BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re CIRO and Englesby, 2025 BCSECCOM 148 Date: 20250407

**Canadian Investment Regulatory Organization (CIRO),
Teymur Englesby and Cale Nishimura**

Panel	Gordon Johnson	Vice Chair
	Judith Downes	Commissioner
	Karen Keilty	Commissioner
Hearing dates	January 23, 24 and February 3, 2025	
Submissions completed	February 3, 2025	
Ruling date	April 7, 2025	
Appearing		
Steve Zolnay Paul Smith	For the Executive Director	
Jagdeep Khun-Khun David McLellan April Engelberg	For Canadian Investment Regulatory Organization	
Owais Ahmed Jessica Mank	For Teymur Englesby and Cale Nishimura	

Ruling

I. Introduction

[1] On July 22, 2024, a Canadian Investment Regulatory Organization (CIRO) panel (CIRO Panel) issued a decision (Decision) dismissing a disciplinary action against Teymur Englesby (Englesby) and Cale Nishimura (Nishimura) following a regulatory proceeding into a notice of hearing and accompanying statement of allegations (Notice of Hearing) which had been issued against them. Among other things, the CIRO Panel found Englesby and Nishimura did not breach their gatekeeper's obligations as alleged in the Notice of Hearing.

[2] On August 12, 2024, CIRO applied to the Commission under section 28 of the *Securities Act*, 1996, c. 418 (Act) and Part 7 of BC Policy 15-601 *Hearings* (15-601) for a hearing and review of the Decision.

[3] On November 8, 2024, Englesby and Nishimura applied to strike the hearing and review application.

[4] On January 23, 24 and February 3, 2025, we heard both the application for hearing and review and the application to strike. We reserved our decision.

II. Factual and Procedural Background

[5] Englesby is a registered representative with an investment dealer currently named Ventum Financial Corp. That entity was previously named PI Financial Corp (PI). Englesby has been employed with PI since 2009.

[6] At all times relevant to this proceeding Nishimura was Englesby's assistant. Nishimura is also a registered representative.

[7] Englesby's clients included four individuals identified in this proceeding by the initials CP, YK, JL and BB. Englesby's other clients included corporations controlled by some those individuals. The relevant corporate clients were identified as CP Corp, YK Corp and BB Corp.

[8] It was alleged that in and around 2018 various activities related to these client accounts generated a number of indicators (Red Flags) suggesting the occurrence of suspicious activity which should have been seen by Englesby and Nishimura. As outlined in the Decision:

> ¶ 5 The Red Flags included:
>
> (i) the deposit of share certificates for shares in companies (the "Subject Issuers") listed on the Canadian Stock Exchange (the "CSE") in the Client Accounts and the sales of the shares represented thereby in the days before or shortly after such deposits, followed by large withdrawals of the proceeds of such sales,
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> (ii) the trading in the Client Accounts being often uneconomic, and
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> (iii) the trading in several of the Client Accounts during the Relevant Period being out of line with the owner of that account's normal and historical account activity and not consistent with that owner's know-your-client ("KYC") information.
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> ¶ 6 It is alleged that these Red Flags should have caused the Respondents to question the Clients about this trading activity in their accounts by asking the Clients:
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> (i) how the Clients obtained the shares traded in the Client Accounts,
>
> (ii) what was the acquisition price for such shares, and
>
> (iii) whether or not the Clients had any relationship with the corporation which had issued these shares.

[9] CIRO investigated Englesby and Nishimura for allegedly failing to notice or properly respond to the Red Flags. The investigation included the collection of various documents and interviews with Englesby and Nishimura.

[10] The CIRO hearing into the Notice of Hearing proceeded on June 3 to 5, 10 and 11 of 2024. Much of the evidence at the hearing was introduced through an investigator who explained the nature of the investigation which had been undertaken and who identified the majority of the documents which were admitted into the record.

[11] In the course of the hearing, PI's Chief Compliance Officer (CCO) was called as a witness for Englesby and Nishimura. That witness was cross-examined extensively, during which he gave

testimony reflecting his opinions about various matters which are summarized to some extent below.

[12] CIRO filed this application for a hearing and review of the Decision on August 12, 2024.

[13] In their November 8, 2024 application to dismiss this proceeding, Englesby and Nishimura submitted that CIRO is not a party directly affected by the Decision and, as a result, CIRO cannot bring this application under section 28 of the Act.

III. Summary of the CIRO Panel's Decision

[14] We will not summarize all of the evidence which was in the Decision in connection with each individual client. We do summarize selected portions of this evidence in our analysis, below.

[15] The Decision mentions the commissions earned by Englesby and Nishimura in relation to the trading which was alleged to be suspicious. The totals were $51,666 in the case of Englesby and $2,066 in the case of Nishimura.

[16] It is useful for us to quote in some detail part of the Decision, including a portion containing some references to the PI Sales Procedure Manual:

> **PI Financial's Sales Procedure Manual**
> ¶ 55 The Investigator referenced the Sales Procedure Manual of PI Financial (the "PI Manual") and specifically Section 8.2 thereof entitled "Standard of Conduct – The [Registered Representative] RR as Gatekeeper", which includes a copy of a directive from the Vancouver Stock Exchange prior to it being incorporated into the TSXV. He noted that the PI Manual states that this directive is very important in that it "lays out the standard of conduct expected of Investment Advisors".
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> ¶ 56 This directive states:
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> > "The Vancouver Stock Exchange and its Members are committed to being 'an honest, fair and efficient market for venture capital.' The support of all industry participants is key to the achievement of this mission. In particular, the role of the Member and its employees in upholding the integrity of the marketplace (the role of 'Gatekeeper') is of major importance.
> >
> > The Know Your Client rule is one of the fundamental rules of the securities industry. It is incumbent upon any RR to have as full a knowledge as possible of the personal circumstances and investment objectives of all clients, both on an initial and an ongoing basis. It follows that it is the duty of RR's to act in the best interests of their clients.
> >
> > However, RR's must also act in the best interests of their employers and through them the whole securities industry. From this it follows that if the RR becomes aware, through knowledge of the client or otherwise, that the intention or effect of the trading by a client would be in breach of the Securities Act or impugn the integrity of the market place, then it is incumbent on the RR in the capacity of 'Gatekeeper' within the securities industry, to draw the matter to the attention of Management of the firm. The member shall draw the situation to the attention of the Exchange. Further, willful blindness on the part of RRs may equally be construed as failure to meet their responsibilities.

> Each RR must be aware of potential signs of market manipulation. These would include such characteristics as market dominance, price leadership, high closing, use of jitneys to multiple firms, etc. RR's are in fact in the best position to be aware of any market scheme at its outset, because of their knowledge of their clients and their trading patterns."

¶ 57 The Investigator then made reference to Appendix H in the PI Manual entitled "Suspicious Transactions Indicators" under the heading "Examples of Common Indicators" and under the subheading "Economic Purpose" with respect to the following four bullet points:

- transaction seems to be inconsistent with the client's apparent financial standing or usual pattern of activities,
- transaction appears to be out of the ordinary course for industry practice or does not appear to be economically viable for the client,
- transaction is unnecessarily complex for its stated purpose, and
- activity is inconsistent with what would be expected from declared business.

¶ 58 The Investigator made further reference to the wording, also in this Appendix H, under the heading "Examples of Industry-Specific Indicators" and the subheading "Personal Transactions" and to the following two bullet points:

- client has no employment history but makes frequent large transactions or maintains a large account balance, and
- client acquires significant assets and liquidates them quickly with no explanation.

¶ 59 And then, finally, in this Appendix H, under the same heading "Examples of Industry-Specific Indicators" as previously set out, but under the subheading "Securities Dealers", the Investigator made reference to the following three bullet points:

- accounts that have been inactive suddenly experience large investments that are inconsistent with the normal investment practice of the client or their financial ability,
- transfers of funds or securities between accounts not known to be related to the client, and
- transaction of very large dollar size.

¶ 60 The Investigator noted that these provisions in the PI Manual appeared to clearly set out the obligations on the Respondents as gatekeepers to ask questions of the Clients and not to simply execute the client's sell orders.

[17] The Decision then summarizes the primary arguments made on behalf of Nishimura, including the argument that although the trading in the relevant client accounts might have been unprofitable it was not "uneconomic", and the argument that although there was trading which was out of line with historical account activity and KYC information Englesby and Nishimura responded appropriately by updating the KYC information.

[18] The Decision then includes a lengthy summary of evidence given by the CCO, a witness called on behalf of Englesby and Nishimura. Some of that testimony is summarized in the Decision as follows:

> ¶ 68 In the KYC context, he testified, the Registered Representatives have a responsibility to identify suspicious activities other than market related activities, but that

this obligation is fact specific and very dependent upon a particular situation. As well, he added, what a particular Registered Representative considers to be suspicious can be very subjective.

