Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF DEUTSCHE BANK SECURITIES LIMITED

- AND -

IN THE MATTER OF A DECISION OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

REASONS AND DECISION

(Section 21.7 of the Act)

Hearing:	January 7, 2011	
Decision:	September 30, 2011	
Panel:	Mary G. Condon	- Commissioner and Chair of the Panel
	Paulette L. Kennedy	- Commissioner
Counsel:	Nigel Campbell Ryan A. Morris Doug McLeod	- For the Applicant, Deutsche Bank Securities Limited
	Christopher D. Bredt Caitlin Sainsbury	- For the Respondent, the Investment Industry Regulatory Organization of Canada
	Swapna Chandra	- For the Ontario Securities Commission

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REASONS AND DECISION

I. INTRODUCTION

[1] This is an application (the "**Application**") brought by Deutsche Bank Securities Ltd. ("**DBSL**" or the "**Applicant**") pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"). DBSL asks the Ontario Securities Commission (the "**Commission**" or the "**OSC**") to set aside the October 13, 2010 decision of a Hearing Panel of the Ontario District Council of the Investment Industry Regulatory Organization of Canada ("**IIROC**" and the "**IIROC Hearing Panel**") dismissing DBSL's motion to set aside or stay the Notice of Hearing against it (the "**IIROC Decision**").

[2] DBSL contends that IIROC does not have jurisdiction to hear the allegations against DBSL in this case because it cannot provide DBSL with basic procedural fairness. DBSL states that although IIROC Staff relies on evidence obtained through the powers of the OSC and the Autorité des Marchés Financiers (the "**AMF**") to compel evidence, IIROC cannot provide DBSL with an opportunity to make full answer and defence to the allegations brought by Staff of IIROC ("**IIROC Staff**") because IIROC does not have power to compel evidence from anyone other than IIROC members, their employees and others who are under IIROC's jurisdiction ("**IIROC Members**" or "**Compellable Witnesses**"). DBSL submits that a stay of proceedings or dismissal of the Notice of Hearing was the only remedy available to the IIROC Hearing Panel to cure the prejudice to DBSL. DBSL submits that in dismissing the DBSL Stay Motion, the IIROC Hearing Panel proceeded on an incorrect principle, erred in law, and failed to consider material evidence of prejudice to DBSL, and further that new and compelling evidence of prejudice is available to the Commission that was not available to the IIROC Hearing Panel. Therefore, DBSL submits that the decision of the IIROC Hearing Panel should be set aside in accordance with the criteria set out in *Canada Malting Co.* (1986), 9 O.S.C.B. 3565 ("***Canada Malting***").

[3] IIROC Staff and Staff of the Commission ("**OSC Staff**") contend that none of the *Canada Malting* criteria is satisfied and that there is no basis for interfering with the decision of the IIROC Hearing Panel. They also submit that the Application is premature.

[4] At the conclusion of the hearing of the Application on January 7, 2011 (the "**Hearing**"), we reserved our decision and ordered that any further proceeding before the IIROC Hearing Panel (the "**IIROC Proceeding**") is stayed until a decision of the Commission has been released ((2011), 34 O.S.C.B. 756) (the "**Interim Stay**").

[5] Having considered the submissions of DBSL, IIROC Staff and OSC Staff (the "**Parties**"), we have concluded that the Application does not satisfy the *Canada Malting* criteria and that it is premature. Accordingly, the Application will be dismissed. Our reasons are as follows.

II. BACKGROUND

[6] The following background facts are set out in the motion records and memoranda of fact and law filed by DBSL and by IIROC Staff.

A. DBSL is a Member of IIROC

[7] On May 15, 2008, DBSL executed a membership application with IIROC (the "**Membership Application**"), the purpose of which was to transfer to IIROC the regulatory

functions of IIROC's predecessor, the Investment Dealers Association (the "**IDA**") in respect of DBSL. In the application, DBSL agreed to submit to the jurisdiction of IIROC, and further consented to IIROC "initiating or continuing either in its own name or the name of the IDA any proceeding or action under the Rules; the Constitution, By-laws, Regulations, Forms, Rulings and Policies of the IDA (the "**IDA Rules**"); or pursuant to any statute, regulation or at law or equity." IIROC consolidated the regulatory and enforcement functions of the IDA and Market Regulatory Services, Inc. ("**RS**") on June 1, 2008.

[8] Article 13, section 13.6 of IIROC By-law No. 1, a general by-law, provides for the collection and exchange of information between IIROC and other provincial regulators for the purpose of investigations and enforcement litigation. Prior to June 1, 2008, the IDA was similarly authorized by IDA By-laws 16.8 and 16.9 to enter into agreements with provincial securities commissions for the collection and exchange of information. By executing the Membership Application, DBSL agreed to be bound by IIROC By-law No. 1 and its predecessor by-laws.

B. The ABCP Market Freeze and the Joint Investigation

[9] On August 13, 2007, the Canadian market for non-bank sponsored asset-backed commercial paper ("**ABCP**") froze (the "**ABCP Market Freeze**").

[10] By May 2008, the Commission and IIROC had started a joint regulatory investigation of Coventree Inc. ("**Coventree**"), the largest non-bank sponsor of ABCP in Canada. By December 2008, the AMF had joined the investigation (the "**Joint Investigation**"). In addition to Coventree, the Commission, the AMF and IIROC (the "**Joint Regulators**") investigated:

- the ABCP dealers in the Coventree dealer syndicate: BNP Paribas (Canada); Canaccord Financial ("**Canaccord**"); CIBC World Markets ("**CIBC**"); Citibank; Credential Securities Inc. ("**Credential**"); Cormark Securities Ltd.; DBSL; HSBC Bank of Canada ("**HSBC**"); National Bank Financial Inc. ("**NBF**"); RBC Dominion Securities ("**RBCDS**"); and Scotia Capital Inc. ("**Scotia**");

- the primary credit rating agency for ABCP in Canada, Dominion Bond Rating Service ("**DBRS**");

- the dominant institutional investor in the ABCP market, Caisse de Dépôt et Placement du Québec ("**CDPQ**"); and

- other ABCP buyers.

C. Regulatory Proceedings Arising out of the Joint Investigation

[11] As a result of the Joint Investigation, each of the Joint Regulators assumed carriage of proceedings against different ABCP market participants.

