

Re Côté & Côté

IN THE MATTER OF:

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

and

François Côté

and

Jean-Rock Côté

2018 IIROC 23

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

Heard: May 8, 2018, at Montréal (Québec)

Decision: May 8, 2018

Reasons for Decision: June 28, 2018

Hearing Panel:

Jean Martel Ad. E., Chair; Lise Casgrain and Jean Morin

Appearances:

Fanie Dubuc, Enforcement Counsel

François Côté, Respondent (present)

Jean-Rock Côté, Respondent (present)

DECISION ON SETTLEMENT AGREEMENT

¶ 1 On May 8, 2018, a hearing was held before our Hearing Panel to consider the settlement agreement (**Settlement Agreement**) signed on March 12, 2018 by François Côté and Jean-Rock Côté (the **Respondents**), and on March 19, 2018 by Fanie Dubuc on behalf of Enforcement Staff (Staff) of the Investment Industry Regulatory Organization of Canada (**IIROC** or the **Organization**), which agreement is recommended for our acceptance.

¶ 2 The Respondents admit having contravened IIROC's requirements¹ when:

¹ IIROC's new rules came into force on September 1, 2016. *Transition Rule No. 1* of IIROC lays out the new rules, which apply only to enforcement proceedings concerned with conduct that occurred after September 1, 2016. Consequently, considering that the offences admitted to by the Respondents occurred on or around February 11, 2016, certain rules that were in force at the material time must apply. For instance, according to *Schedule C.1 of Transition Rule No. 1* of the *Consolidated Enforcement, Procedural, Examination and Approval Rules*, Rule 20.1.3(3)) and Rule 29 apply in this matter, and not the current Rules that govern these same matters.

On or around February 11, 2016, the Respondents participated in unauthorized trading in a client's account, thereby engaging in business conduct or practice unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1.

¶ 3 After consideration of the terms and conditions of the Settlement Agreement, a copy of which is appended hereto, and taking into account the representations of the Respondents and the legal counsel for Staff, our Hearing Panel has ruled in favour of accepting the Settlement Agreement before us for the reasons below.

I. DECISION ON PRELIMINARY MOTION

¶ 4 Before outlining said reasons for acceptance, it is appropriate to bring up a preliminary motion that was initially presented by Staff in a letter dated April 30, 2018, and then reiterated at the Hearing, regarding permitting Mr. Tim Moseley, Vice-President of the Ontario Securities Commission (OSC), to attend as an observer.

¶ 5 Mr. Moseley wanted to attend the hearing and have access to the text of the Settlement Agreement, in the context of an activity that was intended to support his role within a securities regulatory authority that, in Ontario, recognizes IIROC as a self-regulatory organization (SRO).

¶ 6 We accepted the request forthwith. Since it raises a question regarding the application of the Consolidated Enforcement, Examination and Approval Rules of IIROC (the **Rules**) concerning settlement hearings, it is useful to outline the reasons for this here.

¶ 7 Our settlement hearing is a proceeding that must be held in accordance with the provisions of Rule 8200, *Enforcement Proceedings*, as well as the *Rules of Practice and Procedure* provided under IIROC Rule 8400.

¶ 8 One of the requirements imposed by these Rules is found in Rule 8203(5), which posits the principle that, within the Organization, disciplinary justice is rendered publicly. Consequently, the public must normally be able to attend the hearings and have the option of consulting the pleadings filed by the parties.

¶ 9 This requirement is consistent with the rules stated in section 82 of *An Act respecting the Autorité des marchés financiers* (CQLR, c. A-33.2, the **LAMF**), which specifies that when a hearing panel like ours hears a disciplinary matter for a self-regulatory organization in Québec, it must do so “*at a public sitting*”.

¶ 10 This rule is not absolute. The LAMF, in section 82, paragraph 2, allows exceptions to be made by the recognized organization for purposes of its disciplinary mechanism, provided that it is “*in the interest of good morals or public order*”.