[…]

¶ 72 He stated that the reference therein to “Suspicious Transactions Indicators” and the balance of the provisions of Appendix H were set out in the context of this money laundering concern and were not intended as an attempt to more clearly define the Respondents’ overall role as gatekeepers as suggested by the Investigator.

¶ 73 PI’s CCO testified that in his opinion, the allegations made in the Statement of Allegations did not involve money laundering so that these provisions of the PI Manual, which focused on money laundering, were not necessarily directly applicable to the matter at hand.

Red Flags

Large Deposit of Shares

¶ 74 With respect to a situation where there has been a deposit of share certificates representing a large number of shares into a client’s account, PI’s CCO testified that he did not believe that this activity alone should have raised red flags for the Respondents.

¶ 75 He stated that it was not unusual that investors in venture companies made a determination to divest themselves of their entire shareholdings when they wished to exit their investment. The obligation on the Registered Representative when a share certificate is deposited, he testified, is to confirm the validity of the ownership of the shares represented thereby and not to inquire with the client as to the origin of the shares, when they were acquired, or their acquisition price.

Trading Activity in Client CP and Client CP Corp’s Accounts

¶ 76 PI’s CCO testified that after reviewing the dealings of the Respondents with the accounts of Client CP and Client CP Corp, he did not see any activities which should have triggered alarm bells for the Respondents. With respect to the trading of Client CP, PI’s CCO noted, as Client CP listed his business activity as being that of a consultant, it was not unusual for consultants to receive shares in the companies for which they were consulting and then to sell these shares into the market.

[…]

¶ 79 In any event, PI’s CCO noted, the question of the completion of a client’s NCAF is a KYC issue and is not an issue involving uneconomic trading. And, he observed, the client has the obligation to advise the Registered Representative of such issues as insider information or a control position in the company whose shares are being traded. There is no obligation on the Registered Representative to make inquiries in this respect.

[…]

¶ 82 PI’s CCO confirmed that it was his understanding that there was no requirement on a Registered Representative to inquire as to the acquisition price of a client’s shares, even when there appeared to be a series of sales of these shares into a declining market resulting in a reduced price received for these shares and a resulting overall loss to the client.

[…]

Obligation on Registered Representatives to Ask Questions

¶ 86 PI's CCO testified that in his opinion the only requirement on a Registered Representative to ask questions about a client's trading activities occurred if such trading activities clearly involved concerns around items such as market manipulation or money laundering, or when such activities were clearly out of line with the information provided by the client in the client's NCAF.

[19] The Decision then includes summaries of the positions of the parties before moving on to provide the Panel's analysis. The key portions of the CIRO Panel's analysis are the following:

The Gatekeeper Obligation

¶ 137 It is clear to the Panel that what is required of it in making its decision is to firstly define the gatekeeper obligation which was facing the Respondents during the Relevant Period with respect to the activities of the Clients and the trading in the Client Accounts and, based upon this definition, to determine whether, as alleged in the Notice of Hearing, the failure by the Respondents to make the relevant inquiries with respect to such activities constituted a breach of such a gatekeeper obligation.

¶ 138 In determining what was the relevant gatekeeper obligation facing the Respondents during the Relevant Period, the Panel is aware that it appears that the gatekeeper role has in past decisions, such as those cited by Enforcement Counsel and the Respondents' Counsel set out above, normally has been considered in situations where the evidence is of activities involving market manipulation, money laundering, or more clearly defined suspicious behaviour, usually involving some form of improper market activity, the occurrence of which on coming to the attention of a Registered Representative requires the Registered Representative to be proactive and to make inquiries.

¶ 139 In the matter at hand, Enforcement Counsel have submitted that based upon the evidence before the Panel, the gatekeeper role should be expanded to include the activities around the trading in the Client Accounts. In this expanded definition, it is submitted, these suspicious activities were sufficient and clearly required inquiries to be made by the Respondents.

¶ 140 Taking an opposing view, the Respondents' Counsel submitted that the Panel's role is to operate within the confines of the existing 1400 Rules and to not to make any new ones. In any event, Respondents' Counsel submitted, the referenced activities are all very explainable in their context and, as such, did not require the Respondents to make the inquiries as submitted by Enforcement Counsel.

¶ 141 The Panel has determined that instead of attempting to expand the boundary of the gatekeeper role as requested of it by Enforcement Counsel, in making its decision the Panel is focusing on the particular fact situation facing the Respondents as set forth in the evidence before the Panel and to make its decision based upon these facts applying the Panel's specialized knowledge of the investment industry.

¶ 142 In general terms, the approach being taken by the Panel might be described as a three-step approach. The first of these steps is for the Panel to consider whether or not the particular fact situation presented by the evidence before the Panel involves activities to which a party, acting as a duly diligent person who is active in the investment industry and who serves in a gatekeeper role, might reasonably be considered to be a triggering event or a set of triggering events and of a nature which would require this party to make inquiries of the participants in these activities.

> ¶ 143 If the Panel finds that in its opinion the evidence before it discloses that such a triggering event or set of triggering events did occur, then the Panel's next step is to determine whether or not this party in performing a gatekeeper role made the necessary inquiries from all sources of information at the time reasonably available to the party.
>
> ¶ 144 And, if the Panel does find based on the evidence before it that such reasonable inquiries had been made, the final step in this process is for the Panel to determine whether or not this party acted reasonably based upon the information uncovered by these inquiries.

[20] The CIRO Panel then reviewed the circumstances which allegedly created the triggering events or red flags.

[21] The words used by the CIRO Panel in expressing its analysis and conclusions are important. We have included the key paragraphs in their entirety to provide context, and we have highlighted the words we consider most important:

> ¶ 147 In applying the first step of this approach to the evidence before the Panel with reference to the relevant KYC information, in the Panel's opinion, the disclosed increase in CP's net worth and liquid assets over the Relevant Period might well have resulted from the change in the occupation from that of an employee to a self-employed consultant. Therefore, in and of itself, this change does not appear to constitute a triggering event.
>
> ¶ 148 Similarly, the KYC information and changes thereto for Client YK, Client JL, Client BB, Client VT, and the companies related to these clients, other than Client JL, might be considered to have reasonable explanations and, again, in and of themselves, do not appear to be triggering events.
>
> ¶ 149 Therefore, the Panel finds that on the evidence before us, the trading activities of the Clients which might otherwise have been considered to have been contrary to the KYC information in the relevant party's NCAF all appear to have possible reasonable explanations, and therefore that Enforcement Staff [CIRO Staff] has not demonstrated on a balance of probabilities one or more triggering events with respect to possible inconsistencies between the Clients' trading activities and their KYC information.
>
> […]
>
> ¶ 153 These trades, especially in the case of CP and CP Corp, suggest rather than uneconomic trading the monetization of shares earned as consulting fees being sold into a limited and falling market for the shares. And, similarly, with the disposition of the CRYP shares, the trading in these shares appear to be a monetization of the shares into a falling market.
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> ¶ 154 As well, with respect to the Red Flag of a significant change in the account activity for CP and CP Corp, the evidence shows that there was obviously a marked change in the affairs of CP during the Relevant Period and the trading activity in the CP and CP Corp accounts reflected this change.
>
> ¶ 155 The Panel therefore finds that the trading in the Client Accounts might have the perfectly reasonable explanation as set out above, and, therefore, does not constitute a triggering event.
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> […]

> ¶ 159 Based upon this submission, the trading activities reflected in the Statement of Allegations represented a very small portion of the trading activities undertaken by the Respondents during the Relevant Period and makes it difficult for the Panel to accept that the trading activities conducted by the Respondents in the Client Accounts were as a result of improper activities to earn these commissions, were part of a larger collective effort, or, at least, should have raised Red Flags.
>
> […]
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> **Final Determination**
> **Lack of Triggering Events**
> ¶ 161 On the evidence before the Panel, the Panel finds that Enforcement Staff have not proved factors which, on the balance of probabilities, should be considered one or more triggering events which should have reasonably raised a concern to the Respondents as Registered Representatives active in the investment industry and which, therefore, would have imposed upon them the obligation to make further inquiries of the Clients.
>
> ¶ 162 Having not found one or more such triggering events, the Panel does not need to explore the two other steps of its approach as described above.
>
> [emphasis added]

[22] After providing its conclusions the Panel added some comments under a heading about deficiencies in the Notice of Hearing.

