

Re Costa

IN THE MATTER OF:

**The Universal Market Integrity Rules of the Investment Industry
Regulatory Organization of Canada**

and

Remo Costa

2019 IIROC 02

Investment Industry Regulatory Organization of Canada
Hearing Panel (Québec District)

Heard: September 5 and 6, 2018, in Montréal (Québec)
Decision: January 15, 2019

Hearing Panel:

Stéphane Rousseau, Chair, Gilles Archambault and Daniel Houle

Appearances:

Fanie Dubuc, Enforcement Counsel

Remo Costa, representing himself

DECISION ON THE MERITS

I. PROCEEDING

A. Count

¶ 1 In a Notice of Hearing dated December 5, 2017, the Investment Industry Regulatory Organization of Canada (IIROC) made the following allegations against the Respondent Remo Costa :

During five (5) days between July 28, 2015 and September 28, 2015, the Respondent, a client and director of Jitney Trade Inc., entered orders or executed transactions on the Toronto Stock Exchange (TSX) when he knew, or ought reasonably to have known, that the entry of such orders or the execution of such transactions would create or could reasonably be expected to create a false or misleading appearance of trading activity with respect to these securities or an artificial price for the securities, contrary to Rule 2.2(2) and Policy 2.2, for which he is liable under Rule 10.4(1) of the Universal Market Integrity Rules (UMIR).

B. History of the proceeding

¶ 2 On December 5, 2017, IIROC staff issued a Notice of Hearing to the Respondent for an initial appearance before a Hearing Panel on February 28, 2018. The Notice of Hearing was accompanied by a

Statement of Allegations detailing the above count.

¶ 3 On February 28, 2018, the Respondent appeared before the Hearing Panel at a prehearing conference attended by IIROC staff. The Hearing Panel ordered the Respondent to file a response to the Notice of Hearing and the Statement of Allegations within two (2) weeks following the initial appearance, namely by March 14, 2018. The hearing date was set for June 5, 2018.

¶ 4 On June 5, 2018, after hearing the submissions of IIROC staff and the Respondent, the Hearing Panel ordered the postponement of the hearing until September 5 and 6, 2018.

¶ 5 On September 5 and 6, the Hearing Panel held the Hearing on the Merits of the case, in the Carmen Crépin room at the IIROC Québec District Council headquarters in Montréal.

¶ 6 The first day of the hearing was devoted to the presentation of the evidence by IIROC. The Respondent, who was present at the start of the hearing, left at the end of the morning. The Hearing Panel informed him that it would proceed with the hearing and examine the evidence ex parte, as is permitted by the IIROC Rules of Practice and Procedure.¹ The evidence was closed at the end of the first day of the hearing on September 5.

¶ 7 The second day was devoted to submissions. IIROC staff began with its oral submissions. The Respondent, who returned to the hearing on the morning of September 6, delivered his oral submissions, after being informed that the evidence was closed and that he would not be able to introduce new evidence. IIROC staff concluded the oral submissions with a rebuttal to the Respondent's arguments.

¶ 8 Following the oral submissions, which ended in late morning on September 6, the Hearing Panel took the matter under advisement.

II. THE QUESTIONS IN DISPUTE

¶ 9 In the matter at hand, the Hearing Panel must determine whether the Respondent contravened UMIR 2.2 and UMIR Policy 2.2, which prohibit manipulative and deceptive activities, by entering orders or executing market transactions on the Toronto Stock Exchange (TSX) during five (5) days between July 28, 2015 and September 28, 2015, as stated in the count above.

II. THE EVIDENCE

A. IIROC

¶ 10 IIROC staff called just one witness at the hearing, Mr. Yannick Béland, an IIROC investigator since 2008. Prior to this, Mr. Béland held a similar position at the Investment Dealers Association of Canada from 2005 to 2008, and at the Montréal Exchange from 2003 to 2005.

¶ 11 Mr. Béland testified at length during the first day of the hearing. The Respondent having left the hearing during Mr. Béland's testimony, the Hearing Panel heard the evidence ex parte as is permitted by IIROC's Rules of Practice and Procedure.²

¶ 12 The witness explained in detail how the investigation of this matter originated. More specifically, he testified that IIROC's Market Surveillance Department received a complaint from a dealer member concerning a securities trading activity executed by the Respondent on July 28, 2015.