[12] The Commission took carriage of proceedings against Coventree, CIBC and HSBC. In December 2009, OSC Staff entered into Settlement Agreements with CIBC and with HSBC, and the Settlement Agreements were approved by the Commission in separate orders issued on December 21, 2009 (*Re HSBC* (2010), 33 O.S.C.B. 62, and *Re CIBC* (2010), 33 O.S.C.B. 73). The Commission issued a Notice of Hearing against Coventree on December 7, 2009. The

Coventree hearing on the merits started on May 12, 2010 and ended on December 9, 2010 (the "**Coventree Hearing**"); the Commission's decision was issued on September 28, 2011.

[13] The AMF took carriage of proceedings against NBF and Laurentian Bank Securities ("**LBS**"). The AMF entered into Settlement Agreements with NBF and LBS in December 2009, and the Settlement Agreements were approved by the AMF on December 21, 2009.

[14] IIROC took carriage of proceedings against Scotia, Credential, Canaccord and DBSL. In December 2009, IIROC entered into Settlement Agreements with Scotia, Credential and Canaccord, and the Settlement Agreements were approved by IIROC on December 21, 2009. As a result, DBSL is the only IIROC Member currently facing allegations brought by IIROC Staff in connection with the ABCP Market Freeze.

D. The Notice of Hearing against DBSL

[15] On December 7, 2009, IIROC Staff issued a Notice of Hearing against DBSL. IIROC Staff alleged that DBSL "committed the following contraventions" ("the "**Allegations**"):

> 1. During the period between July 25 and August 13, 2007, the Respondent failed to observe high standards of ethics and conduct in the transaction of their business, and/or engaged in business conduct or practice which is unbecoming or detrimental to the public interest contrary to IDA By-law 29.1 in that it failed to act fairly, honestly and/or in good faith to its clients by not disclosing the information relating to US subprime and the liquidity risk in third-party ABCP to all of its clients who had invested or were interested in investing in third-party ABCP, while continuing to sell third-party ABCP to its clients.
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> 2. Between March and August, 2007, the Respondent failed to ensure proper regulatory compliance oversight of third-party ABCP, contrary to Policy 5.

E. DBSL's Stay Motion

[16] On September 7, 2010, DBSL brought a motion for an order staying or dismissing the Notice of Hearing (the "**Stay Motion**"), or alternatively an order that IIROC Staff disclose and produce all documents and evidence gathered by the Joint Regulators in the course of their Joint Investigation. DBSL's grounds for the Stay Motion, were as follows:

> . . . .
>
> (f) The Joint Investigation involved close collaboration amongst the Joint Regulators, including:
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> (i) coordinated and joint investigative steps;
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> (ii) jointly interviewing witnesses, including witnesses compelled to attend and give evidence;

(iii) sharing the fruits of their investigations, including documents and materials provided to the senior regulators under compulsion;

(iv) determining which regulator would take carriage of proceedings against each of the parties; and

(v) jointly drafting the settlements and statements of allegation.

(g) The Joint Regulators collaborated in the investigation of the Respondent, as is evidenced by, among other things:

(i) the OSC investigation order(s) pursuant to which the investigation of the Respondent was conducted;

(ii) representatives of the Respondent were examined by staff of the Joint Regulators at the offices of the OSC, pursuant to summons and to an order of the OSC; and

(iii) representatives of each of the Joint Regulators participated in the examinations of representatives of ABCP market participants relating to DBSL including the examinations of representatives of Coventree and the Credit Union of Central Ontario ("**CUCO**"):

(h) In addition to cooperating to investigate the Respondent, the Joint Regulators shared the fruits of their investigations of other parties. In particular, [IIROC] Staff produced to the Respondent more than 195,000 documents obtained by the OSC in the course of the Joint Investigation and more than 182,000 documents obtained by the AMF in the course of the Joint Investigation;

(i) Flowing from the Joint Investigation, the Joint Regulators prepared a Joint Statement of Facts purporting to set out a comprehensive description of the third-party ABCP market, the roles of different participants in the market, the nature and degree of information disclosure in the market, and the events that allegedly caused the August 13, 2007 market freeze. The Joint Statement of Facts was based on collaboration and discussion between the Joint Regulators, and the sharing of all evidence collected by each of the Joint Regulators during the Joint Investigation;

(j) The Notice of Hearing issued to DBSL sets out the Joint Statement of Facts, which is essentially identical to the Joint Statement of Facts in the Statements of Allegation and the Settlement Agreements entered by the OSC, AMF and IIROC in respect of other ABCP market participants, and is based on the entirety of the fruits of the Joint Investigation.

(k) the allegations made against the Respondent in the Notice of Hearing involve: (i) a July 24, 2007 email from Coventree that Staff alleges should have been provided to the Respondent's clients [the "**July 24 Email**"]; and (ii) an August 7 telephone conference convened by [CDPQ], the

dominant purchaser of ABCP in the Canadian market, regarding liquidity concerns [the "**August 7 Call**"];

(l) The allegations against DBSL are premised upon and flow directly from the Joint Statement of Facts, and are based on the entirety of the evidence obtained by the Joint Regulators in the Joint Investigation, including evidence that IIROC Staff received from the other Joint Regulators. [DBSL] wishes to fully defend the allegations against it.

(m) As a result of IIROC Staff's close collaboration with the other Joint Regulators in the Joint Investigation, IIROC Staff was not subjected to the limitations of IIROC's jurisdiction, and thus was able to obtain evidence that would not have been available to it had it been investigating independently.

(n) IIROC's jurisdiction is limited to investigating the activities of IIROC Members, who are subject to IIROC's jurisdiction by agreement. IIROC is not able to compel attendance for examination, attendance at hearings, or production of documents or evidence.

(o) By contrast, the OSC and the AMF have statutory authority to compel attendance for examination, attendance at hearings, and production of documents and evidence.

(p) IIROC Staff's collaboration with the other Joint Regulators enabled Staff to obtain evidence from parties not subject to IIROC's investigative jurisdiction, through the statutory authority of the OSC and the AMF. Evidence that Staff was able to obtain through the OSC and AMF that it would not otherwise have been able to obtain includes:

    (i) documents obtained from, among others, Coventree, DBRS, CUCO, CDPQ, NBC [National Bank of Canada], LBC [Laurentian Bank of Canada], CIBC, HSBC and others unknown to the Respondent; and

    (ii) transcripts of interviews of representatives of, among others, Coventree, DBRS, CUCO, CDPQ, NBC, LBC, CIBC, HSBC and others unknown to the Respondent.