IV. Jurisdiction

A. Key provisions of the Act

[23] Nishimura and Englesby's application to strike the hearing and review application raises the question of who is entitled to bring an application for hearing and review under section 28 of the Act.

[24] The relevant sections of the Act relating to reviews of decisions are as follows:

> **Recognition**
> 24 On application, the commission may recognize a person as
>
> (a) a self-regulatory body,
>
> (b) an exchange,
>
> (c) a quotation and trade reporting system,
>
> (d) a clearing agency, or
>
> (e) a trade repository.
>
> [...]
>
> **Duty to regulate, conduct and provide information**
> 26 (1) Subject to this Act, the regulations and any decision made by the commission, a self-regulatory body, an exchange or a quotation and trade reporting system must regulate the operations, standards of practice and business conduct of its members or participants, and the

representatives of its members or participants, in accordance with its bylaws, rules or other regulatory instruments.

[...]

Review of action

28 (1) The executive director or a person directly affected by a direction, decision, order or ruling made under a bylaw, rule or other regulatory instrument or policy of a clearing agency, exchange, quotation and trade reporting system, self-regulatory body or trade repository may apply by notice to the commission for a hearing and review of the matter under Part 19, and section 165(3) to (9) applies.

(2) An applicant under subsection (1), other than the executive director, must send a copy of the notice requesting a hearing and review to

(a) the executive director, and

(b) the affected self-regulatory body, exchange, quotation and trade reporting system, trade repository or clearing agency.

(3) If the executive director is the applicant under subsection (1), the executive director must send a copy of the notice requesting a hearing and review to

(a) the affected self-regulatory body, exchange, quotation and trade reporting system, trade repository or clearing agency, and

(b) the persons directly affected by the direction, decision, order or ruling referred to in subsection (1).

[...]

Review of decision of executive director

165 (1) [Repealed 2007-37-37.]

(2) The commission may review any decision of the executive director and, if it intends to do so, must, within 30 days of the date of the decision, notify the executive director and any person directly affected by the executive director's decision of its intention.

(3) Except if otherwise expressly provided, any person directly affected by a decision of the executive director may, by a notice in writing sent to the commission within 30 days after the date on which the executive director sent the notice of the decision to the person, request and be entitled to a hearing and a review of the decision of the executive director.

(4) On a hearing and review, the commission may confirm or vary the decision under review or make another decision it considers proper.

(5) The commission may grant a stay of the decision under review until disposition of the hearing and review.

(6) The executive director is a party to a hearing and review under this section of any decision.

(7) A designated organization is a party to a hearing and review under this section of its decision.

(8) A self-regulatory body, an exchange, a quotation and trade reporting system, trade repository or a clearing agency is a party to a hearing and review under this section of its decision.

(9) On application or on its own motion, the commission may extend the period in subsection (2) or (3) to a date the commission considers appropriate.

B. Applicable provisions of the Commission's hearing policy

[25] The Commission has relevant provisions in its hearing policy, 15-601, as follows:

> PART 2 GENERAL
> **2.4 Parties** – For hearings on enforcement matters, the parties include the executive director of the Commission and respondents named in a notice of hearing. Respondents are persons against whom the executive director makes allegations in a notice of hearing. When a respondent is a corporation that has been wound up, the Commission may take submissions from another person who formerly had authority to act for the wound-up corporation, as the Commission may make orders against that corporation.
>
> In a hearing to review a decision of the executive director or a commissioner, the parties include the executive director and the person directly affected by the decision.
>
> In a hearing to review a decision of a Recognized Entity, the parties include the Recognized Entity, the executive director and the person who is directly affected by the decision
>
> […]
>
> PART 7 REVIEWS
> **7.1 Purpose** – The Commission holds hearings to review decisions of the executive director, single commissioners, and Recognized Entities. The hearings may be held in circumstances where:
>
> - a person directly affected by a decision of the executive director, a single commissioner or a Recognized Entity requests a review
> - the executive director requests a review of a decision of a Recognized Entity or
> - the Commission reviews a decision of the executive director, a single commissioner or a Recognized Entity on its own initiative
>
> **7.2 Requests for reviews**
> ***(a) By a person directly affected*** – A person directly affected by a decision referred to in paragraph **7.1 Purpose** may have the decision reviewed by sending a request to the Commission Hearing Office within 30 days of the date the decision maker sent notice of the decision to the person seeking its review. The Commission may extend the time period for seeking a review to a date the Commission considers appropriate.
>
> The request must identify:
>
> - the decision to be reviewed
> - how the person is directly affected by the decision
> - the grounds for the review
> - the grounds for a stay of the decision, if requested
>
> The person requesting the review must send the request to the other parties. See paragraphs **2.4 Parties** and **7.6 Persons directly affected by a decision**.
>
> […]
>
> **7.6 Persons directly affected by a decision** - Persons directly affected by a decision are generally those named in the decision. Persons not named in the decision must

> satisfy the Commission that the decision directly affects them, in order to be recognized as a party to a review.
>
> A person who is not directly affected by a decision, but who wants to be granted intervener status in a review must apply to the Commission and identify why it is in the public interest for the Commission to exercise its discretion to grant the application. On an intervener application, the Commission balances the efficiency of the proceedings with affording the opportunity to persons with relevant evidence to make submissions and have the opportunity to be heard. The Commission may consider submissions from all the parties

C. Global Securities precedent

[26] Before us, the parties each discussed the 2006 BC Court of Appeal Decision, *Global Securities Corp. v. British Columbia (Executive Director, Securities Commission)*, 2006 BCCA 404. As outlined below, CIRO in particular submits that *Global* settles the law in the province on the issue of whether CIRO Staff have standing to bring this application.

[27] *Global* involved disciplinary proceedings against a registered dealer and member firm of the TSX Venture Exchange (Exchange). An Exchange hearing panel (Hearing Panel) dismissed the alleged infraction against the dealer and member firm. The executive director of the Commission and the Exchange then applied under s. 28(1) for a hearing and review of the Exchange's initial decision before the Commission. On the issue of standing, the dealer and member firm argued that the Exchange did not have standing to seek a review of its own disciplinary panel. The Commission held that the Exchange did have standing to seek a review of the Exchange decision, as it was a person directly affected by the decision.

[28] On appeal, the member firm argued that the Commission (Commission Panel) erred in law in finding the Exchange had standing as a party to seek and argue the merits on a hearing and review of its own decision. The BC Court of Appeal dismissed the appeal from the member firm, upholding the decision of the Commission, finding that:

> [53] In this case, it was not the Exchange but the Hearing Panel which made the decision sought to be reviewed before the Commission Panel. The Hearing Panel heard submissions from the contesting parties, one of which was the Exchange, and rendered the decision. None of the authorities to which Global referred purported to restrict the submissions made by a contesting party upon the review of an independent tribunal's decision.
>
> […]
>
> [55] Global's argument is predicated on the assumption that the Hearing Panel's decision is a decision made by the Exchange itself. The assumption does not withstand scrutiny. The Exchange is responsible for conducting the investigation of infractions and prosecuting them whereas the Hearing Panel is entirely limited in function to its adjudicative role. It is the Exchange, not the Hearing Panel, which sought a review and hearing under s. 28(1) of the ***Act*** and it is the Exchange, not the Hearing Panel, that wishes to make submissions on the merits of the decision of the Hearing Panel.
>
> [56] Contrary to some of Global's submissions, the Canadian Venture Exchange Rule A.1.00 and the Canadian Venture Exchange Rule E - Discipline and Hearing provide ample support for the Commission Panel's conclusion that a disciplinary hearing panel is a purely adjudicative body. The Commission Panel found that a discipline hearing panel interprets the Exchange's rules but otherwise has no role in setting policy and that neither the Exchange nor any of its staff are under the panel's direction.

> [57] While the Hearing Panel was constituted under the rules and by-laws of the Exchange, its sole task in the regulatory scheme was to act as an independent tribunal in relation to the particular disciplinary hearing for which it was selected. There is no evidence to show that the Hearing Panel stepped beyond its role as an adjudicative body independent of the Exchange. The analogy suggested by the Executive Director is apt: the role of the Exchange was that of a prosecutor; the role of the [Hearing] Panel was that of the judge.
>
> [58] The Commission Panel made its decision with specific reference to the Rules of the Exchange and within the context of the regulatory scheme it supervises. The Commission Panel concluded that the Hearing Panel operated independently of the Exchange, and that the Hearing Panel's decision could not be characterized, either legally or practically, as an Exchange decision. It is for that reason that the Commission Panel concluded that the limitation on submissions established by ***Northwestern Utilities*** – namely, that an administrative decision-maker should not argue the merits of its own decision – would not be offended by the Exchange arguing the merits of the Hearing Panel's decision in this case.
>
> [59] It was on that foundation that the Commission Panel concluded that there is no reason in policy why the Exchange should not be permitted to apply for a hearing and review of the decision of the Hearing Panel. In my opinion, there is nothing unreasonable about the decision of the Commission Panel.
>
> [Emphasis added]

[29] It is noteworthy that the Court in *Global* applied the standard of review of reasonableness, as outlined in its analysis in paragraphs 28-49 of its decision, and we are cognizant that the application of this standard predates the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

D. Position of Englesby and Nishimura

[30] During the course of this proceeding, Englesby and Nishimura applied to strike the application for review brought by CIRO, on the grounds that CIRO was not "directly affected" by the Decision as required by section 28(1) of the Act.