¶ 13 Subsequently, the Trading Review and Analysis Department was seized of the alert and referred the matter to the Enforcement Department, which initiated an investigation into the Respondent's trading activities relative to a number of securities, as the latter was informed in a notice of investigation letter dated

¹ Rule 8423(12) of the *Rules of Practice and Procedure*.

² Rule 8423(12) of the *Rules of Practice and Procedure*.

January 15, 2016. Mr. Béland was assigned the case in the notice of investigation letter. He indicated that his investigation lasted approximately one year.

¶ 14 Mr. Béland testified that, in the course of the investigation, the Respondent was convened by IIROC to a meeting to provide information concerning the matter, in accordance with Rule 19 (which has since become IIROC Rule 8100 Enforcement, Examination and Approval Rules). The Respondent's interview took place on August 15, 2016, in the presence of Mr. Béland and IIROC's legal counsel, Fanie Dubuc. The stenographer's transcription of the interview, transcribed by an official stenographer, was entered into evidence by Mr. Béland.

¶ 15 At the close of the investigation, on December 5, 2017, IIROC served the Respondent with a Notice of Hearing pertaining to the allegations described above.

a) The Respondent's registration history with IIROC

¶ 16 During his testimony, Mr. Béland presented the Respondent's registration history with IIROC, referencing the exhibits filed in evidence, including the interview of August 15, 2016, the Respondent's registration with the National Registration Database (NRD) and his approval as a director of Jitneytrade Inc. (Jitney).

¶ 17 From Mr. Béland's testimony and the exhibits filed in evidence, the Hearing Panel retains the following points.

¶ 18 The Respondent was an independent trader investing on his own account at the Montréal Exchange from February 1981 to November 2001. After leaving the Montréal Exchange, he carried on his trading activities as a client of Jitney, an IIROC Dealer Member and Participant under UMIR.

¶ 19 From August 29, 2008 until May 24, 2016, the Respondent was registered with IIROC as a board member of Jitney.

b) Accounts held by the Respondent with Jitney

¶ 20 Referring to the new account application forms filed into evidence, Mr. Béland testified that the Respondent is a client of Jitney, through a business corporation of which he is a director, officer and majority shareholder. This business corporation is the holder of account no. 1, opened on August 26, 2011, and of account no. 2, opened on December 5, 2005. We note that in both cases, the Respondent has indicated that these were not "Pro" accounts, meaning accounts for which he considers himself an investment professional, or "Pro".

¶ 21 In addition, Mr. Béland testified that the Respondent had signed an interfacing agreement with Jitney on September 8, 2014, as shown by the exhibit filed in evidence. The interfacing agreement allows the client to forward his orders directly to the Canadian exchanges, or to any Canadian marketplace. Mr. Béland explained that such an agreement is not for just any client; it is signed with clients who are experienced traders.

c) The Respondent's Trading Activities

¶ 22 As part of his testimony, Mr. Béland presented the Respondent's trading activities for each of the securities covered by the allegations, referencing the Trades, Orders and Quotes Reports, commonly referred to as "TOQ Reports", filed into evidence. He also testified concerning the "Condensed TOQ Reports" on each of the securities covered by the allegations. In his testimony, Mr. Béland explained in detail how the TOQ Reports and Condensed TOQ Reports are compiled.

¶ 23 From Mr. Béland's testimony, we retain that a TOQ Report is generated for a particular security by a computerized reporting system that chronologically records all buy/sell orders submitted, trades executed and

any trade amendments on all the exchanges monitored by IIROC. The TOQ Report is therefore a useful tool for analyzing the activities of any individual trading in a specific security on Canadian markets.

¶ 24 IIROC staff prepares a Condensed TOQ Report for a specific security by deleting data that are not relevant to the analysis. In this case, the Condensed TOQ Report highlights the Respondent's trading activity for each security referenced in the allegations, including the entry, cancellation and execution of orders. It also presents the opening price, as well as any price changes.

