Re Malic

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Gordon Albert Malic

2020 IIROC 37

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

Heard: October 6, 2020 (by videoconference)
Decision: October 6, 2020
Reasons for Decision: October 16, 2020

Hearing Panel:
Eric Spink, QC
Appearance:
Tayen Godfrey, for IIROC Staff
Jeremy L. Taylor for Gordon Albert Malic
Donald J. McGarvey, QC for HW

REASONS FOR DECISION ON MOTION

Introduction

¶ 1 This motion was heard by videoconference on October 6, 2020. I made rulings and gave my decision during the hearing, with written reasons to follow. These are my reasons.

Background

¶ 2 Mr. Malic is the Respondent in this proceeding (the "IIROC Proceeding"). Mr. Malic is also the defendant in a civil action commenced by HW (the "QB Proceeding"). HW is a former client of Mr. Malic, and the complainant in the IIROC Proceeding. Both proceedings arise out of the same events.

¶ 3 Pursuant to the disclosure requirement in IIROC Rule 8417(1), IIROC Staff provided Mr. Malic with certain documents that are the subject of this motion. The documents were attached as Exhibits A and B to the affidavit of Mr. Malic dated September 3, 2020, filed in support of this motion: Exhibit A is a copy of the complaint letter to IIROC from HW's counsel; and Exhibit B is a copy of the transcript of HW's interview with IIROC Staff. Together, those documents comprise what I will sometimes refer to as the "IIROC Information".

¶ 4 Mr. Malic brought this motion to seek permission from the Hearing Panel, under IIROC Rule 8420(6), to use the IIROC Information for the purpose of making an application in the QB Proceeding (the "QB Application"). As counsel for Mr. Malic's describes it, the QB Application will seek "limited relief" from the confidentiality imposed upon Mr. Malic by Rule 5.33 of the Alberta Rules of Court, so that counsel for Mr.

Malic may use the transcript of questioning of HW in the QB Proceeding to defend Mr. Malic in the IIROC Proceeding, including "by impeaching the credibility of HW, and otherwise". Basically, Mr. Malic wants to use the IIROC Information to ask the Court for permission to use HW's QB transcript in the IIROC Proceeding.

¶ 5 The relevant portions of Rule 8420 are as follows:

> **8420. Deemed Undertaking**
>
> (1) In this section, "information" means evidence and information obtained from a party that is required to be disclosed or provided pursuant to sections 8416, 8417, 8418 and 8419 prior to a hearing on the merits, including evidence and information disclosed or provided in a prehearing conference, and any information obtained from such evidence or information. …
>
> (3) A party and its counsel or agent are deemed to undertake not to disclose or use information for any purposes other than those of the proceeding in which the information was obtained, without the consent of the party who disclosed or provided the information or information on the basis of which the information was obtained. …
>
> (5) Notwithstanding subsection 8420(3), information may be used to impeach the testimony of a witness in another proceeding.
>
> (6) A hearing panel may permit the use of information that is subject to this section for purposes other than those of the proceeding in which it was disclosed or provided, if the hearing panel is satisfied that the public interest outweighs any prejudice that would result to the party who disclosed the information or the person from whom it was obtained by that party, subject to any terms and conditions the hearing panel considers just.

HW's Standing On This Motion

¶ 6 HW is not a party to the IIROC Proceeding. At the outset of the hearing, HW's counsel asked for standing to make submissions, on this motion only. Since it was common ground that the motion would require the Hearing Panel to weigh any resulting prejudice to HW, I granted standing to HW to make submissions on this motion only.

The Evidentiary Objection

¶ 7 IIROC Staff objected to the admission, on this motion, of Exhibits A and B attached to the affidavit of Mr. Malic.

¶ 8 Counsel for IIROC Staff submitted that admitting the entire transcript (Exhibit B) would be unfair for the reasons articulated in Re Hoang 2012 IIROC 60. In my view, however, Re Hoang is distinguishable from the present situation. Re Hoang dealt with an application to enter entire transcripts into evidence at a hearing on the merits, as a substitute for presenting the witnesses in person, and as proof of the specific matters described in the transcripts. On this motion, the transcript is included for more limited and reasonable purposes: first, to precisely identify the IIROC Information that is the subject matter of the motion (here, and in the event of an appeal); and second, to demonstrate that the two proceedings involve the same parties and issues (a fact conceded by counsel for IIROC Staff, and not seriously contested by counsel for HW). This motion is not concerned with the details of the transcript at all, merely with the fact that it exists, and that it involves the same parties and issues. I therefore concluded that, unlike the situation in Re Hoang, no unfairness results from including Exhibit B in Mr. Malic's affidavit.