[31] Using the principles of statutory interpretation, Englesby and Nishimura submit that there are a number of sometimes overlapping reasons why a plain reading of the relevant legislation demonstrates that CIRO was not directly affected, including:

a. The notice provision of sections 28(2) and (3) of the Act would be redundant if CIRO were a person directly affected by the Decision, as a plain reading of those sections would require CIRO to provide themselves notice of their own application;

b. Section 165(8), which identifies that a self-regulatory body (SRO) is a party to a hearing and review, would be redundant if an SRO was also a person directly affected by the decision;

c. The Act distinguishes between a party and a person directly affected; and

d. If the legislature wanted to distinguish between CIRO and CIRO Staff, they could have done so but did not.

[32] Further, Englesby and Nishimura argue that their interpretation of the legislation is consistent with 15-601. They submit that section 7.1 of 15-601 distinguishes between a person who is "directly affected" and a Recognized Entity that may request a review of a decision.

[33] Englesby and Nishimura go on to say that the entire context of the Act supports their submissions, as if there had been the intent to allow CIRO to have standing to seek a hearing and review, it would be explicit in the legislation, as it is in other provisions of the Act that provide for an opportunity to be heard in different circumstances.

[34] In support of their position, they submit that we should follow the Alberta Court of Appeal's approach in *Bahcheli v. Alberta (Securities Commission)*, 2007 ABCA 166. In *Bahcheli*, the former Investment Dealers' Association (now CIRO) appealed to the Alberta Securities Commission the underlying decision from the IDA. The ASC decision that the IDA could bring such an application was overturned by the Alberta Court of Appeal, which found that at paragraphs 50-51 that the IDA was not "directly affected" by the underlying decision:

> [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: *Canadian Civil Liberties Assn. v. Ontario Civilian Commission on Police Services*, [2006] O.J. No. 4699 (Ont. C.A.) at para. 8; leave denied, [2007] S.C.C.A. No. 40 (S.C.C.). 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*.

[35] Englesby and Nishimura further submit that the Court in *Bahcheli* applied the correctness standard to the statutory interpretation question which, subsequent to the decision by the Supreme Court of Canada in *Vavilov*, is the standard we should apply here.

[36] Finally, they submit that even if we find CIRO is a person directly affected, CIRO Staff's request for a hearing and review should nonetheless be struck and this matter dismissed, as CIRO Staff (as distinct from CIRO) have not demonstrated that they meet the 'high threshold' for a third party directly affected by the underlying Decision – and in particular, they cannot demonstrate that the rights or economic interests of CIRO have been affected by the Decision, as outlined as a requirement for standing in previous decisions.

E. Position of CIRO

[37] On the issue of jurisdiction, CIRO submissions include arguments that:

a. Englesby and Nishimura have not submitted anything new or novel that could lead us to reject the findings of the BC Court of Appeal in *Global*, outlined above;

b. The right of CIRO Staff to seek a hearing and review is supported by Part 7 of 15-601; and

c. CIRO hearing panels, as independent adjudicative decision-making bodies created under the Investment Dealer and Partially Consolidated Rules, are completely distinct from CIRO Staff – a distinction that has informed numerous applications for hearing and review brought by CIRO Staff and its predecessors since 2006.

[38] In *Global*, the Commission found that the Exchange had standing, and the Court of Appeal upheld this finding, as cited at length below:

> [13] The issue of whether the Exchange has standing before the Commission Panel is academic. The executive director is expressly entitled to bring a review application under s. 28(1) of the Act and, under s. 165(8), the Exchange "is a party to a hearing and review under this section of its decision." Although the issue is moot, all counsel urged us to consider the point because of its importance to the regulation of the securities industry and its significance to the practice followed by the Commission and the self-regulatory organizations in relation to discipline matters.
>
> […]
>
> [22] […] The Commission Panel, after observing that the issue had not been determined in prior Commission decisions, decided to consider the issue:
>
> > [29] Section 28 gives "a person directly affected by a ... decision ... made under a ... rule ... of ... an exchange" the right to apply for a review of the matter. The decision of the disciplinary hearing panel to dismiss the allegation against Global was a decision made under a rule of the Exchange. Section 1 of the Act defines a "person" to include a "corporation". The Exchange is a corporation and, therefore, a person.
>
> [23] On the question of what the words "directly affected" mean, the Commission Panel said, in part:
>
> > [36] Section 28 uses the words "directly affected" to limit who has the right to initiate a commission review of a decision. When the person seeking a review was not a party in the process leading to the decision, the commission must consider and decide whether the person is . . . or is not . . . directly affected by the decision. When the person seeking the review was a party to a contested proceeding that led to the decision, however, the person's interest in the matter is clear and direct, and we can presume that the person is directly affected by the decision.
>
> [24] The Commission Panel cited a previous decision of the Commission which concluded that a person "directly affected by the decision" has to be either a party to the proceedings that led to the decision or someone who is directly affected by the terms of the order or decision rather than just the incidental effects of the decision. The Commission Panel reasoned that the Exchange was a party, adverse in interest to Global, in the disciplinary hearing before the Hearing Panel and therefore the Exchange was "directly affected" by the decision of the disciplinary Hearing Panel to dismiss the allegation against Global.
>
> […]
>
> [26] The Commission Panel then turned to the procedural requirements of subsections (2) and (3) of s. 28 and considered whether those requirements had the effect of excluding the Exchange as a potential applicant for a hearing and review of a Hearing Panel's decision. [….] While it thus appeared that s. 28(2) of the Act contemplated only

the executive director and respondents as applicants for a hearing and review, the Commission in *O'Neill* nevertheless decided that the wording of the procedural requirement should not be interpreted as a bar to the Exchange's application for a hearing and review of the Hearing Panel's decision:

> The apparent inconsistency between the broader wording of the enabling provision in section 28(1) and the narrower wording of the procedural provisions in section 28(2) and (3) does not affect our finding. The Commission has, in the past, found persons other than a party to be directly affected by a decision of the Exchange and permitted them to apply for a hearing and review. [References omitted.] . . […] Finally, as we have found that the Exchange has established that they are directly affected by the decision, it would be patently unfair to deny them the right to apply for a hearing and review of that decision solely on the basis that the procedural requirements in section 28(2) and (3) appear to be inconsistent with that finding.
>
> [underlining added]

[27] The Commission Panel went on to compare the relationship between the Exchange and its hearing panels to that between the executive director and the Commission. It noted that, as a matter of policy, the Commission has instructed its executive director not to seek leave to appeal a decision of the Commission to this Court and contrasted the reasoning behind the Commission's policy in that regard with the circumstances of the Exchange applying to the Commission for a review and hearing of a Hearing Panel's decision:

> In the hearing, we asked the parties to comment on how the circumstances of the Exchange under section 28(1) compare with the circumstances of the executive director under section 167(1), which gives a person directly affected by a commission decision the right to seek leave to appeal the decision to the Court of Appeal. Since the executive director is a party in all hearings before the commission, the analysis above suggests that the executive director would have the right under section 167(1) to seek leave to appeal a commission decision. However, the commission has taken the view that the executive director should not, as a matter of policy, appeal a commission decision. That view is based not on whether the executive director is directly affected by the decision but on the fact that our decisions are made by commissioners who are responsible for setting the policy that the executive director is bound to follow.
>
> The Exchange is in a very different circumstance. The disciplinary hearing panel is a purely adjudicative body. It interprets the Exchange's rules but otherwise has no role in setting policy. Neither the Exchange nor any of its staff are under the panel's direction. There is no reason in policy why the Exchange should not be permitted to apply for a hearing and review of the decision.
>
> [underlining added]

[…]

[66] It is apparent from what the Commission Panel said in its decision that the legislative intent revealed by the use of the modifier "directly" with the word "affected" was recognized for the Commission Panel held that if the Exchange was only incidentally or indirectly affected by the decision of the Hearing Panel, the Exchange would not have standing to apply under s. 28(1). The Commission Panel took the view that the effect on the Exchange of the decision of the Hearing Panel was direct for the decision engaged one of the Exchange's primary functions, that is, the prosecution of infractions.