¶ 11 That is what our Dealer Member Rule 8203(5)(i), and Rule 8428(5) of our *Rules of Procedure* are doing when they state that, contrary to the principle of a disciplinary justice that is open to the public, a settlement hearing must be held behind closed doors and the settlement agreement concerned remain confidential, in both cases until such time as the settlement agreement is accepted by the hearing panel.

¶ 12 This requirement of confidentiality serves the public order, to paraphrase the LAMF, by protecting a respondent’s right to a full and complete defence even if he agrees to avail himself of the settlement procedure provided to him by the IIROC Rules.

¶ 13 Thus the respondent can agree with Staff on certain facts that prove that he contravened IIROC’s requirements, as well as on the sanctions that should consequently be imposed on him, and then submit this agreement for acceptance by a hearing panel, without prejudicing his ability to make a full and complete defence. The resulting benefits to the efficiency of the disciplinary mechanism are unquestionable.

¶ 14 If the Hearing Panel seized of the Settlement Agreement refuses to accept it, the Respondent can therefore exercise his right to a full and complete defence against any disciplinary proceeding that is brought against him subsequently, whether based on the same allegations and charges, or on allegations and charges related to those to which he had admitted or agreed in the rejected agreement. The confidentiality of the arguments and representations, as well as that of the admissions made and consents given by a respondent in a settlement agreement that was previously rejected, thus supports the exercise of this right the same way that it lent credibility to the settlement process in the first place.

¶ 15 In short, the Respondents' right to confidentiality in the context of the settlement hearing and agreement is fundamental in their eyes, and must be carefully protected by the Hearing Panel. This is not a mere question of procedure that we can allow ourselves to deviate from by virtue of the general power conferred on us to control the conduct of the proceeding before us (Dealer Member Rule 8403(3)).

¶ 16 Nevertheless, it must be clearly understood that this right restricts only the general public's access to the hearing or the settlement agreement and that the closed-door requirement does not apply to everyone without exception.

¶ 17 The "public" to whom access to a hearing or a settlement agreement may be denied, under the Rules, does not include persons to whom these same Rules grant, and indeed impose, the recognition of a clear and legitimate interest in obtaining such access.

¶ 18 Thus, this "public" does not include the enforcement staff and disciplinary justice officers whose presence is necessary to the administration of said justice and the conduct of the hearings. The same applies, in our opinion, to a practicing representative of a *securities regulatory authority*, under the meaning of Rule 1201(2), that has recognized IIROC as a self-regulatory organization and that holds statutory supervision powers in its regard.

¶ 19 These persons may not, and must not, be likened to members of the public for whom the Rules of the Organization would normally order a closed-door hearing, nor, consequently, are they subject to it.

¶ 20 In so doing, the fact of granting them or refusing them observer status at a settlement hearing, at the request of one of the parties or, to this end, obtaining a copy of the settlement agreement concerned, ceases to be an issue of public order for the Respondent, becoming a simple procedural issue on which our discretion under Rule 8403(3)(iv) allows us to rule.

¶ 21 This is what we have done when, with the Respondents' consent, we granted the request of counsel for Staff concerning Mr. Moseley.

¶ 22 Now let us move on to the consideration of the Settlement Agreement and to the Reasons that led the Hearing Panel to accept it.

II. STATEMENT OF FACTS

2.1. The respondents

¶ 23 The Respondent François Côté was approved as a registered dealing representative and authorized to act in this capacity for a dealer member of IIROC (and formerly, the IDA), in this instance Industrial Alliance Securities Inc. (**IAS/the Firm/the Dealer**), from July 19, 2005 to May 27, 2016.

¶ 24 For his part, the Respondent Jean-Rock Côté was employed with the Firm from July 14, 2005 to May 27, 2016, also as an authorized representative.

¶ 25 During the time both were employed with the Dealer, the Respondents conducted their business activities as securities professionals together. They presented themselves and acted as a team, which is why we refer to them jointly as the "**Côté & Côté team**".

