# Re Mann

**IN THE MATTER OF:**

**The Rules of the Investment Industry Regulatory Organization of Canada**

**and**

**Dwight Cameron Mann**

2019 IIROC 24

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

Heard: August 22, 2019 in Vancouver, British Columbia
Decision: August 22, 2019
Reasons for Decision: September 19, 2019

**Hearing Panel:**
Joseph A. Bernardo, Chair, Bradley Doney and Alexandra Williams
**Appearance:**
David McLellan, Senior Enforcement Counsel
Patrick Sullivan, for Dwight Cameron Mann
Dwight Cameron Mann (absent)

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## REASONS FOR DECISION ON A MOTION

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¶ 1 On August 22, 2019, the Hearing Panel granted the relief sought under an application brought by Dwight Cameron Mann, the Respondent. These are the reasons for the decision.

**Background**

¶ 2 The Respondent is the subject of a Notice of Hearing issued on March 26, 2019.

¶ 3 The Notice of Hearing is accompanied by a Statement of Allegations. This document particularizes the case the staff (Staff) of the Investment Industry Regulatory Organization of Canada (IIROC) intends to bring against the Respondent.

¶ 4 For present purposes, it is not necessary to review the entirety of Staff's allegations. The particulars specifically relevant to the application are these:

a) The Respondent was a Registered Representative and Portfolio Manager employed in Vancouver, British Columbia by the National Bank Financial Ltd. and National Bank Financial Inc. (collectively, NBF).

b) The Respondent is alleged to have contravened the Dealer Member Rules and Consolidated Rule 1400 by:

i) Offering written performance guarantees to certain NBF clients.

ii) Exploiting NBF's trade correction procedures to create a misleading appearance of client

account performance by (1) falsely claiming he had neglected to enter profitable trades and under that pretext personally covering the additional cost of executing transactions supposedly required to correct the mistakes; and (2) falsely claiming that trades had been mistakenly executed in the wrong accounts and then transferring securities between accounts to supposedly correct their respective positions.

iii) Failing to report a client complaint to NBF.

c. Accounts held by a person identified as Client 1 are alleged to have played a central role in the Respondent's orchestration of securities transfers between accounts.

d. The alleged misconduct occurred from January 2015 to March 2018.

¶ 5 On May 16, 2019, the parties appeared before the Chair of this Hearing Panel to schedule dates for the hearing.

a) Respondent's counsel informed the Chair that:

i) The case against the Respondent includes an allegation that Client 1 was the subject of a judgment obtained by the United States Securities and Exchange Commission (SEC).

ii) Counsel had recently spoken with another lawyer in connection with a different matter. This lawyer disclosed that he and the Chair had in the past engaged in discussions concerning Client 1 and the SEC.

iii) Although he was endeavouring to obtain further details, Respondent's counsel believed it was prudent to alert the Chair at the earliest opportunity that he might be in a conflict of interest.

b) The Chair advised the parties that he had no recollection of the communication in question, but that Respondent's counsel had identified an issue that necessarily required clarification.

¶ 6 On June 18, 2019, a pre-hearing teleconference took place at which the full Hearing Panel presided.

a) Respondent's counsel orally provided details of additional information he had obtained regarding past communications between Client 1's lawyer and the Chair.

b) He submitted that the facts disclosed a potential for reasonable apprehension of bias and asked that the Chair recuse himself.

c) Staff took no position on the request.

d) In the course of discussion, the parties agreed that Client 1's historical involvement with the SEC predated and did not intersect with the misconduct alleged against the Respondent in this proceeding.

e) The Chair on behalf of the Hearing Panel advised that:

i) A claim of reasonable apprehension of bias goes to the heart of the integrity of the hearing process.

ii) The prior interaction at the centre of the claim did not involve the Respondent but rather one of his clients, and appeared unconnected to his alleged misconduct. These factual nuances required close examination.

iii) Resolving a claim of reasonable apprehension of bias required the pertinent facts to be entered into the record and submissions from the parties regarding the relevant law and its application to the facts. In short, the recusal request should be framed and brought forward as an application made in accordance with IIROC's rules of procedure.

**Application**

¶ 7 On July 19, 2019, Respondent's counsel filed a Notice of Application requesting that:

a) Paragraph 42 of the Statement of Allegations be excised.

b) In the alternative, the Chair recuse himself.

¶ 8 The application included written argument, supported by relevant case law citations and affidavits sworn by each of the Respondent and his counsel's legal assistant.

¶ 9 On July 31, 2019, Staff responded to the application by filing a one page letter. The material portion is sufficiently brief that it may be reproduced in its entirety:

> "Staff will be objecting to the Respondent's request to strike paragraph 42 of the Notice of Hearing;
>
> With respect to the request for recusal, Staff are not in a position to question the information provided by the Respondent. However, we are of the view that the legal test for reasonable apprehension of bias is correctly stated by the Respondent, as reflected in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259. In light of the information provided, and in view of the applicable legal test, Staff's review of the grounds for requesting recusal raises concerns about a reasonable apprehension of bias."