> [67] The Commission Panel further reasoned that when a person other than a respondent in discipline proceedings could be "directly affected by a decision", the procedural requirements as to notice ought not to trump the right to apply for a hearing and review

[39] CIRO argues that any contrary interpretation relied on by the Englesby and Nishimura, in preferring the *Bahcheli* decision over the findings of the BC Court of Appeal in *Global*, ignores important differences in the wording of the legislation in both Alberta and British Columbia. In particular, the *Alberta Securities Act* does not have the equivalent of section 165(8) of the Act, which explicitly makes CIRO a party to a hearing and review.

[40] In support of this preference, CIRO submits that the Ontario Securities Commission (OSC) compared the reasoning in *Global* over that in *Bahcheli* in its decision *Re Jeffrey Bradford Kasman et al*., 2008 ONSEC 26. In *Kasman*, CIRO submits, the OSC took a purposive and contextual approach when interpreting the legislation, determining that different lines of reasoning all reach the same conclusion – that the Investment Dealers Association (as it was) needed to have the ability to apply for a hearing and review of IDA decisions, and in the current circumstances CIRO does as well.

[41] Further, CIRO submits that 15-601 specifically identifies "Recognized Entities" as including "the Investment Industry Regulatory Organization of Canada, the Mutual Fund Dealers Association of Canada or any other self-regulatory body, […] recognized by the Commission under the Act," and section 2.4 "Parties" states that parties to a hearing and review of a decision of a Recognized Entity include the Recognized Entity. CIRO submits that there is nothing in 15-601 that prevents a Recognized Entity from also being a person directly affected by a decision of a Recognized Entity.

[42] Finally, CIRO submits that a CIRO hearing panel is arm's length, impartial and adjudicative in nature. The members of an adjudicative panel do not play any other role in CIRO performing its functions, such as policy setting. When CIRO Staff seeks a hearing and review of a decision, it is separate from the decision maker, as outlined in *Kasman* at paragraph 47:

> […] we conclude that the Hearing Panel was carrying out a purely adjudicative function and was independent of the IDA and IDA Staff. Accordingly we do not accept that the IDA is seeking a hearing and review of its own decision in bringing the application.

F. Position of the executive director

[43] The executive director submits that CIRO has significant regulatory obligations and duties as a SRO, as outlined in both the Act and in the Recognition Order dated November 16, 2022. Among other things, CIRO must:

- regulate the standards of practice and business conduct of its members;
- set rules for governing its members;
- monitor and enforce compliance of those rules; and
- where necessary conduct enforcement proceedings.

[44] To comply with these obligations, in particular when conducting enforcement proceedings, the executive director explains that CIRO establishes disciplinary hearing panels that are "institutionally independent" from CIRO Staff. In the underlying proceedings in the matter before us, CIRO Staff initiated the proceedings and acted as the administrative prosecutor, and the hearing panel acted as the independent adjudicator. As a result, there is no direct connection

between the prosecutor and the decision maker: see *Katz v. Vancouver Stock Exchange*, [1995] B.C.J. No. 2018 (C.A.) at paragraph 34.

[45] This independence of the disciplinary hearing panel as distinct from the CIRO Staff, the executive director submits, is fundamental to the regulatory structure of Recognized Entities. The Court of Appeal has held that this structure undermines any argument that a review sought by CIRO Staff amounts to an application to review its own decision. As outlined in *Global* at paragraphs 55-58 and cited above in paragraph 28 of this decision, it is the Recognized Entity, not the disciplinary panel, that seeks a hearing and review.

[46] The executive director further submits that, contrary to the position of the Respondents, when a decision is made after a contested hearing, the parties' interests in the matter are "clear and direct." The executive director says it can be presumed that parties to these types of proceedings are "directly affected" for the purposes of section 28 of the Act and references *Global* at paragraphs 35-36.

[47] The executive director further explains that this direct interest is tangible, and is beyond one of "general application" that applies to the whole community: CIRO has a direct interest in the interpretation, application and enforcement of its rules. The executive director argues that the hearing panel's interpretation of Rule 1400 and assessment of the gatekeeper obligations of CIRO members and representatives, directly impacts CIRO's ability to perform its regulatory responsibilities as outlined in the Recognition Order and the Act.

G. Our approach to statutory interpretation

[48] When interpreting the legislation before us, the principles to be applied have long been established by the Supreme Court of Canada in *Rizzo v. Rizzo Shoes Ltd. (Re)*, [19980 1 SCR 27 at paragraph 21, where the Court cites Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) as follows:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

H. Analysis and conclusions

[49] Englesby and Nishimura rely on several factors which they submit support an interpretation that CIRO is not "directly affected" by the Decision. They divide these factors into the categories of the grammatical and ordinary meaning of the words used in the Act, the words used in 15-601 and the larger context.

[50] Beginning with the language of the Act, Englesby and Nishimura note that the notice provisions contained in subsections 28(2) and (3) of the Act are redundant if it is accepted that CIRO is directly affected by decisions of its hearing panels. In particular, section 28(2) provides that where the applicant is someone other than the executive director they must provide notice to the executive director and the affected SRO. Englesby and Nishimura assert "if the legislature had contemplated that CIRO had standing to seek a hearing and review as a person directly affected, there would be no need to require that CIRO be provided with notice under s. 28(2)(b)".

[51] There is some merit to this argument. The notice provisions in section 28 distinguish between situations where the applicant is the executive director, in which case the executive director must give notice to the decision-making body and to the person directly affected by the decision,

and situations where someone else is the applicant, in which case notice must be given to the executive director as well as the affected decisionmaker. If the legislative intention is that CIRO fits into the category of entities directly affected, it could be expected that CIRO would be explicitly required to give notice to the other party to a decision, and that CIRO might be explicitly separated within the subsections which deal with notice from entities which are directly affected by a decision but which are not the decisionmaker. Otherwise, as Englesby and Nishimura submit, those provisions contemplate that when applying for hearing and review CIRO must give notice to itself.

[52] Next, Englesby and Nishimura submit that the structure of section 165 of the Act is only logical if CIRO is not a party which is directly affected by its decisions. Section 165 deals with reviews of decisions of the executive director. Section 165(3) specifies that any person directly affected by a decision of the executive director may apply for a hearing and review. Section 165(8) specifies that a self-regulatory body (a term which includes CIRO) is a party to a hearing and review under section 165. Englesby and Nishimura submit that if CIRO were a person directly affected under the Act, there would be no need to expressly stipulate that CIRO is a party to the hearing and review.

[53] Englesby and Nishimura's argument with respect to section 165 is considerably less persuasive than their argument with respect to the notice provisions found in section 28. This is because the application of section 165 can arise in a number of cases, including by way of the executive director intervening in a decision of CIRO which has nothing to do with a decision of a CIRO hearing panel. In that instance the provision of section 165 which designates CIRO as a party to the hearing and review is quite logical. It does not follow as a necessary implication that when a hearing panel of CIRO makes a decision regarding the application of CIRO bylaws, CIRO was not directly affected.

[54] Another submission made by Englesby and Nishimura with respect to the language of the Act is that section 163 precludes a self-regulatory body from filing a decision in the Supreme Court if the executive director "or a person directly affected by the decision" has applied for a hearing and review under section 28 of the Act. Englesby and Nishimura emphasize that the section continues the distinction in the Act between an SRO and a person directly affected by a decision. We agree that the distinction is made within the Act, and we return to that topic in our analysis below.

[55] The balance of the submissions of Englesby and Nishimura regarding the structure of the Act relate to some important distinctions made in the Act. They submit, and we agree, that a right to apply for hearing and review is granted to "a person directly affected", but not to "parties", and that this distinction must have some meaning. As we discuss below, our view is that whether or not a party to a proceeding before an SRO hearing panel is also "directly affected" by the decision of that panel requires a separate analysis and conclusion based on the the circumstance. In addition, it is our view that some persons who were not parties to a proceeding before an SRO hearing panel can be directly affected by a decision of that panel.

[56] Englesby and Nishimura submit that the legislature might have chosen to specify that "parties" are entitled to apply for hearing and review, but that was not the choice which was made. We agree, although we do not consider that conclusion to be determinative of whether an SRO is directly affected by a decision of one of its hearing panels.

[57] Englesby and Nishimura submit that there is content within 15-601 which is consistent with their position. 15-601 has authoritative provisions, subject to discretion which it gives to panels,

regarding procedural issues. It is well recognized that administrative bodies can have and apply rules and procedures for the fair and effective administration of disputes which come before it. 15-601 is the Commission's core procedural rule for such disputes. However, we should not and we do not put material reliance on 15-601 in this exercise of statutory interpretation.