¶ 26 In 2015, the Respondents received instructions from the Firm to the effect that the assets of certain client accounts under their responsibility needed to be "rebalanced", meaning that the asset composition had to be adjusted to match the risk level that the account holders said they could tolerate in their investments, as stated in the Firm's client records.

¶ 27 To carry out the requested rebalancing, the Côté & Côté team established a work methodology for themselves (the "**work methodology**"). According to this methodology the Respondents were to:

- (i) conduct a joint analysis of the portfolios in order to identify the securities that might not be suited to the clients' risk profile;
- (ii) once this identification was completed, verify the risk level associated with each of the securities

- concerned;
- (iii) based on the results of this verification, target the securities that, in their opinion, needed to be sold;
 - (iv) before proceeding with the sales transactions, contact the client concerned to obtain the latter's consent;
 - (v) once that consent was obtained, execute the sell transactions through the Firm's trading system.

2.2 The client's account

¶ 28 On October 27, 2016, the client opened her client account with the Dealer. At no time was this account a discretionary account. The buy and sell transactions executed therein therefore had to have the account holder's prior consent.

¶ 29 At the material time of the contravention, to which they have admitted, namely on February 11, 2016, the Respondents were officially assigned to the client's account and were responsible for the trading in that account.

2.3 The transactions executed in the account

¶ 30 On or around the material date, the Respondents applied their established methodology and proceeded to analyze the client's account portfolio.

¶ 31 They ended by drawing up a list containing the securities that, in their opinion, needed to be sold in order to complete the desired rebalancing.

¶ 32 However, due to some confusion in the execution of this methodology, as they have explained, none of the Côté & Côté team members did communicate with the client beforehand, such that the Firm was never authorized to divest itself of the securities concerned.

¶ 33 On or around February 11, 2016, the Respondents gave the order to sell 10 classes of securities held in the client's account, and these trades were effectively executed.

¶ 34 A few days later, on February 19, 2016, the client complained to the Firm, which reversed the unauthorized trades, with no loss to the client.

2.4 The terms of the proposed settlement

¶ 35 After consideration of the agreed-upon facts, the Respondents have agreed with IIROC to accept jointly the imposition of the following penalties and costs:

- a) an aggregate fine in the amount of \$10,000;
- b) retake the Conduct and Practices Handbook course and pass the exam before seeking re-registration with IIROC;
- c) in the event of re-registration, a period of twelve (12) months of strict supervision by the new employer;
- d) costs in the amount of \$2,500.

¶ 36 What's more, considering the Respondents' precarious financial circumstances, Staff agrees that if our Hearing Panel accepts the Settlement Agreement, they may acquit themselves of the above-cited monetary penalties and costs over a 12-month period, in 12 equal and consecutive installments payable on the 1st day of the month following the settlement acceptance.

III. ANALYSIS

3.1 The Guiding Principles

¶ 37 Following a Settlement Hearing, the role of the Hearing Panel is to either accept or reject the Settlement Agreement before it (Dealer Member Rule 20.36(1), *Corporation Hearing Processes*).

¶ 38 To arrive at a decision, the Hearing Panel must determine, after consideration of the agreed-upon facts stated in the Settlement Agreement and while taking care not to interfere unduly in the Settlement Agreement negotiated between Staff and the Respondents, whether the disciplinary measures that it proposes appear to fall within a reasonable range of appropriateness, given the misconduct in question.

¶ 39 This standard, which also guided us in this matter, is consistently applied by IIROC hearing panels presiding at settlement hearings (see, among others, *Re Milewski* [1999] I.D.A.C. No. 17; *Re Bereskin*, 2010 IIROC 37; *Re BMO Nesbitt Burns* [2012] IIROC No. 21).

¶ 40 Moreover, to be considered adequate in respect of the circumstances surrounding the commission of the agreed-upon offences, the sanctions jointly recommended by the parties to the Settlement Agreement must also appear equitable, and consistent with the public interest (*Re Cavalaris*, 2017 IIROC 4, speaking of *R. v. Anthony Cook* [2016] SCC 43, pars. 17 and ss.).