¶ 9 Counsel for IIROC Staff and HW both submitted that Exhibits A and B were unnecessary for purposes the QB Application, and so should not be admitted on this motion. In my view, the test for admissibility on this motion is not whether the material would be "necessary", it is whether there is a reasonable possibility that the material may be relevant to the QB Application – a low threshold similar to that used for determining what

information IIROC must disclose under current IIROC Rule 8417(1) and IIROC's previous requirements, as described in *Re Carbonelli & Conway* 2011 IIROC 74. That threshold is met in this case because the material is plainly relevant to the analytical approach taken by the Court in *Silver Springs Oil Recover v. UMA Engineering Ltd.*, 2004 ABQB 873 ("*Silver Springs*").

¶ 10 The test for admissibility on this motion cannot be whether the material will be "necessary", because that test would require the Hearing Panel to speculate about what position the Court will take on the QB Application. In this case, the Hearing Panel would need to decide whether the Court will use the same approach as in Silver Springs – in which case the material will clearly be necessary – or the approach reflected in Jomha v. McAllister, 2008 ABQB 597 ("Jomha") and other decisions – in which case the material will not clearly be necessary. It is impossible, and would be inappropriate, for an IIROC hearing panel to speculate about how the Court will approach issues that are exclusively within the Court's jurisdiction, and entirely foreign to IIROC (because Rule 8420(5) precludes them). It would be particularly inappropriate for an IIROC hearing panel's speculation to, in effect, override decisions made by Mr. Malic's counsel with respect to the conduct of the QB Application.

¶ 11 I therefore dismissed the preliminary objection and permitted Mr. Malic's affidavit to remain intact for the purposes of this motion.

¶ 12 During the course of argument on this issue, all counsel agreed that some degree of confidentiality for Exhibits A and B was appropriate, because they contain HW's personal information. Counsel for IIROC Staff requested confidentiality pursuant to Rule 8406(10) and, applying the standard in Rule 8203(5)(iii), I ordered that Exhibits A and B to Mr. Malic's affidavit not be available for public inspection, subject to any future order by this or another panel.

The Main Issue

¶ 13 The main issue on this motion is whether the Hearing Panel is satisfied that the public interest outweighs any prejudice that would result to IIROC, or to HW, from permitting Mr. Malic to use the IIROC Information in the QB Application. There are no previous IIROC decisions on this issue.

¶ 14 Counsel for HW submitted that the QB Application is unnecessary because Sections 22 and 23 of the *Alberta Evidence Act*, RSA 2000, c A-18, already permit Mr. Malic to use HW's QB transcript to contradict HW's evidence in the IIROC Proceeding. However, no authority beyond the *Act* itself was advanced for that proposition, which appears to conflict with the general body of case law dealing both with Rule 5.33 of the Alberta Rules of Court and the implied undertaking codified by Rule 5.33. Counsel for IIROC Staff did not support this submission, and Mr. Malic's counsel referred to the Court's remark in *Silver Springs*, at para. 33: "a lawyer or litigant who uses discovery information not obviously in the public domain without first obtaining consent or Court-ordered relief from the undertaking takes a dangerous and ill-advised course." I therefore rejected this submission, and the motion proceeded on the basis that Mr. Malic needs the QB Application in order to use HW's QB transcript in the IIROC Proceeding.

¶ 15 Counsel for Mr. Malic submitted that this motion is part of the overall purpose of permitting his client to defend himself, which has been repeatedly affirmed in various contexts as being both in the public interest, and outweighing any resulting prejudice. He referred to the decision in *Browne v. McNeilly*, [1999] O.J. No. 1919 as being on all fours with this motion. He also referred to *Juman v. Doucette*, 2008 SCC 8 ("*Juman*"), where Justice Binnie described the court's discretion in weighing whether the interests of justice outweigh any prejudice to a party who disclosed evidence, saying (at para. 35): "[W]here discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted." He submitted that the relative weight of the public interest and resulting prejudice are reflected by IIROC Rule 8417(1), which requires disclosure of everything "relevant to the respondent's ability to make full answer and defence"; and

especially, by Rule 8420(5), which gives blanket permission to use information obtained in the IIROC Proceeding "to impeach the testimony of a witness in another proceeding".

¶ 16 Counsel for IIROC Staff deferred to HW's counsel on the question of prejudice to HW, and submitted that the motion prejudiced IIROC because it delayed the IIROC Proceeding. He emphasized that Rule 8401 describes the purpose of IIROC's Rules as being to secure "fair and efficient proceedings", and described the motion as "akin to a stay" of the IIROC Proceeding.