¶ 10 Staff did not submit evidence.

***Positions of the parties***

¶ 11 Paragraph 42 alleges that:

> Client 1 and Client 2 have previously been subject to legal action by the United States Securities and Exchange Commission (SEC), whereby the SEC obtained final judgment which imposed a penny stock bar against Client 1 in the United States.

¶ 12 The Respondent asks that the paragraph be excised on procedural fairness grounds because it refers to facts that on their face cannot be logically connected to the substance of the Statement of Allegations. On his behalf, counsel says this imposes on the Respondent the unreasonable burden of having to respond to an ambiguous case. There are two aspects to the objection:

a) The purpose of notice is to inform persons of the material particulars of the allegations made against them. Alleging facts that do not have a nexus with the alleged misconduct injects gratuitous uncertainty in the Respondent's understanding of the case he must meet.

b) The paragraph alleges facts that are capable of being construed as evidence that Client 1 and Client 2 are persons of dubious character. Staff's purpose in seeking to prove those facts is obscure, but it risks calling the Respondent's own character into question. Character evidence, whether direct or by implication, is inherently prejudicial.

¶ 13 The Respondent's July 31, 2019 affidavit addresses the question of relevance. He testifies that:

> "I had no involvement in the matters alleged in paragraph 42 and have no knowledge of the facts referred to in the judgment referred to in paragraph 42. I also had no involvement in matters related to the [British Columbia Securities Commission] investigation of Client 1 and no knowledge of those facts."

¶ 14 Turning to the issue of reasonable apprehension of bias, certain communications between Respondent's counsel and Client 1's lawyer are reproduced as exhibits to the legal assistant's affidavit.

¶ 15 The critical communication is a June 14, 2019 email from Client 1's lawyer. Hearsay is admissible in IIROC proceedings and there is no reason to doubt either the credibility or reliability of the lawyer's account. Even taken at face value, however, the information provided by the email is limited:

a) The British Columbia Securities Commission (BCSC) commenced an investigation of Client 1 in May 2012.

b) The BCSC investigation was related to a SEC investigation.

c) In December 2012, the lawyer was in communication with the Chair, who at the time was employed by the BCSC.

d) In the course of these communications, the Chair wrote a letter to the lawyer, who responded in kind.

e) The letters addressed evidence, case law and the intersection between the BCSC and SEC investigations.

f) The SEC investigation culminated in Client 1 entering into a March 2016 settlement with the SEC and agreeing to a consent judgment. The lawyer believes this is the judgment referenced in paragraph 42.

¶ 16 In oral argument, Respondent's counsel explained the reasoning behind the recusal request:

a) The request is framed in the alternative because the risk of a reasonable apprehension of bias arises only if Staff's evidence proving paragraph 42 is found to be relevant and enters the record.

b) In that circumstance, the review and assessment of the evidence could potentially jog the Chair's recollection. This would present the Respondent with a two-fold risk:

i) First, independently recalling the circumstances of his previous involvement in the BCSC investigation might lead the Chair, consciously or unconsciously, to take a jaundiced view of the Respondent's later association with Client 1.

ii) Second, no matter how forthcoming the Chair might be in sharing his recollection of facts outside the record, as a practical matter, the Respondent could never be sure whether or not he had been afforded a full opportunity to answer the entire case against him.

c) If, on the other hand, paragraph 42 were to be struck and the pertinent evidence ordered inadmissible, the bias issue would be rendered moot and there would be no need to entertain recusal.

¶ 17 Staff opposes striking paragraph 42, but does not oppose the Respondent's claim of reasonable apprehension of bias.

¶ 18 During argument, Senior Enforcement Counsel provided clarifications of fact that entered the record by consent:

a) He reiterated that there is no intersection between the events discussed in paragraph 42 and the Respondent's alleged misconduct.

b) Client 1 neither admitted or denied any wrongdoing in the SEC settlement.

c) The ensuing consent judgment did not contain any findings of fact.

¶ 19 Staff submits that the matters referenced in paragraph 42 are highly germane to the allegations against the Respondent, but their relevance can only be established within the context of the entire case Staff intends to enter at the hearing. The question of relevance should, in effect, be deferred to the hearing, where it will then become apparent that Client 1 acted as an enabler of the Respondent's misconduct.

***Analysis***

¶ 20 There may be situations in which uncertainty or insufficient information may justify deferring a relevance determination until the rest of the record has been entered. This is not one of them.

¶ 21 In British Columbia, IIROC regulates its members under delegated authority granted by the BCSC under Section 24 of the *Securities Act*, RSBC 1996, c. 418.

*Recognition Order - Investment Industry Regulatory Organization of Canada*, 2018 BCSECCOM 109.

¶ 22 At the risk of belabouring the obvious, a hearing panel is subject to the principles of administrative law and, as such, its jurisdiction is defined strictly by IIROC's Rules and Bylaws.

¶ 23 Rule 8203(b) states that:

> A hearing panel may admit as evidence in a hearing any oral testimony and any document or other thing that is relevant, whether or not given or proven under oath or affirmation or admissible as evidence in a court.

