

Re St-James

IN THE MATTER OF:

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

and

Élizabeth St-James

2018 IIROC 40

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

Heard: September 14, 2018, in Montréal

Decision: October 26, 2018

Hearing Panel:

Alain Gélinas, Chair, François Gervais, Panel Member and Yves Julien, Panel Member

Appearances:

Me Fanie Dubuc, Enforcement Counsel

Me Julie-Martine Loranger, for Élizabeth St-James (hereinafter, the Respondent)

DECISION ON MOTION

¶ 1 The Respondent presented a motion concerning the judicial admissions made by Samuel Kloda (hereinafter, Kloda) during a settlement hearing. The Respondent asks that the Hearing Panel rule that Kloda's judicial admissions are not binding upon her, nor enforceable against her. The first operative part requested in the Respondent's motion was withdrawn.

The facts

¶ 2 Here is a summary of the facts contained in the motion.

¶ 3 Kloda signed an agreement with Staff of the Investment Industry Regulatory Organization of Canada on November 10, 2016. By virtue of this agreement, he admitted to violations committed while he was a representative of the firm, Mackie Research Capital (hereinafter, Mackie).

¶ 4 The agreement was accepted by a hearing panel on December 8, 2016. The decision has therefore been made public. (*Re Kloda* 2016 IIROC 50).

¶ 5 The Respondent was employed as a branch manager at Mackie from September 2008 to March 2014.

¶ 6 In a Notice of Hearing dated May 8, 2018, Staff of the Investment Industry Regulatory Organization of Canada filed a statement of allegations, including notably the allegation that the Respondent failed to adequately supervise Kloda's activities.

¶ 7 The Respondent claims that Kloda's judicial admissions cannot be binding upon her, nor enforceable against her.

¶ 8 The motion concerns Count 1.

Analysis

¶ 9 This motion is made pursuant to Rule 8403 and Rule 8413 of the *Rules of Practice and Procedure*.

¶ 10 The aim of the *Rules of Practice and Procedure* is to secure a fair hearing and just determination of a proceeding.

¶ 11 The Hearing Panel has the power to direct the conduct of the proceedings.

¶ 12 Authors Royer and Piché define “admission” in the following terms:

[TRANSLATION]

“1043 – Definition of admission - An admission is the acknowledgment of a fact which may produce legal consequences against the person who makes it. It is judicial or extrajudicial, verbal or written, express or implicit, simple, qualified or complex.

1044 – The judicial admission - The judicial admission is one made during the proceeding in which it is invoked by a party to a dispute or by an authorized mandatary. Any other admission is extra-judicial. Thus, unfavourable admissions contained in a written argument or made at a prehearing conference or in a document filed as evidence are judicial admissions. So is harmful testimony given by a party during direct examination, cross-examination or any other questioning of a witness in a proceeding.

1045 – The extra-judicial admission - The extra-judicial admission is one made outside of a proceeding, or in another proceeding. It includes notably... the admission of guilt in a criminal or disciplinary case... in a criminal or civil proceeding separate from the proceeding in which it is invoked.”¹

[footnotes excluded]

¶ 13 The statements made by Kloda in another proceeding are judicial admissions that may be invoked against their author. These admissions were made in another proceeding.

¶ 14 The Respondent is not the author of these admissions and we are not in the same proceeding.

¶ 15 The admission may produce legal consequences against its author, and not against third parties. These admissions cannot be binding on the Respondent. The Court of Appeal in *Pincourt (Ville) c. Construction Cogerex ltée*² takes a similar position.

[TRANSLATION]

“219 - The admission must arise from the party against whom one wishes to make a case. However, Goyette is a third party in respect of the Complex administrators and he cannot make an admission that is binding upon the latter.”

¶ 16 The Supreme Court of Canada emphasized that settlement agreements signed by co-respondents were not binding on the Commission. Here is the relevant passage of the judgment of the Court delivered by Lebel J in *Cartaway Resources Corp. (Re)*³ :

“ In my view, settlement agreements arrived at by co-respondents and the Executive Director are not binding on the Commission in determining the appropriate penalty for other co-respondents, although such settlements are among the relevant factors in assessing the appropriate penalty ...”

¶ 17 The decision as to whether the Hearing Panel can *a priori* take elements from the Kloda case into account in this proceeding comes down to determining the relevance of the evidence. Evidence may be set up

¹ Jean-Claude ROYER and Catherine PICHÉ, *La Preuve Civile*, 5^{ième} édition, Éditions Yvon Blais, pp. 845 and 846.

² 2013 QCCA 1773.

³ (2004) 1 SCR 672, on page 699.

against the Respondent if it is relevant.

¶ 18 The Court of Appeal in *Lachance et Pronovost c. Beauchemin et als.*⁴ emphasizes that it is preferable to leave it to the trial judge to decide the issue of relevance. The Honourable Justice Ross Goodwin also notes, in *Ruest c. Boily*⁵, that the appreciation of evidence is a matter of judicial discretion, and is difficult to exercise in the early stages of proceedings.

¶ 19 It will be up to the Hearing Panel to determine the relevance of admitting into evidence the elements connected with the Kloda case and evaluating their probative effect, if any.

¶ 20 The Hearing Panel is fully aware that its role in a contested matter is different than in a settlement hearing. *Re Donnelly* and *Re Deutsche Bank Securities Limited* are a reminder that settlement agreements are often the result of “much compromise and give-and-take between the parties in order to reach an acceptable position agreeable to both parties.”⁶

Decision

¶ 21 For these reasons, the Hearing Panel rules as follows:

¶ 22 TAKES NOTE of the withdrawal of the first operative part from the Respondent’s motion, the effect of declaring inadmissible as evidence against her the extra-judicial admissions of Kloda in the settlement agreement.

¶ 23 DECLARES that the judicial admissions made by Kloda are not binding upon the Respondent or the Hearing Panel.

¶ 24 DECLARES that it shall fall to the Hearing Panel to determine the relevance of admitting into evidence the elements connected with the Kloda case and evaluating their probative effect if any.

Signed at Montréal, Québec, this 26th day of October, 2018.

Alain Gélinas

François Gervais

Yves Julien

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⁴ 200-09-002238-895, judgment dated November 1998.

⁵ (1995) J.Q. no 3651.

⁶ *Re Donnelly*, 2016 IIROC 23; *Re Deutsche Bank Securities Limited*, 2013 IIROC 07.