(q) IIROC Staff's allegations against DBSL, premised on the Joint Statement of Facts, are based on the entirety of the evidence obtained in the course of the Joint Investigation, including evidence that IIROC Staff only received or had access to through the other Joint Regulators. Accordingly:

    (i) the allegations in the Notice of Hearing could not have been formulated but for the evidence obtained by extra-jurisdictional methods; and

    (ii) IIROC cannot require witnesses to attend for cross-examination by the Respondent, thereby denying the Respondent the ability to test the evidence against it and to

make a full answer and defence to the allegations in the Notice of Hearing.

(r) DBSL's inability to test the evidence against it is of particular importance in the instant case. The allegations against DBSL hinge on: (i) a July 24, 2007 email from Coventree that IIROC Staff alleges should have been provided to the Respondent's clients; and (ii) an August 7, 2007 teleconference convened by CDPQ regarding market support. At a minimum, IIROC cannot compel Coventree and CDPQ representatives to attend at the Respondent's hearing to provide evidence about the email, the teleconference or other relevant circumstances.

(s) IIROC Staff operated outside of its jurisdiction in issuing a Notice of Hearing against DBSL based on the evidence obtained through the other Joint Regulators. Because the jurisdiction of IIROC prevents DBSL from making full answer and defence to the allegations against it, and from demonstrating that its conduct is distinguishable from the conduct of other market participants and was entirely proper, the Notice of Hearing should be stayed or dismissed.

(t) The Notice of Hearing should be stayed or dismissed because the Joint Regulators chose the regulator to prosecute DBSL. It was open to the Joint Regulators to have the OSC prosecute DBSL. Instead, the Joint Regulators proceeded in a forum that renders full answer and defence by DBSL impossible, breaching a key principle of fundamental justice.

(u) In the alternative, if the prosecution of DBSL is permitted to proceed, DBSL's right to make full answer and defence in accordance with the principles of fundamental justice must be protected to the extent possible by providing DBSL with full disclosure of the fruits of the Joint Investigation.

(v) IIROC Staff is obliged to disclose all relevant evidence, including material that has a reasonable possibility of being relevant to the ability of DBSL to make full answer and defence. In this case, that includes evidence obtained by the other Joint Regulators that IIROC Staff had access to in formulating the Joint Statement of Facts and the allegations against DBSL.

[17] DBSL's Stay Motion was heard by the IIROC Hearing Panel on September 27, 2010 and October 6 and 7, 2010 (the "**Stay Motion Hearing**").

F. The IIROC Decision

[18] On October 13, 2010, the Hearing Panel dismissed the Stay Motion, giving the following reasons:

> IIROC participated with the Ontario Securities Commission and L'Autorité des marchés financiers in an investigation into the freezing of the third party Asset-Backed Commercial Paper market in the summer of 2007. That investigation identified a number of specific persons who, Deutsche Bank states, could give material support to its defence to the contraventions alleged against it. Those

persons are not IIROC Members. Deutsche Bank wants to have those persons testify on its behalf at the hearing.

It is common ground that IIROC has no power to compel persons, who are neither members of the IDA nor employed by a member, to testify at a disciplinary hearing. Deutsche Bank contends, therefore, that it is deprived of its right to make full answer and defence because it cannot force those persons, or any of them, to testify.

The law with respect to granting a stay at this stage of a proceeding has been enunciated by the Court of Appeal on more than one occasion. We refer specifically to *R. v. R.C.*, [1995] O.J. No. 210 (C.A.) ["***R.C.***"]. While the circumstances giving rise to the application for a stay in that case were different from these, we are satisfied that there is no difference in principle. We quote from the decision of the Court which was delivered by Griffiths J.A.:

> Mr Justice Jenkins then found on the evidence before him that the accused had met this burden.
>
> In our respectful view the evidence must clearly establish prejudice to the defence of a significant degree before a stay should be granted by reason of pre-charge delay. In *Regina v. François*, (1993) 15 O.R. (3d) 627 this court quoted with approval from an earlier decision in Blake as follows:
>
> > In our view, the showing of some prejudice is not a sufficient basis for a decision that an accused person's Charter rights under ss. 7 and 11(d) would be infringed if the accused were required to stand trial. What must be demonstrated on the balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence. The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all of the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal. The Crown's submission was, in our view, right. The motion was premature and the stay should not have been granted when it was.
>
> In our view the above reasoning applies equally to this case. It would be more appropriate for this matter to proceed to trial and for the trial judge to determine whether a stay is appropriate at that stage of the trial, when he or she has had the benefit of hearing sufficient evidence to assess whether prejudice has been demonstrated of such magnitude as to justify a stay.

> We have no hesitation in concluding that, in this case, the appropriate course is to allow the case to proceed to a hearing at which time the hearing panel will be able to assess whether prejudice has been demonstrated of such magnitude as to justify a stay. The request for a stay is, accordingly, dismissed.

[19] Though DBSL also raised disclosure issues in its Stay Motion before the IIROC Hearing Panel, those issues had been substantially resolved prior to the Stay Motion Hearing. The IIROC Hearing Panel granted DBSL's request for an adjournment to allow counsel to review the disclosure, and ordered that a date for the hearing on the merits (the "**IIROC Merits Hearing**") be set after April 4, 2011. No date has been fixed.

G. The Application

[20] In its Notice of Request for Hearing and Review, DBSL asks the Commission to:

(a) set aside the IIROC Decision;

(b) set aside, or, in the alternative, stay the Notice of Hearing;

(c) stay further IIROC proceedings until the Application has been concluded; and

(d) such further and other relief as the lawyers may request and the Commission may permit.

[21] As noted at paragraph 4 above, we issued an interim stay of the IIROC Proceeding pending our decision on the Application.

III. THE STANDARD OF REVIEW

[22] There is no dispute in this case about the appropriate standard of review.

[23] Section 21.7 of the Act provides as follows:

> **21.7(1) Review of decisions –** The Executive Director or a person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling.
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> **(2) Procedure –** Section 8 applies to the hearing and review of the direction, decision, order or ruling in the same manner as it applies to a hearing and review of a decision of the Director.