[58] Englesby and Nishimura have further submissions based on the larger context of the Act. They point specifically to provisions in the Act which allow the executive director to make decisions, then give notice of such decisions and allow the party who is the subject of the decision an opportunity to be heard. Englesby and Nishimura submit that since there are no similar provisions allowing for submissions and reconsideration with respect to decisions of SROs, this suggests that CIRO does not have the ability to seek hearing and review of its own decision.

[59] The strongest submission made by Englesby and Nishimura is that the *Bahcheli* decision of the Alberta Court of Appeal was made after our Court of Appeal's decision in *Global* and comes to a different conclusion. The Alberta Court of Appeal in *Bahcheli* concluded both that a self-regulatory body is appealing from itself when it appeals a decision of a hearing panel and that although a self-regulatory body may have a concern about the precedent set by that panel, it is not "directly affected". Englesby and Nishimura submit that since the *Global* decision was made applying a reasonableness standard, we are not obligated to follow it post-*Vavilov*. Englesby and Nishimura provide a detailed review of the similarities between the Act and the provisions of the *Alberta Securities Act* which were influential to the Alberta Court of Appeal in reaching its conclusions. Englesby and Nishimura emphasize that the Alberta Court of Appeal found that there is no proper distinction to be drawn between an SRO and a decision made by a hearing panel of that SRO, with the result that decisions of a hearing panel are decisions of the SRO itself and an entity cannot appeal its own decision. In addition, Englesby and Nishimura emphasize the Alberta Court of Appeal's conclusion that the words "directly affected" mean a personal and individual interest, as distinct from a general interest. We are asked to apply the same analysis and to reach the same conclusions.

[60] We agree that as a general proposition an entity cannot appeal its own decisions. The general proposition would apply quite clearly if, for example, a manager of a self-regulatory body decided to refuse an application for membership from an individual and another manager within the self-regulatory body disagreed with that decision. The second manager would be expected to address the disagreement within the organization, and not by application for hearing and review. But this example does not resolve the issue of whether a decision of a self-regulatory body's hearing panel is, in this context, a decision of the self-regulatory body itself. It is true that there is only one legal entity that identifies as CIRO. If we were to look only at the issue of form, that would likely resolve the issue. However, it is our view that we can and should take a practical view of the substance.

[61] The Act authorizes the Commission to recognize self-regulatory bodies and the Commission has recognized CIRO. The Commission approves CIRO's rules, including those regarding its disciplinary processes, its hearings, and the measures taken to ensure the independence of its hearing panels from the staff at CIRO who create and enforce rules. Our procedural rule 15-601 and our decisions are quite explicit that we show deference to decisions of CIRO hearing panels. We do so, in large part, because it is well established that those panels have an appropriate degree of independence from the CIRO organization, and specifically from enforcement staff.

[62] We conclude that there is a sufficient distinction and independence between CIRO staff and CIRO hearing panels such that when CIRO seeks a hearing and review, CIRO is not appealing

its own decision. When we express that conclusion we recognize that it is the same conclusion which the Commission panel reached in *Global*. We came to our conclusion through our own independent analysis, but we do take some support and comfort from the work of that panel, and from the conclusion of our own Court of Appeal that the analysis of that panel led it to a reasonable conclusion.

[63] Turning to the issue of whether CIRO was directly affected by the Decision, we note that we have summarized and commented on the primary arguments of Englesby and Nishimura above. We would characterize their strongest points as the following:

a. There are indicia within the Act, especially in the notice provisions which form a part of section 28 of the Act but also in relation to the review of decisions of the executive director which we would expect to be different if they were written with an expectation that CIRO is a party "directly affected";

b. It is not sufficient that CIRO be affected by the Decision in order to have an ability to apply for hearing and review. CIRO must be directly affected; and

c. The Alberta Court of Appeal decision in *Bahcheli* supports the submissions of Engelsby and Nishimura.

[64] We are not convinced by those points. We do not suggest that the points are meritless. However, there are other factors which collectively lead us to conclude that CIRO is directly affected in these circumstances. These factors are :

a. The structure of the Act contemplates that self-regulatory bodies such as CIRO have no status unless they are recognized by the Commission and are subject to oversight by the Commission. One of the oversight functions performed by the Commission is to ensure that CIRO is applying policies which are consistent with those applied by the Commission. For that reason, any interpretation of any provision of the Act which limits an important subset of CIRO's policies from review is inconsistent with the intention of the Act. As a result, it is very difficult to support an interpretation of section 28 of the Act which limits reviews of CIRO hearing panel decisions which dismiss allegations. Those are among the types of decisions which the Legislature contemplates the Commission will have the greatest interest in reviewing. We recognize that there are other avenues for review, especially the potential that the executive director can initiate a review of a decision of a CIRO hearing panel, but it cannot be assumed that such panel decisions, and the policy implications of such decisions, will come before the executive director in a timely way;

b. In general, a party to a dispute is affected by the decision which determines the outcome of that dispute. The use of the concept "directly affected" in section 28 makes it clear that not all parties to all disputes are automatically given a right to apply for a hearing and review. However, it is counter-intuitive, at least, to conclude that such a significant party as what might be called the administrative prosecutor is precluded from an ability to seek a review from a decision made by an institutionally independent decision maker that has no concurrent role in developing policy or oversight; and

c. CIRO has a general duty to create policies which promote the public interest. CIRO has a structure and it has built a set of rules and policies to support its efforts in that

regard. More specifically, over a period of decades CIRO has developed rules and educational programs around the gatekeeper role which CIRO expects investment advisors will play in financial markets. Decisions which might compel CIRO to repeat or revise its efforts do affect CIRO, and they do so in a direct way, compelling further action by CIRO.

[65] The Commission panel in *Global* has previously decided that self-regulatory bodies can apply for the hearing and review of hearing panel decisions, and our Court of Appeal upheld that decision, describing it as reasonable. Other decisionmakers have reached the same conclusion, including the OSC decision in *Kasman*, which was decided after *Bahcheli*. These precedents, together with our independent reconsideration of the issues in light of the very competent submissions provided on behalf of Englesby and Nishimura, point us to the same conclusion. We would usually find the Alberta Court of Appeal's precedent to be very influential, and we have considered it carefully. But here there is conflict in the precedents and even though our Court of Appeal applied a reasonableness standard rather than a correctness standard in *Global* we find that the correct conclusion is consistent with the outcome in *Global*.

[66] On balance, we conclude that CIRO is directly affected by the Decision and can apply for hearing and review under section 28 of the Act. As a result, the application to strike the hearing and review application is dismissed.

V. Hearing and Review

A. Standard of review

[67] Many submissions were made to us in relation to the standards of review which an appellate court will apply on appeal. Those standards exist for good reason and they are helpful to us. However, our context and rules are distinct from that of an appellate court. Most importantly, our public interest mandate under the Act includes a supervisory role with respect to self-regulatory bodies which we recognize. Section 24 of the Act authorizes the Commission to recognize a self-regulatory body and to impose terms over a body so recognized in the form of a recognition order. The Commission has recognized CIRO as a self-regulatory body under the Act and a recognition order exists which contains extensive terms defining CIRO's obligations and avenues for the Commission to supervise and assist CIRO in protecting the public interest. As a result of the relationship between CIRO and the Commission, when a panel of the Commission is considering an application for hearing and review of a decision from a CIRO panel, the Commission panel's role is not limited to adjudicating rights as between the parties to the proceeding. The Commission's panel must ensure that the approach of each CIRO panel reflects policies which are consistent with the public interest.

[68] The Commission's rules for hearings are set out in 15-601. The most relevant provisions of that policy are under Part 7 Reviews, including 7.1 Purpose and 7.2 Requests for Reviews, cited above, and:

> **7.9 Form and scope of reviews of a decision under sections 28 and 165**
> ***(a) Where the review of a Recognized Entity decision proceeds as an appeal*** – The Commission does not provide parties with a second opinion on a matter decided by a Recognized Entity. If the decision under review is reasonable and was made in accordance with the law, the evidence, and the public interest, the Commission is generally reluctant to interfere simply because it might have made a different decision in the circumstances. For this reason, generally, the person requesting the review presents a case for having the decision revoked or varied and the Recognized Entity responds to that case.