¶ 25 Mr. Béland testified that he analyzed the Respondent's trading activities carried out in account no. 1 over a period that ran from July to September 2015. With his analysis, Mr. Béland prepared Condensed TOQ Reports for five (5) different securities, namely ATP.DB.A, AX.PR.U, TA.PR.D, ENB.PF.U and ENB.PR.V, for five (5) different days.

¶ 26 Mr. Béland also testified that he drafted a table based on the Condensed TOQ Reports filed into evidence, which details, for each of the securities on the days in question, the number of transactions executed by the Respondent, as well as the volume and value they represent. In regard to this table, Mr. Béland explained that the Respondent's trading activities concerned securities that were not liquid, with the exception of ATP.DB.A. He also testified that the transactions executed by the Respondent represented a sizable proportion of all of the buy/sell orders and the volume and value of these securities for the days under scrutiny.

¶ 27 Mr. Béland explained the Condensed TOQ Reports for each security, filed in evidence as exhibits 19 through 23. He gave a detailed analysis of the trading activity in each security, using the Condensed TOQ Reports, and made sure to highlight the Respondent's trading activities.

¶ 28 Finally, Mr. Béland testified that the Respondent's manipulative or deceptive trading activities during the period in question allowed him to realize a gain of \$470.20.

B. Respondent

¶ 29 The Respondent left the hearing during the first part of Mr. Béland's testimony, only to return on the second day of the hearing, after the evidence was closed. By absenting himself, the Respondent deprived himself of the right to present evidence to support his allegations. Specifically, the Respondent did not cross-examine IIROC's witness, Mr. Yannick Béland. He did not testify himself and did not introduce any evidence. Finally, the Respondent admitted not having looked at the file of written materials submitted by IIROC on a USB key.

III. LAW

A. Standard of proof

¶ 30 IIROC staff has the burden of proving the alleged violation according to the balance of probabilities, also known as the "preponderance of evidence". Indeed, though disciplinary law is a hybrid law, sitting somewhere between civil law and penal law, the burden of proof of penal law is not applicable in the absence of a penal action.³

¶ 31 Recognizing that the burden of proof is that of the balance of probabilities, the case law of IIROC's hearing panels specifies that admissible evidence must always be clear, convincing and cogent.⁴

¶ 32 In the course of its analysis, the Hearing Panel must consider the evidence as a whole, while avoiding examining the exhibits filed by either party in isolation.

³ *Bisson v. Lapointe*, 2016 QCCA 1078, par. 63-66 (CanLII).

⁴ *Re Sadeghi*, 2017 IIROC 55; *Re Lemay*, 2012 IIROC 69. See also *Bisson v. Lapointe*, 2016 QCCA 1078, par. 67 (CanLII).

B. Jurisdiction of IIROC

¶ 33 UMIR 10.4(1) defines the jurisdiction of IIROC to institute an action against the Respondent.

10.4 Extension of Restrictions

(1) A related entity of a Participant and a director, officer, partner or employee of the Participant or a related entity of the Participant shall:

(a) comply with the provisions of UMIR and any Policies with respect to just and equitable principles of trade, manipulative and deceptive activities, short sales and frontrunning as if references to "Participant" in Rules 2.1, 2.2, 2.3, 3.1 and 4.1 included reference to such person; and

(b) in respect of the failure to comply with the provisions of UMIR and the Policies referred to in clause (a), be subject to the practice and procedures and to penalties and remedies set out in this Part.

¶ 34 Indeed, we agree with IIROC staff that the Respondent is particularly subject to UMIR 10.4(1) in his capacity as a director of Jitney, a Participant of UMIR at the material time that led to the action.⁵

C. UMIR 2.2 - Manipulative and Deceptive Activities

¶ 35 In this matter, IIROC alleges that Respondent's trading activities contravene UMIR Rule 2.2 and UMIR Policy 2.2 which prohibit manipulative and deceptive activities. It should be kept in mind that the objective of this prohibition is to "to protect the marketplace from manipulative and deceptive activities which undermine the integrity of the marketplace and erode investor confidence."⁶

¶ 36 In *Lemire*, upheld by the Court of Québec, the Bureau de décision et de révision, now the Financial Markets Administrative Tribunal, emphasized the importance of thwarting market manipulation activities:

[TRANSLATION]

[87] As the Bureau reminds us in *Autorité des marchés financiers c. Normand Bouchard et al.* [113] :

"[11] The investment markets are a barometer of our economy. We expect the trading that occurs there to be a reflection of all the available information and an honest confluence of supply and demand. The public must be confident that these markets are protected from manipulation that would skew our reading of the investment markets...