[24] Subsection 8(3) of the Act provides as follows:

> **8(3) Power on review –** Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.

[25] There is no dispute that the IIROC Decision is a "direction, decision, order or ruling made under a by-law . . . of a recognized self-regulatory organization" and is therefore subject to review by the Commission under section 21.7 of the Act.

[26] In considering a section 21.7 application, the Commission exercises original jurisdiction, as opposed to a more limited appellate jurisdiction, and is free to substitute its judgment for that of the self-regulatory organization ("**SRO**"). However, in practice the Commission takes a restrained approach. The Commission will not substitute its own view of the evidence for that of the SRO just because the Commission might have reached a different conclusion. As stated in *Canada Malting*, the leading case on this issue, and reaffirmed in a number of subsequent decisions, the Commission will intervene in a decision of the SRO if:

1. the SRO has proceeded on an incorrect principle;

2. the SRO has erred in law;

3. the SRO has overlooked some material evidence;

4. new and compelling evidence is presented to the Commission that was not presented to the SRO; or

5. the SRO's perception of the public interest conflicts with that of the Commission.

(*Canada Malting*, *supra*, at para. 24, followed in, for example, *Re Boulieris* (2004), 27 O.S.C.B. 1597 ("***Boulieris***"), at paras. 29-32, aff'd [2005] O.J. No. 1984 (Div. Ct.), at para. 27; *Re Berry* (2008), 31 O.S.C.B. 5441 ("***Berry Disclosure***"), at paras. 55-59; *Re Berry* (2009), 32 O.S.C.B. 8051 ("***Berry Jurisdiction***"), at para. 69; *Re HudBay Minerals Inc.* (2009), 32 O.S.C.B. 1089, at para. 23, and (2009), 32 O.S.C.B. 3733, at para. 105; and *Re Kasman* (2009), 32 O.S.C.B. 5729, at para. 43)

IV. POSITIONS OF THE PARTIES

A. DBSL

1. The Standard of Review

[27] DBSL submits that its Application satisfies four of the five *Canada Malting* criteria. Specifically, DBSL submits that the IIROC Hearing Panel proceeded on an incorrect principle, which led to an error of law and failure to consider material evidence, and that new and compelling evidence that was not available to the IIROC Hearing Panel confirms the prejudice to DBSL as a result of what DBSL claims is IIROC's inability to provide a fair hearing.

[28] In particular, DBSL makes the following submissions:

(i) IIROC proceeded on an incorrect principle

[29] DBSL submits that the common law rules of natural justice apply to IIROC proceedings, and a high level of procedural fairness is required because an IIROC hearing is close to the judicial end of the administrative-judicial spectrum (*Re Mills*, [1999] I.D.A.C.D. No. 41 (IDA)

("***Mills***") at p. 5 (QL)). As a matter of natural justice, DBSL has a right to make full answer and defence to the allegations against it, and is entitled to procedural fairness, including the right to call, examine and cross-examine witnesses (*Mills*, *supra*, at p. 3 (QL); *Derivative Services Inc. v. Investment Dealers Association of Canada*, [2005] O.J. No. 2118 (Div. Ct.), at paras. 58, 87-88).

[30] However, as an SRO, IIROC is not governed by the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**"), and has no power to issue subpoenas under subsection 12(1) of the SPPA (*Re Derivative Services Inc.*, 1999 CarswellNat 3808 IDA) ("***Derivative Services***"), at para. 69; *Re Shaughnessy*, [2001] I.D.A.C.D. No. 3 (IDA) ("***Shaughnessy Withdrawal***"), at para. 13; and *Re Konidis*, [2002], I.D.A.C.D. No. 18 (IDA) at para. 14).

[31] DBSL submits that the IIROC proceeding concerns broad allegations that engage an entire segment of the financial services market. The Allegations are based on an expansive investigation in which Staff employed the powers of senior regulators to compel evidence from persons who are not IIROC Members and are not compellable by IIROC (the "**Non-Members**" or "**Non-Compellable Witnesses**"), and then based the Allegations against DBSL on the evidence so obtained. DBSL submits that probative exculpatory evidence in support of DBSL's defences is known to IIROC Staff and DBSL but DBSL cannot secure it because of IIROC's inability to compel the testimony of Non-Members, thus denying it the right to make full answer and defence (*R. v. Seaboyer*, [1991] 2 S.C.R. 577, at para. 34). DBSL submits that unlike the other Joint Regulators (the OSC and the AMF), IIROC alone cannot provide DBSL with this fundamental level of fairness. DBSL submits that the OSC has not assigned to IIROC any of its investigative or disciplinary authority, and is not authorized to do so (*Derivative Services*, *supra*, at para. 91). A hearing in this case, on the alleged subject matter before IIROC, would be so tainted by procedural unfairness and breach of natural justice that it should not proceed, in DBSL's submission.

[32] Accordingly, DBSL submits that the IIROC Hearing Panel proceeded on an incorrect principle by treating DBSL's Stay Motion as an evidentiary motion rather than a jurisdictional motion. DBSL submits that while some evidentiary issues may be determined in the context of a hearing, a jurisdictional issue, particularly in the case of an SRO, which has no inherent jurisdiction, must be determined before a hearing can proceed:

> The District Council will lose jurisdiction to hear a matter only if a respondent presents evidence of actual prejudice from the delay that significantly hinders the respondent's ability to make full answer and defence to the allegations in the notice of hearing. As long as there is sufficient evidence to allow a fair hearing, a matter can proceed.
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> (*Re Shaughnessy*, [2000] I.D.A.C.D. No. 34 (IDA) ("***Shaughnessy***"), at pp. 7-8 (QL); followed in *Re Global Securities Corp.*, [2007] I.D.A.C.D. No. 42 (IDA) ("***Global Securities***"), at para. 48; see also *Berry Jurisdiction*, *supra*, at paras. 60-65)

[33] DBSL submits that IIROC does not have jurisdiction to hear the Allegations because it cannot provide DBSL with a fair hearing.

(ii) IIROC erred in law

[34] DBSL submits that proceeding on this incorrect principle led the IIROC Hearing Panel to err in law by basing its decision on *R.C.*, an evidentiary decision in a criminal case. DBSL submits that *R.C.* is distinguishable. Whereas *R.C.* concerned evidence that was "missing" or unavailable, due to the death of the accused's wife, DBSL submits that this case is about evidence that is available but cannot be compelled because of IIROC's limited powers of compulsion. In *R.C.*, the accused did not challenge the jurisdiction of the court.