¶ 41 In other words, to the question of knowing whether, on this level, the conclusions of the Settlement Agreement are “lenient or harsh to the point of being unreasonable, contrary to the public interest, and/or of a nature to bring IIROC’s disciplinary process into disrepute” (*Re Kloda*, 2016 IIROC 50, par. 15), the Hearing Panel must be able to answer in the negative.

¶ 42 The exercise of appraising the facts that underpin these conclusions necessarily requires an examination of the mitigating and aggravating circumstances that arise from the admissions made in the Settlement Agreement. For purposes of the resulting analysis, the IIROC Sanction Guidelines (February 2, 2015 version) (the **Guidelines**) have served as our guide.

3.1. The circumstances

¶ 43 The circumstances contained in this record are essentially mitigating.

¶ 44 The Hearing Panel finds, first of all, that the Respondents have cooperated with staff of IIROC, notably by being transparent and not delaying the investigation. This attitude is entirely to their credit.

¶ 45 Furthermore, the number of illicit transactions is relatively low and the misconduct in question represents one isolated act, since they were all executed the same day, applied as part of a methodology that was correct in and of itself, but that was not followed the way it should have been.

¶ 46 In other words, the sale of the client’s securities without her consent was not the result of an intentional fault of the Respondents, but rather an error attributable to confusion in the execution of this methodology by the Côté & Côté team.

¶ 47 Finally, the client did not suffer any financial prejudice attributable to the contraventions of the Rules by the Respondents, and the latter did not derive any financial benefit from the irregular sale of her securities.

¶ 48 Counsel for Staff has argued that the Respondents knew the applicable rules, that they knew full well that they had a duty to obtain the client’s consent and that they did not act with the degree of care that was to be expected when they applied their methodology in order to fulfill that duty. Without going so far as to say outright that this negligence must be considered an aggravating factor – after consideration of the agreed-upon facts there is nothing that qualifies it as gross negligence – neither can we place it in the mitigating circumstances column.

IV. CONCLUSIONS

¶ 49 After consideration of the Sanction Guidelines and analysis of the case-law cited by counsel for Staff regarding similar infractions to those committed by the Respondents, and the sanctions that were imposed as a result (*Re Proulx*, 2017 IIROC 47; *Re Giroux-Garneau*, 2016 IIROC 46; *Re Tersigni*, 2016 IIROC 19; *Re Sloan*, 2014 IIROC 35; *Re Biron*, 2012 IIROC 4), we have come to the conclusion that the provisions of the Settlement Agreement are consistent with the guidelines that must guide our Hearing Panel in the exercise of its jurisdiction in the matter.

¶ 50 Indeed, we estimate that, in the circumstances, there is a reasonable appropriateness between the

proposed monetary sanctions and the costs that should be ordered, and the alleged misconduct.

¶ 51 Finally, the 12 months of strict supervision and the obligation to successfully complete the Conduct and Practices Handbook Course before seeking re-registration are additional sanctions which to us seem fully justified under the circumstances.

¶ 52 For all of these reasons, we allow the joint recommendation of the parties and accept the Settlement Agreement before us.

¶ 53 As for us, we believe that the sanctions agreed upon in the Settlement Agreement, in regard to the facts admitted in the Settlement Agreement, are consistent in every respect with the criteria of fairness and reasonable appropriateness, allowing us to rule in this manner.

FOR THESE REASONS,

¶ 54 **THE HEARING PANEL ACCEPTS** the Settlement Agreement appended to this decision, including the following penalties against the Respondents:

- 1) The imposition of a fine in the amount of \$10,000 for both Respondents;
- 2) Costs in the amount of \$2,500, payable by both Respondents to IIROC;
- 3) Retake the Conduct and Practices Handbook course and pass the exam before seeking re-registration with IIROC; and
- 4) In the event of re-registration with IIROC, 12 months of strict supervision by the new employer.

