Re Deeb

IN THE MATTER OF:

Dealer Member Rule of the Investment Industry Regulatory Organization of Canada (IIROC)

and

Peter Michael Deeb

2012 IIROC 54

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District Council)

Hearing: September 28, 2012
Decision: October 1, 2012

Hearing Panel:
Frederick Webber (Chair), Selwyn Kossuth, Sandy Grant
Appearances:
Mr. Andrew Werbowski, Enforcement Counsel
Mr. Grant Sawiak, Joseph Groia and Kevin Richard, Respondents' Counsel

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BOYCE WITNESS DECISION

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1. Introduction

¶ 1 The Respondent proposed to call an expert witness, Larry Boyce ("Boyce"), to testify regarding matters contained in a report prepared by him, dated August 31, 2012 ("the Boyce Report") which relates to Count 3 in the Notice of Hearing ("NOH"). The Respondent also proposed to call Boyce as a fact witness regarding Counts 1 and 2 in the NOH based on his witness statement. IIROC counsel advised the Panel that IIROC would bring a motion to exclude the witness, both as an expert witness regarding Count 3 and as a fact witness regarding Counts 1 and 2.

¶ 2 Immediately prior to hearing the motion on September 28, 2012, the Respondent engaged two additional counsel, Joseph Groia and Kevin Richard who advised the Panel that they would be primarily responsible for representing the Respondent on this motion and for the remainder of the hearing. With the agreement of both counsel, the Panel was given a copy of the Boyce Report and the witness statement, and the IIROC motion was argued on September 28, 2012. The Panel reviewed the Boyce Report and his witness statement and then heard oral submissions from counsel for both parties. The decision on the motion was delivered on October 1,2012.

2. Exclusion of Boyce as a Fact Witness

¶ 3 The IIROC motion asked that the Panel exclude Boyce as a fact witness regarding Counts 1 and 2 on the following grounds:

- Boyce is not properly a fact witness since his proposed evidence is purely opinion evidence that is being characterized and re-packaged as fact evidence.
- Boyce was not present when any of the Count 1 and 2 transactions were taking place. He was simply retained by the Respondent after the issuance of the NOH to review one arbitrarily selected

month in a 13 month time frame;

- Boyce's evidence is not necessary and his conclusions are not relevant.

¶ 4 In his witness statement, Boyce stated that he selected the month of September, 2011 (sic, this was meant to refer to 2009) and reviewed all of the Respondent's trading activity through a review of daily trade records. The witness statement then summarizes his findings.

¶ 5 The Panel disagrees with the IIROC assertion that the proposed evidence is opinion rather than fact evidence. In the Panel's view, the proposed evidence is largely, if not totally factual evidence. Boyce's evidence should not, and will not be excluded on this ground.

¶ 6 IIROC's second ground was that Boyce was not present when the Count 1 and 2 transactions took place. In the Panel's opinion, this is not a valid ground on which to exclude the testimony. The IIROC witnesses also testified without being present when the transactions occurred. In all cases, the witnesses either have testified, or will testify, about their review of records of existing transactions. Boyce's evidence should not, and will not be excluded on this ground.

¶ 7 IIROC also argued that Boyce's testimony would be irrelevant because it would deal with only one month out of thirteen which are covered in Counts 1 and 2 and that month did not include the two months that are the subject of Count 1. The Panel has some sympathy with this argument. However, the Panel decided that it would be premature to rule on the relevancy of the testimony without giving the witness a chance to make his point and counsel to establish its relevance if IIROC counsel objected to the testimony on that ground. The Panel could then rule on relevancy after proper argument, and if allowed, could give it the appropriate weight.

3. Exclusion of Expert Evidence

¶ 8 IIROC objected to the admissibility of the Boyce Report in relation to Count 3 on the grounds that:

- It is not necessary to assist the Panel; and
- It is not relevant.

¶ 9 In support of its position, IIROC asserted that the criteria for the admissibility of expert evidence are set forth in the leading case of *R. v. Mohan*, [1994] 2 S.C.R. 9, [1994] S.C.J. No. 36 where the Supreme Court of Canada stated "that the admission of expert evidence depends on the application of the following criteria: (a) relevance; (b) necessity in assisting the trier of fact; (c) the absence of any exclusionary rule; and (d) a properly qualified expert." Criteria (c) and (d) are not applicable in our case. However, (a) and (b) are relevant.

¶ 10 3.4 The court quoted from *R. v. Abbey*, [1982] 2 S.C.R. 24 that, "an expert's function is…to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate… If on the proven facts the judge or jury can formulate their own conclusions without help, then the opinion of the expert is unnecessary."

¶ 11 The standard is more than "helpful". "What is required is that the opinion be necessary in the sense that it provides information, which is likely to be outside the experience and knowledge of a judge or jury."

¶ 12 Furthermore the court stated that the expert testimony must be assessed in light of its potential to distort the fact-finding process. "…experts must not be permitted to usurp the functions of the trier of fact… causing a trial to become "a contest of experts." While the rule that excluded expert testimony in respect of the ultimate issue is no longer of general application, the concerns underlying it remain and the rule will be strictly applied in appropriate cases to exclude evidence as to an ultimate issue.

¶ 13 IIROC also asserted that "In the securities field, IIROC… [has] been found to be [an] expert tribunal capable of understanding and ruling on issues such as compliance, standards and practices in the securities industry, issues related to margin requirements and improperly obtaining access to credit without hearing from experts on the matter. Such issues fall squarely within the expertise of the tribunal." This Panel agrees with this assertion, but finds that it does not necessarily preclude the admission of expert evidence regarding such issues in every case before an IIROC hearing panel.