[35] DBSL submits that IIROC erred in law by asserting jurisdiction where it had none due to its inability to provide procedural fairness, including the right to make full answer and defence. DBSL submits that in this case, the IIROC Hearing Panel did not have the option to proceed to a hearing on the merits because the deficiency that arises from IIROC's limited powers of compulsion goes to fundamental jurisdiction.

[36] DBSL also submits that it is necessary for a fair hearing that the DBSL Stay Motion be decided prior to the IIROC Merits Hearing. The IIROC Hearing Panel erred in failing to make that decision.

(iii) IIROC failed to consider material evidence

[37] DBSL submits that because it applied the wrong precedent (*R.C.*), the IIROC Hearing Panel failed to consider the evidence before it about the prejudice DBSL would suffer as a result of its inability to make full answer and defence.

[38] In particular, DBSL submits that it provided evidence to the IIROC Hearing Panel that its ability to make full answer and defence would be undermined as follows (the "**Stay Motion Evidence**"):

(a) DBSL's defence that its role in the ABCP market was limited and distinguishable from that of other dealers implicated by the Joint Regulators, and that DBSL was not privy to the same information as those other dealers, is prejudiced because it cannot call:

  (i) evidence from former Coventree employees that DBSL did not play a material role in the marketing, distribution and market-making of Coventree ABCP;

  (ii) evidence from counterparties such as Mavrix that DBSL was an agency dealer with a limited role in the ABCP market; and

  (iii) evidence from counterparties such as CDPQ that DBSL had a limited role in liquidity discussions and did not have a sufficient role in the market that it could impair liquidity.

(b) DBSL's defence that counterparties did not rely or reasonably rely on DBSL's advice is prejudiced because DBSL cannot call evidence from counterparties such as CUCO and CDPQ that they, as ABCP purchasers, did not rely on the advice of dealers, and DBSL in particular, in selecting which ABCP products to buy, but rather that they conducted their own due

diligence and at all material times were aware of, among other things, conduit subprime content;

(c) DBSL's defence that it had a good faith, reasonable belief that the ABCP market would continue is prejudiced because it cannot call:

(i) evidence from representatives of Coventree of communications, which did not involve DBSL, in late July 2007 regarding CDPQ pulling back from the ABCP market and redeploying its resources; and

(ii) evidence from representatives of Coventree that the ABCP market may have been poised for a "liquidity event" in the days before the August 7 Call, and that DBSL was excluded from the group of participants with knowledge of the potential "liquidity event"; and

(d) DBSL's defence that the July 24 Email was immaterial to DBSL's counterparties is prejudiced because DBSL cannot call evidence from Coventree and CDPQ that the market freeze was driven not by the subject matter of the July 24 Email but rather by external global factors.

[39] DBSL submits that the IIROC Hearing Panel did not address DBSL's evidence of prejudice in the IIROC Decision and that this was a further error such that the IIROC Decision should be set aside.

(iv) There is compelling new evidence not available to the IIROC Hearing Panel

[40] DBSL submits, in addition, that the transcripts of the Coventree Hearing provide new and additionally compelling evidence that is available to the Commission but was not available to the IIROC Hearing Panel. The transcripts were not made available to DBSL until after the Stay Motion Hearing. DBSL identified thirteen witnesses, apart from DBSL personnel, that it requires in order to make full answer and defence to the Allegations, at least ten of whom are non-compellable. DBSL gave two specific examples of evidence given by Non-Members in the Coventree Hearing that supports DBSL's defences to the Allegations (the "**Coventree Evidence**"). DBSL submits that the Coventree Evidence demonstrates that the evidence of Non-Compellable Witnesses is required to permit DBSL to make full answer and defence to the Allegations.

(v) Evidence of prejudice to DBSL

[41] DBSL submits that IIROC cannot provide it with an opportunity to make full answer and defence because IIROC lacks power to compel evidence that is "probative and potentially exculpatory" from Non-Members, including the Stay Motion Evidence and the Coventree Evidence. DBSL submits that there was no remedy available to IIROC short of a stay of proceedings or dismissal of the Notice of Hearing that would cure the prejudice to DBSL.

2. Stay of Proceedings

[42] DBSL submits that the IIROC Hearing Panel has a residual discretion to stay proceedings where going ahead "would violate those fundamental principles of justice which underlie the

community's sense of fair play and decency" (*Shaughnessy*, *supra*, at p. 8; *Re Global Securities Corp.*, [2007] I.D.A.C.D. No. 42 (IDA), at para. 48). The IIROC Hearing Panel should have stayed the proceeding in this case, according to DBSL, because no remedy short of a stay can cure the prejudice to DBSL.

[43] DBSL submits that admitting the transcripts of the examinations of witnesses examined during the Joint Investigation will not provide DBSL with the ability to make full answer and defence. Because this evidence is hearsay, DBSL cannot know whether it will be admitted or given any weight by the IIROC Hearing Panel. In addition, because the examinations were conducted by the Joint Regulators, the transcript evidence is limited to the questions asked by the Joint Regulators and reflects their views and objectives. DBSL submits that it must have an opportunity to cross-examine these witnesses, who may have relevant evidence that supports DBSL's defences (*Re B and Catholic Children's Aid Society of Metropolitan Toronto*, [1987] O.J. No. 2614 (Div. Ct.); *Gilbert v. Ontario (Provincial Police)*, [1999] O.J. No. 4784 (S.C.J.), at para. 11). Finally, DBSL submits that, like the respondents in the OSC and AMF proceedings, it must be able to go beyond the documents and evidence obtained in the Joint Investigation to be able to make full answer and defence.

[44] DBSL submits that it is evident from the conduct of the Joint Investigation that the summons power is vital to DBSL's right to make full answer and defence. Most of the witness examinations conducted in the course of the Joint Investigation were compelled by summons.