In other words, a hearing panel has the discretion to admit only relevant information into evidence. It does not have any authority to admit superfluous information.

¶ 24 A challenge to the relevance of proposed evidence therefore necessarily engages Rule 8203(b), which is to say the party whose evidence is in controversy is put to the test of having to explicitly prove relevance and the hearing panel is presented with a justiciable issue it is obligated to decide.

¶ 25 Staff has declined to explain how paragraph 42 relates to the Respondent's alleged misconduct, or to provide a substantive explanation for why the assessment of relevance is so difficult that it should be deferred. The consequences of this for the application are profound: by electing to not address the probative value of Client 1 and 2's SEC history, Staff has relegated the fate of paragraph 42 to the mercy of the Respondent's ability to make out prima facie grounds for his objection.

¶ 26 The Hearing Panel has these facts before it:

a) The Respondent's uncontroverted testimony disavowing any nexus to Client 1's SEC history.

b) Staff's concession that there is no connection between the matters discussed in paragraph 42 and the alleged misconduct.

c) Staff's confirmation that neither the settlement nor the consent judgment discussed in paragraph 42 disclose any details of the matters that led the SEC to secure a judgment against Client 1.

¶ 27 From these facts, it appears that proving paragraph 42 at the hearing would establish nothing more than the bare proposition that the SEC secured a judgment against Client 1 on the basis of unknown activities that had nothing to do with the Respondent.

¶ 28 In the absence of any elaboration of relevance, therefore, the Hearing Panel can only agree with the Respondent that paragraph 42 stands out in the Statement of Allegations as an anomalous reference to events that have no rational connection to the Respondent's alleged misconduct. In summarizing Client 1's history with the SEC, the paragraph refers to character evidence that, risk of prejudice aside, is simply not relevant to the factual question of whether that person enabled the Respondent's misconduct years later.

¶ 29 This finding is sufficient to dispose of the application in the Respondent's favour. It follows that the claim of reasonable apprehension of bias advanced in the alternative is rendered moot.

¶ 30 In the interests of transparency, however, some observations regarding this aspect of the application are nonetheless warranted. Nothing is more vital to a proceeding than impartiality and the appearance of it. There should be no ambiguity in the public record about the factual grounds upon which the bias claim was based.

¶ 31 The parties are in agreement that the reasoning of the Supreme Court of Canada in Wewaykum, supra, provides the correct analytical framework for assessing reasonable apprehension of bias.

¶ 32 The key point of the decision is that an assessment of reasonable apprehension of bias must begin with a strong presumption of judicial impartiality that can only be overturned after a highly fact specific inquiry. The simple existence of some degree of prior involvement is not by itself a basis for disqualification. Indeed, automatic disqualification is not a principle in Canadian law. There are no short cuts in the analysis, which must always be case specific and requires that the unique facts of a prior involvement be thoroughly weighed against the question of how they would be perceived by a reasonable third-party observer.

*Wewaykum, supra*, at paras. 76, 77, and 81.

¶ 33 Neither of the parties addressed these issues substantively in their submissions.

¶ 34 As already mentioned, at the June 18, 2019 pre-hearing teleconference, the Chair advised Respondent's counsel that a formal application was the appropriate procedure for advancing a claim of reasonable apprehension of bias. Counsel responded that the difficulty in bringing such an application was that he did not control the relevant correspondence.

¶ 35 This is reflected in the evidence ultimately tendered by the Respondent. It establishes that Client 1's lawyer and the Chair exchanged correspondence in the course of the BCSC's investigation of Client 1. The evidence does not disclose the actual content of the correspondence or shed any light on what views the Chair held at the time about Client 1 or, for that matter, anything else. The only reference to content is a one sentence summary in which Client 1's lawyer reports on the general nature of the topics discussed.

¶ 36 It is evident that counsel did not meaningfully engage the prescribed analytical framework for reasonable apprehension of bias because the available information was too limited for the purpose.

¶ 37 As noted, nothing turns on these points. Nonetheless, it is difficult to see how it would be possible to assess the character of the Chair's involvement, and therefore its potential for bias, absent evidence of what he actually said and thought at the time. It follows that the sufficiency of the evidence would have been a prominent question for the Hearing Panel had it been necessary to apply the test set out in *Wewaykum, supra*.

**Conclusion**

¶ 38 The relief sought in the Respondent's written material did not include an explicit request that evidence of the matters referred to in paragraph 42 be ordered inadmissible at the hearing. This, however, was implicit in the nature of the application. In any case, the point was canvassed in the course of the appearance, as was the Hearing Panel's jurisdiction under Rule 8413(15) to decide a motion in such manner as it considers appropriate.

¶ 39 Accordingly, on August 22, 2019 the Hearing Panel ordered:

a) paragraph 42 struck from the Statement of Allegations; and

b) evidence tending to the proof of the allegation in paragraph 42 is inadmissible against the Respondent in these proceedings.

Dated at Vancouver, British Columbia this 19 day of September, 2019.

Joseph A. Bernardo

Bradley Doney

Alexandra Williams