FORMALLY CONFIRMS to the Respondents that Staff agrees that they may pay the monetary sanction and above-cited costs over a period of 12 months, in 12 equal and consecutive installments, payable as of June 1, 2018.

[The next page is the signatures page]

Montréal, June 28, 2018

« Jean Martel »

« Lise Casgrain »

« Jean Morin »

SETTLEMENT AGREEMENT

PART I - INTRODUCTION

1. The Investment Industry Regulatory Organization of Canada (IIROC) will issue a notice of application to announce that a settlement hearing will be held before a Hearing Panel (the Hearing Panel) to consider whether, pursuant to Rule 8215 of IIROC's Enforcement, Examination and Approval Rules, it should accept a settlement agreement (the Settlement Agreement) between Staff of IIROC (Staff) and François Côté and Jean-Rock Côté (the Respondents).

PART II - JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondents jointly recommend that the Hearing Panel accept the Settlement Agreement in accordance with the terms set forth below.

PART III – AGREED FACTS

3. For purposes of the Settlement Agreement, the Respondents agree with the facts set out in this Part III.

Summary

4. On or around February 11, 2016, the Respondents, as members of the Côté/Côté team working for

Industrial Alliance Securities Inc. (IAS), participated in the unauthorized sale of ten (10) securities in the account of their client H.M.

B. Approval History

5. The Respondent François Côté has been approved as a registered representative with IIROC, as well as its predecessor the Investment Dealers Association of Canada (IDA), since July 19, 2005;
6. The Respondent Jean-Rock Côté has been approved as a registered representative with IIROC, as well as its predecessor the IDA, since July 14, 2005;
7. The Respondent François Côté was employed with IAS from July 19, 2005 to May 27, 2016;
8. The Respondent Jean-Rock Côté was employed with IAS from July 14, 2005 to May 27, 2016;
9. The Respondents are no longer approved as registered representatives with IIROC.

C. Alleged contravention

Unauthorized trading

10. The client H.M. opened an account at IAS on October 27, 2010;
11. The client's account was never preauthorized or approved as a "discretionary account";
12. The Respondents were part of the Côté/Côté team, which was composed of François Côté and Jean-Rock Côté, both of them IIROC registrants;
13. At the material time, the Respondents were both officially assigned to the client H.M.'s account and were responsible for the trading in that account;
14. The Respondents have confirmed to Staff of IIROC that on or around February 11, 2016, they participated in the sale of ten (10) securities in H.M.'s account;
15. According to the Respondents, the Côté/Côté team had, earlier in 2015, received instructions from IAS that certain client accounts needed to be "rebalanced", meaning that the composition of the portfolios had to be modified to match the risk level stated in the client records;
16. According to the Respondents, the methodology employed by the Côté/Côté team to carry out the rebalancing requested by IAS was set up as follows :
 - a) The Côté/Côté team would conduct a joint analysis of the portfolios in order to identify the securities that might not be suitable for the client profiles;
 - b) Depending on the results of this analysis, the Respondents would verify the risk level associated with each of the identified securities;
 - c) Based on the risk assessment of the identified securities, and by mutual agreement, the Côté/Côté team would pinpoint the securities that needed to be sold;
 - d) The client would be contacted to obtain his or her consent prior to the sale;
 - e) The Côté/Côté team would execute the sell transactions through the IAS trading system.
17. According to the Respondents, they based themselves on this work methodology to analyze the client H.M.'s portfolio and identify a list of securities that needed to be sold;
18. However, the Respondents confirmed to staff of IIROC that, due to confusion between the Côté/Côté team members, no one communicated with the client H.M. before the securities were sold;
19. On or around February 19, 2016, H.M. filed a complaint with IAS concerning the ten trades that were executed in her account without her authorization on February 11, 2016;
20. Pursuant to the complaint filed by the client H.M., IAS canceled the ten trades executed without authorization in her account. The client H.M. suffered no loss;

21. On May 27, 2016, the Respondents were dismissed from their positions as representatives of IAS.

PART IV – CONTRAVENTION

22. By reason of the conduct described above, the Respondents contravened the IIROC Dealer Member Rules as follows :

On or around February 11, 2016, the Respondents participated in unauthorized trading in a client's account, thereby engaging in business conduct or practice unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1.