[45] DBSL submits that proceeding to the IIROC Merits Hearing, at which time the IIROC Hearing Panel will be able to assess whether prejudice has been demonstrated, is unfair because, amongst other reasons:

(a) DBSL requires the ability to call individual and corporate witnesses evidently adverse to it, such as representatives of CDPQ; it stands to reason and attracts judicial notice that adverse witnesses will not voluntarily attend DBSL's hearing without compulsion;

(b) DBSL's right to make full answer and defence cannot rest on a non-party witness's non-binding decision whether or not to voluntarily attend at DBSL's hearing;

(c) DBSL's right to make full answer and defence cannot depend on witnesses with whom an attendance needs to be negotiated in any manner; and

(d) DBSL (and IIROC Staff) would be required to spend time and resources preparing for a hearing premised on the hope, rather than the certainty, that witnesses would appear.

[46] In summary, DBSL submits that to proceed with the IIROC Merits Hearing despite these limitations is not practical or fair. IIROC is without jurisdiction due to its inability to assure DBSL its right to make full answer and defence. The only solution is to stay or dismiss the Notice of Hearing.

3. Prematurity

[47] In response to the submission of IIROC Staff, supported by OSC Staff, that the Application is premature, DBSL submits that the Application is not premature because "IIROC is not going to get the power to summons" before the IIROC Merits Hearing, and therefore, DBSL's counsel says "We know now exactly what I'm going to be having to say to the panel hearing this in April. I have these witnesses, I can't get at these witnesses, and it's a structural problem in this case because this case essentially shouldn't be at a forum on these issues with these disabilities." (Hearing Transcript, p. 41).

[48] DBSL submits that this case, which concerns a jurisdictional issue – the inability of IIROC to provide DBSL with an opportunity to make full answer and defence – is distinguishable from *R.*C., which concerned an evidentiary issue involving only one witness. DBSL submits that the issue was previously canvassed in *Berry Disclosure*, where the Commission intervened to stop a denial of natural justice and achieve a just and expeditious resolution of a dispute.

B. IIROC Staff

1. The Standard of Review

[49] IIROC Staff emphasizes the well-established principle that the Commission takes a "restrained approach" to applications for review under section 21.7 of the Act and submits that DBSL bears a heavy burden to demonstrate that this case satisfies the *Canada Malting* criteria. IIROC Staff submits that this case does not fall within the very limited circumstances in which the Commission will interfere with the decision of an SRO. In any event, IIROC Staff submits that the Application is premature.

[50] IIROC Staff submits that the Joint Investigation and the Notice of Hearing were authorized by IIROC's by-laws, to which DBSL agreed when it executed the Membership Application. IIROC submits that its investigatory powers are not limited in such a way as to prohibit IIROC Staff from obtaining evidence from persons who are not Compellable Witnesses in the course of an investigation – as, for example, when a complaint from a client of an IIROC Member results in an investigation and proceeding – or from relying on that evidence, whether or not it was obtained through an investigation conducted in conjunction with another regulator, or from a client, or from any other legitimate source.

[51] IIROC Staff submits that the IIROC Decision was correct and reasonable and should not be disturbed by the Commission.

[52] IIROC Staff asks that the Application be dismissed and the IIROC Merits Hearing be permitted to proceed.

2. Stay of Proceedings

[53] IIROC Staff relies on *R.C.* and on *Sam Lévy & Associés Inc. v. Mayrand*, [2006] 2 F.C.R. 543 (aff'd [2006] F.C.J. No. 867) ("***Lévy***").

[54] In *R.C.*, which was referenced in the IIROC Decision, set out at paragraph 18 above, the Ontario Court of Appeal quoted with approval an earlier decision which stated that showing "some prejudice" is not sufficient to obtain a stay:

> What must be demonstrated on a balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence. The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal.

[55] In *Lévy*, certain holders of trustee licences granted by the Superintendent of Bankruptcy under the authority of the *Bankruptcy and Insolvency Act* applied for judicial review of decisions of Delegates of the Superintendent. At the hearing before the Delegates, the licensees sought a stay of the disciplinary proceedings against them on the basis that the Delegates had no power of summoning or compelling witnesses to testify, and that this "created a risk of infringing their right to make full answer and defence". The stay motion was refused. On judicial review, the Federal Court held that the Delegates did not err in determining that the stay motion was premature:

> In the case at bar, the problem of summoning witnesses and compelling them to testify seemed purely hypothetical. Thus, in the absence of evidence of actual and present harm, the Delegates were entitled to refuse to exercise their discretion to decide the question raised by the licensees.
>
> (*Lévy*, *supra*, at para. 179)

[56] In the present case, IIROC Staff submits that the problem of summoning witnesses and compelling them to testify is hypothetical at this stage. For example, with respect to DBSL's submission that it will not be able to advance a defence that its role in the ABCP market was limited and distinguishable from other dealers because IIROC cannot compel the attendance of certain potential witnesses, IIROC Staff submits that it bears the onus of proving its allegations. IIROC Staff further submits that it has not alleged that DBSL's role was indistinguishable from that of other dealers, but if IIROC Staff leads evidence to that effect, DBSL will be entitled to object to the evidence being entered and to cross-examine any witness put forward by IIROC Staff. Moreover, IIROC Staff submits that DBSL has not provided any evidence that any potential witness has refused to testify, and has not explained why its own employees would be unable to give evidence about DBSL's role.

[57] IIROC Staff submits that in the absence of evidence of actual and present harm, the IIROC Hearing Panel was correct in refraining from exercising its discretion to dismiss or stay the Notice of Hearing.

3. Prematurity

[58] IIROC Staff submits that the general principle concerning administrative proceedings is that they are to be completed before review is sought, absent extraordinary circumstances. IIROC Staff relies on *Berry Disclosure*, in which the Commission considered the case-law on prematurity at some length, referring to *Ontario College of Art v. Ontario Human Rights Commission* (1992), 11 O.R. (3d) 798 (Div. Ct.) ("***OCAD***"), *Coady v. Law Society of Upper Canada* (2003), 171 O.A.C. 51 (Div. Ct.) ("***Coady***"), and *Lifford Wine Agencies Ltd. v. Ontario (Alcohol & Gaming Commission)* (2005), 76 O.R. (3d) 401 (C.A.) ("***Lifford***"). IIROC Staff submits that, in this case, the issues raised by DBSL can only be resolved in the context of the IIROC Merits Hearing.