[13] Manipulation is a cancer on the investment markets, investors and society in general. Its effects are disastrous and the Bureau must act to put an end to such activities. It undermines the foundation and credibility of the markets. It hinders the price setting mechanisms of various financial instruments [...]"

[emphasis added]⁷

¶ 37 In this spirit, UMIR Rule 2.2 describes a general prohibition against Manipulative and Deceptive Activities. UMIR Policy 2.2, which complements the Rule, specifies the type of activities that are prohibited. The Rule and the Policy are of equal force and weight and must be read together.⁸

C. Elements of the alleged violation

¶ 38 IIROC alleges that the Respondent committed a violation involving manipulative and deceptive

⁵ UMIR 1.1 ("Participant").

⁶ *Re Sadeghi*, 2017 IIROC 55, ¶121.

⁷ *Autorité des marchés financiers v. Lemire*, 2015 QCBDR 63 ¶87, citing *Autorité des marchés financiers v. Normand Bouchard et al.*, 2009 QCBDRVM 78; conf. 2016 QCCQ 8932. [TRANSLATION]

⁸ UMIR 1.1; *Re Nott et al.*, 2010 IIROC 55.

activities, contravening UMIR 2.2(2)(b):

2.2 Manipulative and Deceptive Activities

[...]

(2) A Participant or Access Person shall not, directly or indirectly, enter an order or execute a trade on a marketplace if the Participant or Access Person knows or ought reasonably to know that the entry of the order or the execution of the trade will create or could reasonably be expected to create:

(a) a false or misleading appearance of trading activity in or interest in the purchase or sale of the security; or

(b) an artificial ask price, bid price or sale price for the security or a related security.

¶ 39 The violation comprises three elements that must be proved in accordance with the balance of probabilities:

1. A Participant or Access Person has, directly or indirectly, entered an order or executed a trade;
2. The order creates or could reasonably be expected to create a false or misleading appearance of trading activity or interest in the purchase or sale of a security;
3. The person entering the order knows or ought reasonably to know that the entry of the order or the execution of the trade will create or could reasonably be expected to create a false or misleading appearance of trading activity in or interest in the purchase or sale of the security.

¶ 40 UMIR Policy 2.2, Part 2 identifies activities that, without limiting the generality of UMIR 2.2(2)(b), constitute a violation of this rule.

¶ 41 Furthermore, the end of Part 2 of Policy 2.2 specifies that if persons know or ought reasonably to know that they are engaging or participating in these or similar types of activities, those persons will be in breach of subsection of UMIR 2.2(2)(b) “irrespective of whether such activity results in a false or misleading appearance of trading activity or interest in the purchase or sale of a security or an artificial ask price, bid price or sale price for a security or a related security.” In other words, “an “attempt” is sufficient to trigger a breach of the Rule”.⁹

IV. DECISION

A. The parties’ arguments

1. IIROC’s position

¶ 42 IIROC staff alleges that the Respondent contravened UMIR 2.2(2)(b) and UMIR Policy 2.2, which prohibit manipulative and deceptive activities. More particularly, IIROC alleges that on five (5) days during the period of July 28, 2015 to September 28, 2015, the Respondent engaged in manipulative and deceptive trading activities, which consisted in the practice of layering the securities ATP.DB.A, AX.PR.U, TA.PR.D, ENB.PF.U and ENB.PR.V. These manipulative and deceptive trading activities allowed the Respondent to realize a gain of \$470.20 during this period.

¶ 43 Specifically, IIROC staff is of the opinion that the evidence establishes that, during this period, the Respondent entered orders that he intended to execute (bona fide orders) on one side of the market. Simultaneously, he entered orders that he did not intend to execute (non-bona fide orders) on the other side of the market, in an attempt to induce other participants to react to the non-bona fide orders and to trade one of his bona fide orders at an artificial price. The Respondent then canceled his non-bona fide orders

⁹ *Re Sadeghi*, 2017 IIROC 55, ¶12.

immediately after liquidating his long position or covering his short position.

