motion to quash the appeal, the outcome of which would impact the timing and length of the merits hearing.⁶ Second, *Kitmitto*⁷ can be distinguished because the process adopted by the parties to use affidavit evidence for some of Staff's witnesses removed a number of days from a long and complex hearing without impacting the scheduled end date for the hearing.
- [17] I agree with Mr. Daley that what is new is his understanding, gleaned just recently, that an allegation of obstruction by the Commission may have implications for his Law Society license. I do not, however, accept that this new awareness constitutes exceptional circumstances warranting an adjournment of this proceeding. Whether Mr. Daley should have comprehended earlier that Staff's allegations may impact his status with the Law Society is not an issue for the Commission. Nor is it a matter for the Commission what, if any, consequences for his Law Society license may arise from this proceeding.
- [18] There is currently no active proceeding before the Law Society related to Staff's specific public interest allegations against Mr. Daley in this proceeding. The Law Society obligations for licensees are a separate and different issue from the Commission allegations. The merits hearing before the Commission had not commenced at the time of this motion and its outcome is unknown. What, if any, implications for his Law Society license flow from the existence or outcome of this proceeding are for Mr. Daley to address with the Law Society, if and when they arise. Therefore, this ground for adjournment fails to meet the test of exceptional circumstances warranting a delay in this proceeding.
- [19] As regards Mr. Daley and his family's potential exposure to COVID-19, the only information before me was his email correspondence and oral submissions which were vague and lacked particulars. The information mentioned that certain members of his extended family, with whom his immediate family had had repeated recent contact, had tested positive for COVID-19. As a result, several members of his immediate family were in quarantine and he is experiencing some symptoms on par with what his other family members initially felt.
- [20] One of six factors the panel in *Pro-Financial* took into consideration when granting an adjournment in that case was a medical emergency in the applicant's family. It is not clear from the reasons in *Pro-Financial* how much weight was given to each of the factors. In that case, another factor was that Staff had delivered a new six-page affidavit with nine exhibits two days prior to the start of the hearing. The panel in *Pro-Financial* concluded that, in the circumstances, the applicant required more time to respond to Staff's case and that there was no appreciable prejudice to Staff from the adjournment and therefore the public interest in proceeding expeditiously was outweighed by the need to ensure fairness to the respondent in *Pro-Financial*.⁸

⁶ *Cheng* at paras 2-4, 7 and 10-12

⁷ *Kitmitto (Re)*, 2020 ONSEC 22, (2020) 43 OSCB 6723 at paras 27-30

⁸ *Pro-Financial* at paras 26-30

- [21] The situation before me differs from *Pro-Financial*. Staff's case against Mr. Daley has not changed since the Statement of Allegations was issued in 2019. Mr. Daley has had ample time to prepare to defend against Staff's allegations. What he now feels he needs time to address are Law Society matters outside of this proceeding which may never crystallize.
- [22] COVID-19 can be very serious and I'm sympathetic to Mr. Daley's and his family's situation. While Staff elected not to cross-examine Mr. Daley on the contents of his email, the email provided limited information and was insufficient to meet the test of exceptional circumstances warranting a delay in this proceeding.

III. CONCLUSION

- [23] In my view the grounds on which Mr. Daley sought an adjournment of the merits hearing did not meet the test of "exceptional circumstances". The motion is dismissed.

Dated at Toronto this 22nd day of April, 2021.

"M. Cecilia Williams"

M. Cecilia Williams