

Re Rail

IN THE MATTER OF:

**The Dealer Member Rules of the Investment Industry Regulatory
Organization of Canada (IIROC)**

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Stéphane Rail

2012 IIROC 17

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

Hearing held on November 7, 2011
Decision rendered on March 27, 2012

Hearing Panel:

Me Robert Monette (Retired Lawyer), Elaine Phenix, John Ballard

Appearances:

Me Jean-Pierre Michaud, Legal Counsel for IIROC

DECISION ON PENALTY

Preamble

¶ 1 On June 7, 2011, the Investment Industry Regulatory Organization of Canada (IIROC or the Organization) filed a Notice of Hearing alleging three counts against Stéphane Rail (the Respondent).

¶ 2 On November 7, 2011, our Hearing Panel held a Disciplinary Hearing respecting these allegations; the Respondent, though duly informed, was absent. IIROC did not present its penalty submissions immediately at the time of this hearing.

¶ 3 In its decision of December 12, 2011¹, the Hearing Panel found the Respondent guilty on all three counts:

FINDS the Respondent guilty of having, on December 8, 2005 and July 13, 2006, during examinations by Staff of IIROC, contravened IDA By-law 29.1. (now IIROC Rule 29.1) by impeding the IDA (IIROC)'s investigation when he lied about the existence and/or the involvement of A concerning the account of B;

FINDS the Respondent guilty of having, between September 1995 and April 2001, violated IDA

¹ Re Rail 2011 IIROC 64

Regulation 1300.1(a) (now IIROC Rule 1300.1(a)) when he failed to use due diligence to learn and remain informed of the essential facts relative to his client B and to every order or account accepted, considering the fact that A, the president and secretary of B and the person identified as the authorized individual on the account, had been deceased since December 1994;

FINDS the Respondent guilty of having, between September 1995 and March 2001, violated IDA Regulation 200.1(i)(3) (now IIROC Rule 200.1(i)(3)) relative to instructions concerning approximately 124 trades executed in the account of B, which were from an unauthorized person;

¶ 4 The hearing on penalties was set for February 24, 2012. On the date of the hearing, IIROC was represented by Me Jean-Pierre Michaud (Counsel for IIROC) who declared himself ready to proceed. The Respondent was absent.

¶ 5 Considering that the Respondent was formally informed that the hearing was to be held, as appears from a registered mail receipt dated February 10, 2011², the Hearing Panel authorized Counsel for IIROC to proceed ex parte³.

Summary

¶ 6 Keep in mind that, during the material period, Respondent held the following positions: from 1994 to 2001, Registered Representative at TD Evergreen; from May 2001 to May 2011, Branch Manager at Canaccord Capital Corporation; since May 2011, Respondent is no longer a registrant with an IIROC-regulated firm.

¶ 7 Let us briefly review the conclusions of our Hearing Panel regarding Respondent's role in the violations committed in the course of managing a private portfolio account (the Account). Contrary to the information provided by the Respondent, there was no Authorized Individual acting on behalf of the Account.

¶ 8 The first and principal count against the Respondent concerns a failure to observe high standards of ethics and conduct in the transaction of his business; in that, at meetings held in 2005 and 2006, the Respondent lied to IIROC investigators in his description of the role of the Authorized Individual on the account.

¶ 9 It was only in 2010 that IIROC discovered that the Respondent had not cooperated at the earlier meetings with the investigators, when it was confirmed that the Authorized Individual had been deceased since 1994.

¶ 10 The IIROC representatives obtained this information in the course of a civil proceeding at which the Respondent was called as a witness; during the proceeding, the Respondent had to alter his testimony to finally acknowledge the facts confirming the death of the Authorized Individual on the account.

¶ 11 The other two counts are: the Respondent's failure to use due diligence to learn and remain informed of the essential facts relative to an account; a series of 124 trades effected by the Respondent but for which instructions could not have come from an Authorized Individual.

¶ 12 Both of these counts are the result of the absence of an Authorized Individual on the account.

Submissions

¶ 13 Counsel referred to the documentary evidence in the case and submitted the relevant case law in this matter.

¶ 14 Council presented the submissions below, dwelling more particularly on the importance of the first count, as described in paragraph 8 above.

¶ 15 At the time of the meetings with the Organization's representatives in 2005 and 2006, the Respondent

² Exhibit R-1

³ Rule 13.5 of the Rules of Practice and Procedure.

Where a Respondent, having been served with a Notice of Hearing, fails to attend a disciplinary hearing, the Hearing Panel may proceed in the absence of the Respondent and may accept as proven the facts and violations alleged by the Organization in the Notice of Hearing.

was employed as a branch officer.

¶ 16 The Organization's investigation was impeded by the Respondent's continued lie, in which he failed to reveal a fact of which he had been aware since 2001, namely the death of the Authorized Individual on the account.

¶ 17 The obstruction was intentional and willful in order to cover up a situation of non-compliance with the standards of conduct, namely the absence of the Authorized Individual on the account.

¶ 18 The misconduct was continued over time, over a period of four years, until 2010, during which time the Respondent never revised his position.

¶ 19 In the end, the Respondent only collaborated after facts were revealed during a court hearing, during which he initially held to an inaccurate version of the facts.

¶ 20 The Respondent has never shown any remorse.

¶ 21 As for the other two counts, which are automatically inferred from the same lie, they are imbued with the seriousness of the overall situation.