¶ 44 According to IIROC staff, the evidence shows that the Respondent created a false impression of interest in the security by entering a buy order that would improve the best bid or a sell order that would improve the best asked price. In other words, the Respondent's non-bona fide orders created a false or misleading appearance of trading activity.

¶ 45 What's more, Staff stressed the Respondent's profile as an experienced trader acting on his own behalf on the markets since the 1980s. Referring to the stenographer's notes from the interview with the Respondent, which have been filed in evidence,¹⁰ IIROC staff argued that the Respondent acted deliberately when he traded the securities in question on both sides of the market. In other words, the fact of the Respondent positioning himself on both sides of the market constituted a strategy that was deliberately adopted in order to secure the best price.

¶ 46 To IIROC staff, the securities' price movements induced the other market participants to react and to trade with these orders. Because of his misconduct, the Respondent secured an advantage with respect to the bid/ask price of the securities.

2. Respondent's Position

¶ 47 In his arguments, the Respondent did not dispute that he entered the orders or executed the transactions that are the subject of the allegations of manipulative and deceptive activities formulated by IIROC. However, he did maintain that he did not engage in manipulative or deceptive trading activities. Specifically, the Respondent argued that securities trading involves taking a position on both sides of the market, which is what he does. In his opinion, the goal of trading is to be the counterparty of the next transaction. According to the Respondent, on the current market, which is characterized by the presence of algorithmic trading systems (robots), the only strategy that an individual trader like himself has is to enter buy and sell orders that are then amended based on the market's reaction in order to obtain the "best price".

¶ 48 The Respondent questioned the conduct of IIROC staff in this matter. He maintained that IIROC's evidence was vitiated by a lack of understanding of the stock market. He further maintained that IIROC's actions in his regard were harassing, pointing to the very small gains that he had realized from the alleged manipulative or deceptive trading activities.

B. Analysis

¶ 49 The infraction of deceptive or manipulative trading activities enacted by Rule 2.2 requires the proof of three elements according to the preponderance of probabilities, as mentioned above.

¶ 50 First, the evidence has established, via the TOQ Reports and Condensed TOQ Reports, that the Respondent, as an Access Person, entered orders on a marketplace concerning the securities that are of interest in this matter, on the days referred to in Count 1.

¶ 51 Second, we are of the opinion that the orders entered by the Respondent created, or could reasonably be expected to create, a false or misleading appearance of trading activity with respect to the security.

¶ 52 Indeed, the evidence has revealed that the Respondent positioned himself on both sides of the market twenty (20) times during the five (5) days analyzed for the securities in question. On each occasion, the orders that he entered improved the Best Ask or the Best Bid, as the case may be. Subsequently, as the evidence has shown, the arrival of a bid or ask price that was equal to or better than that entered by the Respondent would lead the latter to switch to the other side of the order book in order to serve as counterparty to the order with

¹⁰ Interview with Mr. Remo Costa, August 15, 2016, Stenographer's Transcription (Claude Morin, Official Stenographer), filed as exhibit #5, ¶1062, 1083, 1116-1123 1132-1135.

the equal or better price. As a corollary, the Respondent would cancel the order that he had had no intention of executing.

¶ 53 We find from looking at the evidence that the Respondent's non-bona fide orders created a false or misleading appearance of trading activity on each occasion. For each of the five (5) securities, the Respondent communicated bona fide orders to the market, which he intended to execute, as well as non-bona fide orders which were destined to be canceled in order to create a layering effect. According to UMIR Policy 2.2, Part 2(f), the fact of "entering an order or a series of orders for a security that are not intended to be executed" is deemed to constitute a deceptive or manipulative trading activity. Similarly, it is also a deceptive or manipulative activity according to the case law.¹¹ In fact, numerous elements identified in the case law also show up in this matter and support qualifying the Respondent's trading activities as manipulative.¹²