C. OSC Staff

1. Standard of Review

[59] Like IIROC Staff, OSC Staff submits that despite the Commission's broad powers of review on a section 21.7 application, the Commission has repeatedly stated that it will take a restrained approach when reviewing decisions of an SRO, and that the applicant has a heavy burden of showing that its case fits squarely within one of the five *Canada Malting* grounds.

[60] In this case, OSC Staff submits that none of the five factors is present that would normally form the basis for the Commission to interfere with the decision of the IIROC Hearing Panel. OSC Staff submits that the IIROC Hearing Panel did not err in principle or law by dismissing the Stay Motion until a full hearing could be held. The IIROC Hearing Panel properly applied the law and reserved its decision until the extent of the prejudice, if any, could be considered in the context of a full hearing.

2. Stay of Proceedings

[61] OSC Staff submits that the IIROC Hearing Panel properly applied the law on granting a stay of proceedings, dismissing the Stay Motion until the extent of the prejudice suffered by DBSL, if any, could be determined at the IIROC Merits Hearing.

[62] OSC Staff submits that a stay is an extraordinary remedy that is normally considered once prejudice has been clearly established and where there are no other reasonable means to remedy the prejudice suffered. (*R. v. O'Connor* (1995), 4 S.C.R. 411). Further, where a stay is sought based on alleged prejudice to the ability to make full answer and defence, it will be granted only where it is demonstrated that the actual prejudice suffered is of such a degree that it would violate those fundamental principles of justice which underlie the community's sense of fair play and decency (*R. v. Jewitt* (1985), 2 S.C.R. 128). Therefore, a stay is appropriately granted after the decision maker has had an opportunity to consider the evidence and assess prejudice in light of all the evidence admitted (*R. v. La* (1997), 2 S.C.R. 680 ("***La"***); *R. v. Bero* (2000), O.J. No 4199 (C.A.) ("***Bero***"); and *R. v. Henderson* (2004), O.J. No. 4157 (C.A.) ("***Henderson***")).

3. Prematurity

[63] OSC Staff agrees with IIROC Staff that the Application is premature. It relies on *OCAD, Universal Settlements International, Inc. v. Ontario (Superintendent of Financial Services)*, [2001] O.J. No. 4301 (S.C.J.) ("***USI***"), *Re TSX Inc.* (2007), 30 O.S.C.B. 8917 ("***TSX***"), and *ATI Technologies Inc.* (2004), 27 O.S.C.B. 6859 ("***ATI***"). OSC Staff submits that no exceptional or extraordinary circumstances exist in this case that require the Commission to exercise its discretion to interfere with the IIROC Decision and that interfering with the IIROC proceeding now would fragment the IIROC process.

V. ANALYSIS

A. Standard of Review: Does the Application meet the *Canada Malting* Criteria?

[64] DBSL submits that the Application satisfies four of the five *Canada Malting* criteria set out at paragraph 26 above. It argues that in dismissing the Stay Motion, the IIROC Hearing Panel proceeded on an incorrect principle, erred in law and failed to consider material evidence of

prejudice to DBSL, and that new and compelling evidence that was not available to the IIROC Hearing Panel further demonstrates prejudice.

[65] We are not persuaded by DBSL's submissions. For the reasons stated at paragraphs 66 to 71 below, we find that the IIROC Hearing Panel correctly stated and applied the law on granting a stay of proceedings and did not err in dismissing DBSL's Stay Motion. We also find, for the reasons stated at paragraphs 72 to 76 below, that DBSL's request for an order setting aside the IIROC Decision is premature. Our order dismissing the Application would not preclude DBSL from bringing a motion for a stay of proceedings at a later stage of the IIROC Proceeding or from bringing an application for a hearing and review of any decision of an IIROC Hearing Panel in the future. In our view, it is unnecessary for us to address DBSL's submissions relating to IIROC's jurisdiction in these circumstances.

B. Stay of Proceedings

[66] The IIROC Hearing Panel noted, in the first paragraph of its reasons, that DBSL submitted that the Joint Investigation had identified a number of specific persons who are not IIROC Members who could give material support to DBSL's defence. As we read the IIROC Decision, the IIROC Hearing Panel found there was no need for a detailed discussion of the Stay Motion Evidence because it had concluded that the "the appropriate course is to allow the case to proceed to a hearing at which time the hearing panel will be able to assess whether prejudice has been demonstrated of such magnitude as to justify a stay."

[67] In dismissing DBSL's Stay Motion, the IIROC Hearing Panel relied on *R.C.*, which concerned pre-charge delay. The accused was charged with sexually assaulting his stepdaughter. At trial, he sought and obtained a stay of proceedings on the basis that his wife, who had died about 3 months before charges were laid, could have given evidence for the defence on important factual issues. The trial judge found that the accused had satisfied his burden of showing that his defence had been prejudiced by the pre-charge delay. As stated in the IIROC Decision, set out at paragraph 18 above, the Ontario Court of Appeal allowed the Crown's appeal from the stay order, concluding that the case should proceed to trial, at which time the trial judge could determine whether sufficient evidence of prejudice had been demonstrated of such magnitude as to justify a stay.

[68] Although, as stated at paragraph 34 above, DBSL attempted to distinguish *R.C.* on the basis that it concerned unavailable evidence rather than non-compellable evidence, and that it did not involve a challenge to jurisdiction, we find *R.C.* to be applicable on the central point, that is: the appropriate timing of a stay of proceedings.

[69] We find that there is a great deal of authority for the approach adopted by the IIROC Hearing Panel. We find the decision of the Supreme Court of Canada in *La* to be especially helpful on the process to be followed. In *La*, the trial judge granted a stay of proceedings because a police officer had lost a tape recording of his interview with a complainant, and therefore the tape was unavailable to be disclosed by the Crown. The Crown successfully appealed the stay order. In dismissing the accused's further appeal, the Supreme Court of Canada made the following comments about the timing of a stay decision:

> The appropriateness of a stay of proceedings depends upon the effect of the conduct amounting to an abuse of process or other prejudice on the fairness of the trial. This is often best assessed in the context of the trial as it unfolds. Accordingly, the trial judge has a discretion as to whether to rule on the

> application for a stay immediately or after hearing some or all of the evidence. Unless it is clear that no other course of action will cure the prejudice occasioned by the conduct giving rise to the abuse, it will usually be preferable to reserve on the application. This will enable the judge to assess the degree of prejudice and as well to determine whether measures to minimize the prejudice have borne fruit.
>
> (*La*, *supra*, at para. 27)