> The Commission generally confirms the decision of the Recognized Entity, unless:
>
> - the Recognized Entity has proceeded on an incorrect principle
> - the Recognized Entity has made an error in law
> - the Recognized Entity has overlooked material evidence
> - new and compelling evidence is presented to the Commission or
> - the Commission's view of the public interest is different from that of the Recognized Entity

B. Position of CIRO

[69] CIRO submits that the CIRO Panel, in finding that the Englesby and Nishimura did not fail to fulfill their roles as gatekeepers to the capital markets contrary to Rule 1400 of the Investment Dealer and Partially Consolidated Rules (the "IDPC Rules"):

a. proceeded on incorrect principles;

b. made errors in law;

c. overlooked material evidence; and

d. failed to adequately consider the public interest in interpreting the IDPC Rules concerning gatekeeper obligations.

CIRO identifies a number of shortcomings in the Decision falling within these categories, as summarized below.

[70] CIRO first submits the CIRO Panel erred in law and proceeded upon incorrect principles in its interpretation that CIRO staff were seeking to expand the gatekeeper role rather than enforce the existing role as established in the existing law. The Panel states at paragraph 139 of the Decision:

> Enforcement Counsel have submitted that based upon the evidence before the Panel, the gatekeeper role should be expanded to include the activities around the trading in the Client Accounts. In this expanded definition, it is submitted, these suspicious activities were sufficient and clearly required inquiries to be made by the Respondents.

[71] CIRO argues that they did not take this position before the CIRO Panel. To the contrary, the CIRO Panel improperly sought to expand the scope of the gatekeeper obligation by proceeding on incorrect principles in its interpretation of CIRO's position.

[72] CIRO also submits that the panel proceeded on an incorrect principle and erred in law by frequently relying on "plausible alternative explanations," including that Englesby and Nishimura knew the Clients were consultants, or plausible reasons for selling shares into a falling market, without grounding those explanations in evidence.

[73] Further, CIRO argues that the panel substituted its own expertise for evidentiary gaps in the evidence, such as stating what is common practice for Registered Representatives to review without having evidence to support that assertion, as outlined in the Decision at paragraph 152:

> Indeed, PI's CCO testified that he had only once reviewed a Form 9 during his years in the investment industry, and, although PI's CCO's opinion might not be considered to be

> an unbiased observation, based upon the Panel's experience it is not common practice for Registered Representatives to conduct a review of relevant Form 9's prior to effecting the trading in the shares referenced therein.

[74] CIRO also submits that the Englesby and Nishimura transcripts that CIRO Staff submitted as evidence before the CIRO Panel clearly demonstrated that Englesby and Nishimura did not have any contemporaneous information to support a "reasonable explanation" for the client activity. The conclusion therefore must be that the Panel did not properly consider the transcript evidence before them. In their submission before us, CIRO categorized the alleged overlooked material evidence in the Decision to include:

- uneconomic trading, as the Respondents in their interviews stated they did not monitor for this type of trading;
- large withdrawals, where the magnitude should have been a triggering event;
- significant and unusual commissions in previously inactive accounts, especially where the extreme increase in total commission should have been a Red Flag;
- failure by the Respondents to ask questions of their clients; and
- transfers and connections between clients, where the Respondents had no explanation of why the shares were transferred and the nature of the relationship between the clients.

[75] CIRO Staff further submit that the CIRO Panel, in effect, treated the CCO as an expert witness. The CCO was not called as an expert witness, rather he was the only witness called by Englesby and Nishimura in his capacity as the sole representative of PI. However, CIRO Staff argue the CIRO Panel accepted his opinion evidence as if it had been adduced through an expert concerning matters that were central to the issues before the CIRO Panel including:

- requirements of a Registered Representative to make inquiries;
- requirements to complete an NCAF;
- the frequency of updating NCAFs; and
- whether Englesby and Nishimura adhered to PI's policies.

[76] Finally, CIRO Staff submit that the effect of the Decision is to reduce industry expectations of registrants, allowing registrants to speculate about plausible explanations for conduct within client accounts rather than ask reasonable questions and make appropriate inquiries to identify suspicious activities. This outcome, they submit, fails to appropriately consider the public interest in interpreting the IDPC Rules, and in particular Rule 1400.

C. Position of Englesby and Nishimura

[77] Englesby and Nishimura submit that, despite the multiple categories identified by CIRO in their statement of points, they only identify one ground of appeal – namely, that they disagree with the Decision of the CIRO Panel and seek to reargue the matter.

[78] Englesby and Nishimura submit that the CIRO Panel did not proceed on an incorrect principle, but rather correctly identified the gatekeeper standard. In the matter before the panel, other than alleged uneconomic trading, the Respondents submit that there was an absence of the types of red flags commonly seen when parties attempt to effect a market manipulation or engage in abusive trading. As CIRO Staff were unable to identify any previous cases where the alleged red flags were limited to the facts in the matter before the panel, this provided the context for the CIRO Panel to find as follows at paragraphs 138-140:

> In determining what was the relevant gatekeeper obligation facing the Respondents during the Relevant Period, the Panel is aware that it appears that the gatekeeper role has in past decisions, such as those cited by Enforcement Counsel and the Respondents' Counsel set out above, normally has been considered in situations where the evidence is of activities involving market manipulation, money laundering, or more clearly defined suspicious behaviour, usually involving some form of improper market activity, the occurrence of which on coming to the attention of a Registered Representative requires the Registered Representative to be proactive and to make inquiries.
>
> In the matter at hand, Enforcement Counsel have submitted that based upon the evidence before the Panel, the gatekeeper role should be expanded to include the activities around the trading in the Client Accounts. In this expanded definition, it is submitted, these suspicious activities were sufficient and clearly required inquiries to be made by the Respondents.
>
> Taking an opposing view, the Respondents' Counsel submitted that the Panel's role is to operate within the confines of the existing IDPC Rules and to not to make any new ones. In any event, Respondents' Counsel submitted, the referenced activities are all very explainable in their context and, as such, did not require the Respondents to make the inquiries as submitted by Enforcement Counsel.
>
> [emphasis added]

[79] Englesby and Nishimura submit that the CIRO Panel clearly understood CIRO Staff's submissions, and then concluded that if they found a breach of Rule 1400 as requested by CIRO Staff, they would necessarily have to expand the gatekeeper role.

[80] Regarding CIRO Staff's submissions about "plausible alternate explanations," Englesby and Nishimura submit that the CIRO Panel was properly applying the first part of the three-part test, considering whether the underlying facts and circumstances were in fact suspicious such as to impose a duty on Englesby and Nishimura to make further inquiries. In doing so, Englesby and Nishimura submit that there was an evidentiary basis and reasonable rationale for the CIRO Panel to make the conclusions they did with respect to the Red Flags identified by CIRO Staff.

[81] Further, they submit that the Panel did not overlook evidence as argued by CIRO Staff. The categories of evidence allegedly overlooked in the Englesby and Nishimura transcripts, including evidence of withdrawals from CP Corp's accounts, commissions from inactive accounts, and journal transfers between clients were considered by the CIRO Panel, referenced in the Decision, and either expressly or implicitly dealt with in their analysis.

[82] Englesby and Nishimura also submit that in the context of the evidence provided by the CCO, it was CIRO Staff that elicited the evidence they now take issue with through cross-examination before the panel; at the time, CIRO Staff did not object to its admissibility and it is ironic that they now do. Further, they argue that the CIRO Panel only considered the evidence as it relates to the obligation of reviewing the Form 9, and subsequently explained that the panel was considering its own expertise in this area.

[83] Finally, Englesby and Nishimura submit that CIRO Staff have not advanced any substantive analysis to support their claim that the Panel failed to properly apply the public interest.

D. Position of the executive director

[84] The executive director outlines that the nature and scope of a registrant's gatekeeper role requires them to know their clients and monitor the activity in their clients' accounts. They must

make inquiries, and become fully informed if something "raises a concern" that a client might be involved in an illegal or improper scheme.

[85] The executive director canvasses a number of previous decisions, from this Commission as well as other decisionmakers, to further describe the gatekeeping role for registrants when monitoring client accounts as:

- alert and curious to make reasonable inquiries and be reasonably satisfied with the answers where a duly diligent person would do so in similar circumstances (see: *Re Kasman,* IDA November 13, 2007 at paragraph 41);
- inquisitive and proactive (see: *Pacific International Securities Inc. (Re)*, 2006 BCSECCOM 532 at paragraph 332);
- in a position to spot suspicious or unusual circumstances or potential improprieties (see: *Wenzel (Re), sub nom Stewart (Re*), 2005 ABASC 91 at paragraphs 52-53); and
- able to make diligent inquiries in light of peculiar or suspicious activity that may be consistent with market manipulation, deception or other improper activity (see: *Trenholm (Re)*, 2009 IIROC 40 at paragraph 1).