¶ 54 Specifically, the size of the batches of orders that were canceled, namely the non-bona fide orders, was small, while that of the orders executed, namely the bona fide orders, was larger. Furthermore, the Respondent would cancel orders that he had just entered at lightning speed, proceeding with the cancellation in a matter of seconds. The Respondent was also a major trader, even a dominant one, with his buy and sell orders representing between 26% and 81% of the trading volume for the five (5) securities in question on the five (5) days under scrutiny. Similarly, the securities that the Respondent traded were, for the most part, characterized as having low liquidity. Finally, we note that the TOQ Reports revealed that the Respondent was coded as "client", which allowed him to trade anonymously, e.g. to submit orders without revealing his identity to the other market participants.¹³

¶ 55 Thirdly, to rule on the infraction, we must determine whether the Respondent knew or ought reasonably to have known that the entry of the order or the execution of the transaction would create or could reasonably be expected to create a false or misleading appearance of trading activity or interest in the purchase or sale of the security.

¶ 56 In this regard, the Hearing Panel considers that given his experience, the existence of the interfacing agreement, and the information disclosed on the new account application forms, the Respondent is an experienced trader. We are of the opinion that the Respondent, as a seasoned trader who knows very well how the markets work, knew or ought clearly to have known that the entry of the orders in question would create or could reasonably be expected to create a false or misleading appearance of trading activity in the securities.

¶ 57 The objective evidence that results from the Respondent's conduct supports this conclusion. More particularly, a reading of the stenographer's transcription of the interview of the Respondent by IIROC staff clearly shows that he was fully conscious of the effect of the orders that he was entering. The Respondent explained that his strategy was to target low liquidity securities and position himself on both sides of the order book in order to identify a trend. As part of this strategy, the Respondent admitted that he did not intend to execute all of the orders that were entered. Indeed, based on the identified trend, he would evaluate his position and cancel the orders accordingly, in order to avail himself of the best price.

¶ 58 Incidentally, we must emphasize that the amount of the gains realized by the Respondent is not relevant to the analysis of the elements of the infraction of manipulative or deceptive trading activities. The infraction is intended to prevent deceptive or manipulative trading activities, whether the resulting gains are large or small, because of their deleterious effects on the integrity of the market and investor confidence. This

¹¹ *Autorité des marchés financiers v. Lemire*, 2015 QCBDR 63, ¶164; conf. 2016 QCCQ 8932.

¹² *Autorité des marchés financiers v. Lemire*, 2015 QCBDR 63, ¶164; conf. 2016 QCCQ 8932; *Autorité des marchés financiers v. Gévry*, 2017 QCTMF 110; *Re Sadeghi*, 2017 IIROC 55, ¶133.

¹³ Without ruling on this question, we note that if the Respondent had been designated a non-client as he should have been by reason of his position as a board member at Jitney, he would have been unable to trade anonymously.

is also the opinion expressed by the Financial Markets Administrative Tribunal in *Autorité des marchés financiers v. Asgary*: [TRANSLATION] “Other decisions have also emphasized the importance of maintaining the integrity of the markets and how the mere fact of their manipulation could damage them [...] And this is a serious violation, even if the amounts obtained from it are not so large; the problem mainly has to do with how it impacts the markets.”¹⁴

¶ 59 To conclude, we find that the three elements of an infraction of deceptive or manipulative trading activities enacted by Rule 2.2 have been established by IIROC staff, by means of clear, cogent and convincing evidence.

¶ 60 In closing, we wish to underline the exemplary conduct of IIROC staff in this matter, in which the Respondent was not represented by counsel. We therefore reject the position alleged by the Respondent in his submissions, while highlighting the professional conduct of the Staff.

V. DISPOSITION

¶ 61 For all these reasons, the Hearing Panel finds and declares the Respondent guilty of the count against him.

Signed at Montréal, Québec, this 15th day of January, 2019.

Stéphane Rousseau

Gilles Archambault

Daniel Houle

Copyright © 2019 Investment Industry Regulatory Organization of Canada. All Rights Reserved

¹⁴ *Autorité des marchés financiers v. Asgary*, 2015 QCBD 49, ¶ 61, 62. See also *Autorité des marchés financiers v. Cajolet*, 2010 QCBD 12.