[70] The Ontario Court of Appeal followed *La* in *Bero*. In that case, the accused, who had been charged with impaired driving causing bodily harm, brought a stay motion on the ground that evidence (the vehicle involved in the accident) had been lost or disposed of. The trial judge considered the motion at the outset of the trial and dismissed it. On the accused's appeal from his conviction, the Ontario Court of Appeal held that the trial judge should have reserved on the motion until all the evidence had been heard:

> The trial judge should not have ruled on the motion at the outset of the trial. This Court has repeatedly indicated that except where the appropriateness of a stay is manifest at the outset of a proceeding, a trial judge should reserve on motions such as the motion brought in this case until after the evidence has been heard. The trial judge can more effectively assess issues such as the degree of prejudice caused to the accused by the destruction of evidence at the end of the trial.
>
> (*Bero*, *supra*, at para. 18; see also *Henderson*, *supra*, at para. 39)

[71] We find that the IIROC Hearing Panel correctly stated and applied the law on granting a stay of proceedings. We accept the submissions of IIROC Staff, set out at paragraph 56 above, that at the time the IIROC Hearing Panel heard the Stay Motion, the extent of any prejudice to DBSL as a result of IIROC's inability to compel evidence from Non-Members could not be determined, and therefore any stay of proceedings would have been premature.

C. Prematurity

[72] For the same reasons, we accept the submission of IIROC Staff and OSC Staff that DBSL's Application for an order setting aside the IIROC Decision is premature.

[73] The courts and the Commission have repeatedly expressed their reluctance to interfere with an ongoing proceeding absent extraordinary circumstances. The Commission reviewed the leading cases in *Berry Disclosure*, as follows:

> The general legal principles regarding prematurity are set out in [*OCAD*, *supra*] at 799-800:
>
> > [A court has] a discretion to exercise in matters of this nature. It can refuse to hear the merits of such an application if it considers it appropriate to do so. Where the application is brought prematurely, as alleged by the Attorney General in these proceedings, it has been the approach of the Court to quash the application, absent the showing of exceptional or extraordinary circumstances demonstrating that the application must be heard: see *Latif v. Ontario (Hospital Resources Commission)* (an unreported decision of this court of March 11, 1992; leave to appeal was denied on

> June 8, 1992 by the Ontario Court of Appeal) and *Hancock v. Ontario (Human Rights Commission)* (an unreported decision of this court of November 10, 1992).
>
> These decisions follow a long line of authority which has indicated the need to avoid a piecemeal approach to judicial review of administrative action. The board of inquiry in this case has jurisdiction to entertain and determine any of the issues that have been so ably advanced …
>
> For some time now the Divisional Court has, as I have indicated, taken the position that it should not fragment proceedings before administrative tribunals. Fragmentation causes both delay and distracting interruptions in administrative proceedings. It is preferable, therefore, to allow such matters to run their full course before the tribunal and then consider all legal issues arising from the proceedings at their conclusion.

The Divisional Court in [*Coady*, *supra*] further stated:

> When litigants before administrative tribunals seek the court's intervention in the midst of the litigation, the court is reluctant to do so except in very extraordinary circumstances. Experience has shown that the best course is to permit the hearings to be completed and then review the entire mater. Many apparent problems disappear in the light of further evidence; sometimes the result makes the application unnecessary. ([*Coady*], *supra* at paras. 9-11.)

The Commission has recognized these concerns. The recent Commission decision of *Re TSX Inc.* (2007), 30 O.S.C.B. 8917, noted that premature attempts to review tribunal decisions are rejected because the interruption would hinder the first instance tribunal from properly and effectively performing its function (at para. 181).

Nonetheless, the Court of Appeal has recognized:

> [The general rule] is not absolute and should not be applied rigidly if there is a prospect of real unfairness through, for example, the denial of natural justice. In these circumstances, which will arise infrequently, the courts will intervene before completion of an administrative hearing and prior to the exhaustion of all alternative remedies. ([*Lifford*], *supra* at para. 43.)

(*Berry Disclosure*, *supra*, at para. 107-111)

[74] In *Berry Disclosure,* the issue was whether Berry was entitled to disclosure of materials relating to the settlement between RS Staff and Berry's former employer, which was a co-respondent in the same proceeding. RS, in a preliminary decision, had dismissed Berry's disclosure motion. In the circumstances of that case, the Commission concluded that ordering

disclosure of the settlement materials before the RS hearing on the merits began would expedite rather than delay or fragment the RS proceeding.

[75] There are no outstanding disclosure issues in this case. In our view, the extent of any prejudice to DBSL's ability to make full answer and defence can only be assessed by the IIROC Hearing Panel in the context of the IIROC Merits Hearing. At that time, IIROC Staff will have set out its theory of the case and disclosed the evidence on which it intends to rely, and DBSL will have prepared its defence, had an opportunity to attempt to secure the attendance of certain Non-Compellable Witnesses on a voluntary basis, and obtained transcript evidence from Non-Compellable Witnesses who refuse to attend on a voluntary basis. The IIROC Hearing Panel will then be able to consider the actual prejudice to DBSL's right to make full answer and defence caused by specific refusals of Non-Compellable Witnesses to testify. Any such decision made by an IIROC hearing panel would be reviewable by the Commission pursuant to section 21.7 of the Act at that time.

[76] At this stage, prior to commencement of the IIROC Merits Hearing, we find that the Application is premature. However, we note the comment of the Supreme Court of Canada, in *La*, that a stay motion that is unsuccessful at an early stage of a trial "may be renewed if there is a material change of circumstances. . . . This would be the case if, subsequent to the unsuccessful application, the accused is able to show a material change in the level of prejudice" (*La*, *supra*, at para. 28). Our ruling on the Application does not preclude DBSL from bringing another stay motion before the IIROC Hearing Panel or from bringing another application before the Commission in the appropriate circumstances.

VI. CONCLUSION

[77] For these reasons, it is ordered that:

1. the Application is dismissed; and

2. the Interim Stay ordered on January 7, 2011 is revoked.

DATED in Toronto, Ontario this 30th day of September, 2011.

"Mary G. Condon"	*"Paulette L. Kennedy"*
Mary G. Condon	Paulette L. Kennedy