¶ 22 Counsel referred to the Disciplinary Sanction Guidelines and suggested the following penalties:

- i. as regards Count 1, a permanent bar from approval and a \$50,000 fine.
- ii. As regards Count 2, a **\$25,000 fine**.
- iii. As regards Count 3, a **\$25,000 fine**.
- iv. With costs reduced to \$10,000.

Examination of the principles and rules to consider according to the Guidelines

¶ 23 Every hearing panel has the discretion to impose penalties where a registered individual has failed to comply with applicable securities regulations or has engaged in business conduct unbecoming.⁴

¶ 24 It goes without saying that this discretion is exercised in context and according to the circumstances of each case.

¶ 25 IIROC has published a detailed but non-exhaustive set of disciplinary sanction guidelines.

¶ 26 These guidelines propose, among other things, principles and rules to provide hearing panels with a framework for assessing the gravity of a specific breach.

¶ 27 The hearing panels' main concerns in applying these principles are, among others, the protection of the integrity of the Organization's process, and the protection of the integrity of the securities market.

¶ 28 Considerations are provided in addition to these general principles, to guide the hearing panels in determining appropriate and reasonable sanctions according to the particulars of each count.

¶ 29 Our Hearing Panel has analyzed these considerations and finds as follows:

Harm to Clients

¶ 30 The clients suffered no actual harm, but the integrity of the profession and the reputation of the securities market have been tainted by the Respondent's lying attitude toward his professional organization, and which he maintained before a court of justice moreover.

Blameworthiness

¶ 31 Respondent's behaviour over several years and his insistence on hiding a non-compliant situation leads us to conclude that his conduct was intentional. It was only when the evidence became flagrant that he admitted the truth.

⁴ Dealer Member Rule 20.33.

¶ 32 The blameworthiness factor is heavily emphasized by our Hearing Panel, inasmuch as the Respondent was an officer of the branch at the material time.

Degree of Participation

¶ 33 The Respondent is the only participant in the misconduct.

Extent to which the Respondent was Enriched by the Misconduct

¶ 34 There is no evidence that the Respondent benefited financially from the misconduct.

Prior Disciplinary Record

¶ 35 In a decision rendered on August 12, 2009⁵, the Respondent had been disciplined previously for misconduct in the management of an account.

Acknowledgement of Misconduct and Remorse

¶ 36 Given the Respondent's absence and the documentary evidence, this factor is nonexistent and cannot be taken into account.

Credit For Cooperation

¶ 37 This factor is nonexistent since the principal count against the Respondent is to the contrary, namely a lack of cooperation.

Voluntary Rehabilitative Efforts

¶ 38 This factor is nonexistent.

Reliance on the Expertise of Others

¶ 39 This factor is not relevant to the matter.

Planning and Organization

¶ 40 For several years, the Respondent concealed from authorities information that was important to the management of an account and, moreover, effected a large number of transactions without the approval of the Authorized Individual on the account.

¶ 41 These events were concealed from the authorities and the Respondent's insistence on pursuing these planned actions is an aggravating factor in this matter.

Multiple Incidents of Misconduct Over an Extended Period of Time

¶ 42 The misconduct in this matter continued for several years.

Vulnerability of Victim

¶ 43 This factor is not relevant in this matter.

Failure to Cooperate with the Investigation

¶ 44 As the Hearing Panel observed previously, this is the principal count against the Respondent.

Significant Economic Loss to the Client and/or Member Firm

¶ 45 This factor is not relevant in this matter.

Discussion and conclusion

¶ 46 The Guidelines state that a permanent ban from approval of an individual is a severe economic penalty that should generally be reserved for egregious cases.

¶ 47 What is more, the Guidelines state that a fine may be imposed even when the person is permanently

⁵ Re Rail 2009 IIROC 36

barred in egregious cases involving significant harm to the integrity of the profession.

¶ 48 The Hearing Panel is of the opinion that it is in the presence of such a case.

¶ 49 At meetings with the Organization's representatives, the Respondent engaged in blameworthy conduct when he described, to his oversight body, a misleading situation that had gone on for several years.

¶ 50 He failed to cooperate fully with the Organization's investigators and, in so doing, prevented IIROC from completely fulfilling its role as an industry regulator.

¶ 51 The case law submitted by Counsel for IIROC establishes clearly that a failure to cooperate with representatives of the Organization must be considered serious misconduct.⁶

¶ 52 What's more, the Respondent has tainted the reputation of his entire industry by maintaining a lying attitude during a civil proceeding pertaining to the performance of his professional duties.

¶ 53 He adopted this blameworthy attitude while he was in a position of authority and was expected to demonstrate exemplary conduct to his subordinates.

¶ 54 The Respondent has shown no remorse or regret for his misconduct and there are no mitigating factors in his favour.

¶ 55 The Hearing Panel must conclude that the Respondent behaved disrespectfully towards his profession and his oversight body; by the same token, this flagrant lack of integrity is a formal impediment to any reinstatement within the securities industry.

¶ 56 Consequently, the Hearing Panel finds that the recommendations of the Organization are well founded and must be upheld.

¶ 57 **For all of these reasons**, the Hearing Panel imposes the following penalties on the Respondent:

- **regarding Count 1**, a permanent bar from approval with IIROC, as well as a \$50,000 fine.
- **regarding Count 2**, a \$25,000 fine.
- **regarding Count 3**, a \$25,000 fine.
- **with costs** reduced to \$10,000.

Signed at Montréal, this March 27, 2012

Me Robert Monette (retired lawyer)

Élaine Phénix

John Ballard

⁶ See, among others: *Re Lohrisch* 2010 IIROC 31, *Re Dass* 2009 IIROC 22