¶ 14 In the recent case of *Re Northern Securities* 2012 IIROC 38, the panel found that the *Mohan* criteria were applicable, not only in the case of regular courts, but also in the case of administrative tribunals. It applied the *Mohan* criteria, and in particular the "necessity" criterion, to exclude expert evidence in that case.

¶ 15 In our case the Respondent submitted that the high threshold of expert evidence admissibility in cases such *Mohan* has only limited application in administrative proceedings and that the *Mohan* criteria should not preclude the admissibility of such evidence; if considered, those criteria should be limited to gauging the weight given to the evidence by the Panel.

¶ 16 In his written submissions, the Respondent stated that"…in *Alberta (Securities Commission) v. Workum*, [2010] A.J. No. 1468, the Alberta Court of Appeal held that *Mohan* has no application in administrative hearings." They also asserted that administrative tribunals such as IIROC "are not bound by the civil rules of evidence, and as such, the same strict standards do not apply to the admission of expert evidence in the administrative context as they apply in judicial proceedings." This Panel agrees with that assertion. The Respondent cited the Alberta Court of Appeal decision in *Alberta (Workers' Compensation Board) v. Alberta (Workers' Compensation Board Appeals Commission)*, 2005 ABCA 276, 371 A.R. 318, a case prior to *Workum*, as distinguishing the application of the *Mohan* criteria in a court of law from their application in the administrative context. In that case, the court held that an agency's failure to formally qualify an expert according to the rules in *Mohan* did not preclude the admissibility of his evidence. The Court stated:

> "…As a general rule, the strict rules of evidence do not apply to administrative tribunals…While rules relating to the inadmissibility of evidence (such as the Mohan test) in a court of law are generally fixed and formal, an administrative tribunal is seldom, if ever, required (emphasis added) to apply those strict rules…." In an administrative law context "relevant expert evidence is admissible. Any frailties in the facts or hypothesis upon which an opinion is based, or in the qualifications of the expert, affect the weight of the evidence, but not its admissibility."

¶ 17 The *WCB* and *Workum* cases were not cited in the *Northern* case, but that does not mean that *Northern* was wrongly decided or that the *Mohan* criteria have no application in administrative hearings. The *WCB* and *Workum* cases simply mean that the *Mohan* criteria need not be as strictly applied in administrative cases as in courts of law, but they may still be referred to in order to determine whether expert evidence should be admitted in any particular case. The decision whether or not to admit the expert evidence should be decided on a case by case basis. On the issue of whether the expert's evidence is "necessary" for the tribunal to make its decision, this Panel agrees with the factors cited in the Northern case, viz.:

- the subject matter of the evidence relative to the subject matter expertise of the Panel members in respect of the issues to be decided by the panel;
- the qualifications of the expert; and
- the quality of the evidence.

¶ 18 Prior to making its decision, the Panel read the Boyce Report. The Panel concluded that Mr. Boyce was a properly qualified expert on the subject matter of the report, whether the Respondent's financial transactions in his RRSP and TFSA accounts during the periods referred to in Count 3, constituted "free riding" and were a breach of IIROC Rule 29.1 as alleged. Mr. Boyce's qualifications were not challenged by IIROC. Also while the Panel felt that the subject matter of the Boyce Report was not strictly speaking "necessary" for the Panel to make its decision, on the basis of the *WCB* and *Workum* cases, the Panel may admit the expert evidence even if it does reach the level of necessity; and the Panel felt that the evidence would be instructive on these issues and quite helpful to it in making its decision. Finally, the Panel agreed with the position of the Respondent's counsel, that the Boyce Report and Mr. Boyce's testimony covered the same subject matter on which three IIROC witnesses had already testified without being qualified as experts and that it would be unfair to the Respondent to exclude the Boyce Report and testimony in these circumstances. The Panel decided not to exclude the Boyce Report and his testimony on the ground that it was not necessary.

¶ 19 Lastly, IIROC took the position that the Boyce Report was not relevant. The Boyce Report concluded

that the trading in the RRSP and TFSA accounts was not a breach of the requirements for cash accounts. IIROC's position was that this conclusion was not relevant because the Respondent was not charged with a breach of the cash account rules. The Panel disagreed with IIROC on this point. The Boyce Report not only concluded that the Respondent did not breach the cash account rules, but also that by not breaching them, he did not engage in free riding as alleged in Count 3. Also, even if the RRSP and TFSA trading could not be characterized as free riding, the matters covered in the Boyce Report could be relevant on the question of whether they constituted a breach of IIROC Rule 29.1.

¶ 20 In the result, the Panel decided to allow the Boyce Report into evidence and to allow Mr. Boyce to testify in that regard.

¶ 21 In addition to testifying regarding the RRSP and TFSA accounts, both of which are cash accounts, the Respondents proposed to have Mr. Boyce testify regarding the Respondents trading in certain margin accounts regarding which an IIROC witness had already testified. This was not covered in the Boyce Report but in the interest of procedural fairness, IIROC counsel indicated that they did not object to Mr. Boyce testifying regarding these margin accounts. Therefore it was not necessary for the Panel to rule on the admissibility of this evidence, and he was accordingly allowed to testify.

Dated as of October 1, 2012

Fred Webber- Chairman

Selwyn Kossuth- Member

Sandy Grant- Member