[86] Given the foregoing, the executive director describes the analysis by the CIRO Panel in the underlying Decision as unhelpful. Where the panel suggests that a registrant's duty to make inquiries only where the registrant knows (or should know with certainty) that a client is engaging in illegal or improper conduct and there is no possible reasonable explanation for the activity in the client's account, the executive director submits this limitation is contrary to prior decisions and not in the public interest.

[87] The executive director submits that in the underlying matter, given CP's financial circumstances, the Respondents should have made inquiries when CP deposited and sold shares at a value of over $8.7 million – especially when the client account form indicated that throughout the period CP had liquid assets of only $75,000 and his company only $50,000.

[88] Rather than focusing on the fact that CP was a consultant and it was possible that he received share certificates as compensation, the executive director submits that the panel should have considered the Respondents' gatekeeper role in light of all the relevant facts.

E. Need to consider entire context upon a review of a CIRO decision

[89] As we make clear in our analysis below, it is our finding that in reaching its conclusions the CIRO Panel proceeded on an incorrect principle, made an error in law and failed to adequately consider the public interest. Before we turn to that analysis we wish to be clear that we consider more than the exact words used by the CIRO Panel in reaching its Decision.

[90] We agree with Englesby and Nishimura that while assessing the adequacy of reasons of a CIRO hearing panel it is essential that we consider not just the words used in the expression of any specific conclusion reached by a panel, but to look at the whole context. In many cases panels will write decisions with an objective of avoiding repetition. It may follow that when a panel expresses a certain conclusion the panel is referencing back, at least implicitly, to arguments summarized earlier in the decision, or even to certain evidence or lines of authority.

[91] Englesby and Nishimura made submissions emphasizing the extent to which the proper case authorities and the full evidentiary record was before the CIRO Panel. They submit that we

should not single out certain phrases used by the CIRO Panel as indications that the panel was not taking that other information into account. It is suggested that the panel might at times use shorthand to address information which would have been well understood by the parties in the hearing room at the time. We understand this submission. However, as our analysis shows, the words used by the CIRO Panel in expressing its conclusions are quite clear in terms of what test it was applying. It is clear that the CIRO Panel was applying the wrong test.

F. Analysis and conclusions

[92] As will be clear from our summary above, the Decision includes both a general description by the CIRO Panel of its approach and a section which applies its approach.

[93] The CIRO Panel described its general approach as a three-step approach. The first step is to consider whether or not a particular fact situation "involves activities to which a party, acting as a duly diligent person who is active in the investment industry and who serves in a gatekeeper role, might reasonably be considered to be a triggering event…which would require this party to make inquiries…". Under this approach, it is only if the first step identifies a triggering event would the next steps be engaged regarding whether the necessary inquiries were made and whether the party in question acted reasonably on the information uncovered.

[94] There are many fact patterns which engage the gatekeeper obligation. As a result, it is particularly difficult to create a single, comprehensive definition of the gatekeeper obligation and when it arises. Although there are other equally valid ways in which to frame the analysis without using the CIRO Panel's three-step approach, we do not conclude that the panel made an error using this three-step approach. The error arose when the CIRO Panel applied the "triggering event" test to the circumstances of this case. The CIRO Panel made it clear that if an advisor and gatekeeper came across information which appeared on its face to be out of the ordinary and worthy of attention, it would not amount to a triggering event if other circumstances were present such that it "might well have resulted" from, for example, a change in occupation, or otherwise "appears to have possible reasonable explanations".

[95] Aside from their ongoing know-your-client obligations, there is no suggestion that investment advisors are obligated to question clients about routine events. What is "routine" is highly contextual. The CIRO Panel was quite right to look carefully at the context of each alleged Red Flag to determine if that context explained the event such that whatever concern would naturally arise was reasonably resolved. But the CIRO Panel went too far when it treated potential speculative explanations unsubstantiated through inquiry which might or might not apply as resolving obvious issues.

[96] The clearest example in this case relates to clients CP and CP Corp. As of December of 2017, CP was the director of hockey operations for a winter club. His client account form indicated that CP had liquid assets of $45,000 and a net worth of $745,000. In February of 2018 CP updated his client account form and CP Corp signed a client account form. At that point CP's occupation was listed as a self-employed consultant and CP listed his net worth at $1,575,000, with liquid assets of $75,000. CP Corp listed its business as "Consultant/Entrepreneur" with a net worth of $55,000 and liquid assets of $50,000. By early summer of 2018 a series of share certificates were deposited into the accounts and CP Corp had over $2,000,000 in net equity. A client account form update for CP Corp for August of 2018 indicated that CP Corp then had a net worth of $1,005,000. The day after that form was updated CP Corp withdrew $2,300,000 from that account. We find that none of the events from early summer of 2018 through August of 2018 could be considered to be routine.

[97] Because there was an inquiry within PI about the activity in the CP and CP Corp accounts we know that one or both of Englesby and Nishimura obtained the information from CP that CP was not just any kind of consultant, he was a consultant for venture companies and might be expected to receive share compensation. But they did not consider that the circumstances required them to inquire any further and the CIRO Panel agreed with them. This was the situation about which the CIRO Panel concluded that the changes in net worth and liquid assets "might well have resulted" from the change in occupation. By expressing its conclusion in that way, the CIRO Panel was speculating in a manner which inferred facts that were never ascertained by Englesby and Nishimura and avoided a number of questions which a gatekeeper would be obligated to look into.

[98] It is possible that financial consultants to venture companies can make significant amounts of money. It is also probable that such consultants might be paid in the form of share participation. But many financial consultants work for decades building up networks of contacts and expertise in deal structures. It is not automatic that any director of hockey operations at a local winter club can become a financial consultant and then almost instantly begin to make millions of dollars. The circumstances surrounding CP and CP Corp might well have been explainable upon inquiry. But by applying a standard of "maybe this fact would be the explanation", the CIRO Panel was speculating about what the answers to the proper gatekeeper questions might be if those inquiries had actually been made. That was an error. Instead, the CIRO Panel should have considered whether reasonable registrants would have asked for some explanation from their clients or made some other inquiry given the particular transactions in the client accounts in this case.

[99] The error in question can be characterized as a legal error in that the CIRO hearing panel asked itself the wrong question in assessing whether a triggering event was present. The error in question could alternatively be characterized as failing to protect the public interest or as proceeding on an incorrect principle. In any event we have concluded that the Decision should be and is set aside.

[100] We should add that we do not agree that the position of CIRO staff before us or before the CIRO Panel represented an expansion of the gatekeeper role. However, as noted above, there are many circumstances in which the gatekeeper role is engaged. The role is not limited to a prescribed set of circumstances. There are some precedents and there is some guidance which will be helpful for registered representatives in CIRO publications and in the practice manuals of their own firms. The principles which apply are not limited to specific areas of the industry.

[101] The next question is what should happen to the underlying CIRO proceeding. Both CIRO and Englesby and Nishimura argued that instead of remitting the issues to the CIRO hearing panel we should make our own decision on the merits. Upon inquiry during oral submissions, it became apparent that the parties made that submission based on the assumption that our decision on the merits would be favorable.

[102] We recognize that this proceeding has gone on for a long time. It has been very thoroughly argued, and the evidence has been explored at length at the CIRO hearing. On that basis we have some sympathy for Englesby and Nishimura. If they are successful in the end they are not likely to find a pathway to recover any costs. If they are not successful in the end they may find that the scope of the proceeding has been more costly than the value of the ultimate sanction. We considered the option of attempting to resolve all of the outstanding issues. However, we concluded that we should not attempt to do so. There is a large body of evidence which was before the CIRO Panel about which that panel had the benefit of detailed submissions made

contemporaneously. We would not want to weigh that evidence without the same benefit.

[103] In addition, although we have given one example above of an allegation related to the circumstances of CP and CP Corp where we consider the outcome regarding the existence of a Red Flag to be quite obvious, not every issue has such an obvious answer. Some of the other issues regarding whether there are indicators suggesting the existence of suspicious activity are subtle and can be better answered by the CIRO Panel given its better familiarity with the evidence and specialized expertise of CIRO panels. In addition, once a decision is made regarding what Red Flags should have been identified, there are further questions to be answered about what steps should have been taken to inquire further, and then regarding whether the totality of the conduct of Englesby and Nishimura amounted to "conduct unbecoming" under the CIROs partially consolidated Rule 1400.

[104] As a result we remit the entirety of the proceeding to the CIRO Panel to decide on an approach consistent with this decision.

April 7, 2025

For the Commission

Gordon Johnson
Vice Chair

Judith Downes
Commissioner

Karen Keilty
Commissioner