¶ 17 HW's counsel submitted that the deemed undertaking in Rule 8420(3), together with other provisions in IIROC's Rules intended to protect the privacy of complainants and witnesses, reflect the importance of that objective. He submitted that, because the IIROC Information is not necessary to the QB Application, the public interest in this situation cannot outweigh the resulting prejudice to HW.

¶ 18 The public interest, privacy and efficiency objectives that I must consider on this motion are basically similar to the objectives considered by the courts and other tribunals in the various decisions cited to me. In my view, IIROC Rule 8420(5) strongly indicates how the hearing panel ought to weigh the public interest against resulting prejudice in this situation. Rules 8420(5) codifies the common law, as it applies within IIROC's limited sphere, in essentially the same way as the rules of court in some provinces have codified the common law, as summarized by the Supreme Court in *Juman*. Rule 8420(5) attaches significant weight to the public interest value of what the Alberta courts have described as "protecting the integrity of the oath" (see: *Iozzo v. Weir*, 2004 ABQB 259, at para 10; *Harcap Investments Inc. v. Alberta Permit Pro Inc.*, 2007 ABQB 590; and *Dreco Energy Services Ltd. v. Wenzel*, 2007 ABQB 635). Rule 8420(5) attaches correspondingly insigificant weight to the resulting prejudice, which is consistent with the statement in *Juman*, quoted above, and the statement in *Jomha* (at para. 20):

> [A]ny possible "injustice" to the Plaintiff can only be the potential for the Defendant to test inconsistencies or inaccuracies in the Plaintiff's evidence at trial. This is not the type of "injustice" which would justify the court's protection.

The Court in *Jomha* cited the British Columbia Supreme Court's description of the test under their *Rules of* Court, emphasizing that:

> [A]n order for production of a discovery transcript from another action should be almost automatic, provided it is established that there is sufficient connection between the two actions, by the parties, their interests and the broad issues between them, so that it can be said that the actions are related. … [I]n my view it is the possibility of there being inconsistent statements which triggers the special reason for the production of the discovery transcript. The test over the years, to my knowledge, has never been higher than "lets (sic) see what the witness had to say under oath before with regard to these or related matters". (*Jomha* at paras. 9-10, citing *Scuzzy Creek Hydro and Power Inc. v. Terrecon Contractors Ltd.* (1998), 27 C.P.C. (4th) 252, emphasis added in *Jomha*).

The Court in *Jomha* also recognized the possibility that the person's evidence under oath in both proceedings may be congruent, in which case "no harm can be done" (*Jomha* at para. 21, quoting *United Nurses of Alberta v. Alberta Children's Hospital*, 1996 ABCA 209, at para. 7).

¶ 19 It follows that, from IIROC's perspective, the public interest favoring this motion outweighs any resulting prejudice. Mr. Malic wants to use the IIROC Information to seek permission from the Court to do something that, from IIROC's perspective, is so clearly in the public interest that, insofar as IIROC's Rules apply, they give blanket permission to do it.

¶ 20 Delay must be weighed against these same public interest considerations. IIROC Rule 8403(1) says the Rules "shall be interpreted and applied to secure a fair hearing and just determination of a proceeding on its merits and the most expeditious and least expensive conduct of the proceeding." Delay could be a significant

factor if there had already been extraordinary delay, or if the motion actually sought a stay of the IIROC Proceeding or an adjournment of the IIROC Proceeding pending the completion of the QB Proceeding. However, none of that has occurred here and the public interest favoring the motion outweighs any prejudice to IIROC resulting from delay.

¶ 21 I rejected the submissions of HW's counsel suggesting that the IIROC Information was unnecessary for the QB Application for basically the same reasons set out in paragraphs 9 and 10, above. The IIROC hearing panel cannot speculate about what position the Court will take on the QB Application. For the purposes of this motion, the IIROC hearing panel need only consider the purpose of the QB Application in order to weigh, from IIROC's perspective, the public interest versus prejudice in permitting Mr. Malic to use the IIROC Information in making the attempt. IIROC's perspective is evident from Rule 8420(5), and it favors permitting Mr. Malic to make the attempt.

Conclusion

¶ 22 For these reasons, I concluded that the public interest in permitting Mr. Malic to use the IIROC Information outweighs any resulting prejudice to IIROC and HW. I granted the motion and gave Mr. Malic permission to use the IIROC Information for the purpose of the QB Application.

¶ 23 Counsel were to settle upon the precise terms of the order, and may return before the Hearing Panel if they are unable to agree.

Dated at Edmonton, Alberta this 16 day of October, 2020.

Eric Spink