PART V - TERMS OF SETTLEMENT

23. The Respondents jointly accept the following penalties and costs:
- a) An aggregate fine in the amount of \$10,000;
 - b) Retake the Conduct and Practices Handbook course and pass the exam before they can seek reapproval with IIROC;
 - c) In the event of reapproval with IIROC, a period of twelve (12) months of strict supervision by the new employer;
24. The Respondents agree to pay costs to IIROC in the amount of \$2,500;
25. In accordance with IIROC's Disciplinary Sanction Guidelines, the Respondents have provided convincing proof of their precarious financial circumstances. Consequently, IIROC has taken into account the Respondents' financial circumstances in determining a payment schedule for the monetary penalties and costs (imposed amounts);
26. If the Hearing Panel accepts the Settlement Agreement, the Respondents agree to pay the imposed amounts mentioned above according to a 12-month payment schedule. The imposed amounts must be paid in twelve (12) equal installments beginning the 1st day of the month following the settlement acceptance date;
27. The Respondents acknowledge that their reapproval as IIROC registrants is conditional on their payment in full of the amounts imposed in the Settlement Agreement.

PART VI – STAFF COMMITMENT

28. If the Hearing Panel accepts this Settlement Agreement, Staff will not initiate any further action against the Respondents in relation to the facts set out in Part III and the contraventions in Part IV of this Settlement Agreement, subject to the provisions of the paragraph below.
29. If the Hearing Panel accepts the Settlement Agreement and the Respondents do not abide by the terms thereof, Staff of IIROC may initiate proceedings against the Respondents, pursuant to Rule 8200. These proceedings may be based on, but are not limited to, the facts set out in Part III of this Settlement Agreement.

PART VII – SETTLEMENT ACCEPTANCE PROCEDURE

30. The Settlement Agreement is subject to acceptance by the Hearing Panel;
31. The Settlement Agreement shall be presented to a Hearing Panel at a settlement hearing held in accordance with the procedures described in Sections 8215 and 8428, in addition to any other procedures that may be agreed upon between the parties.
32. Staff and the Respondents agree that this Settlement Agreement shall constitute all of the agreed facts that will be submitted at the Settlement Hearing, unless the parties agree that additional facts should be submitted at the Settlement Hearing. If the Respondents do not appear at the Settlement Hearing, Staff may communicate additional material facts at the request of the Hearing Panel;

33. If the Hearing Panel accepts the Settlement Agreement, the Respondents waive their right, under IIROC rules and any applicable legislation, to a disciplinary hearing, review or appeal.
34. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondents may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing in relation to the same allegations or to related allegations.
35. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
36. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post a full copy of this Settlement Agreement on the IIROC website. IIROC will also publish a summary of the facts, contraventions, and the sanctions agreed upon in this Settlement Agreement.
37. Staff and the Respondents agree that, if the Hearing Panel accepts the Settlement Agreement, they or anyone on their behalf will not make any public statements inconsistent with the Settlement Agreement;
38. The Settlement Agreement shall become effective and binding upon the Respondents and Staff from the date of its acceptance by the Hearing Panel.

PART VIII – SIGNATURE OF THE SETTLEMENT AGREEMENT

39. This Settlement Agreement may be signed in one or more counterparts which, together, will constitute a binding agreement.
40. The fax or electronic copy of any signature will be treated as an original signature.

SIGNED at Sherbrooke on March 12, 2018.

(s) François Côté _____

François Côté

Respondent

SIGNED at Sherbrooke on March 12, 2018.

(s) Jean-Rock Côté _____

Jean-Rock Côté

Respondent

SIGNED at Montréal, on March 19, 2018

(s) Fanie Dubuc _____

Fanie Dubuc

Enforcement Counsel,

for Enforcement Staff of IIROC

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