

Re Desmarais

IN THE MATTER OF:

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

and

Christian Desmarais

2020 IIROC 13

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

Hearing (held by teleconference): April 28, 2020, in Montréal, Québec

Decision: April 28, 2020

Reasons for Decision: May 19, 2020

Hearing Panel

Robert Monette (Chair), Danielle Le May and Jean Morin

Appearances

Francis Larin, Enforcement Counsel for IIROC

Marie-Geneviève Masson, for Respondent

Christian Desmarais (present)

DECISION ON ACCEPTANCE OF SETTLEMENT AGREEMENT

¶ 1 The parties entered into a settlement agreement on January 20, 2020.¹ The Hearing Panel heard submissions by counsel for both parties who jointly requested the acceptance of their Settlement Agreement.²

¶ 2 After considering the arguments of both counsel and after deliberation, the Hearing Panel accepted the Settlement Agreement, while reserving the right to publish its reasons at a later date.

¶ 3 This decision explains the reasons for acceptance of the Settlement Agreement.

Contraventions and relevant facts

¶ 4 Between January 28, 2016, and February 2, 2016, the Respondent contravened IIROC Dealer Member Rule 29 on two counts.

¹ The Settlement Agreement is appended to this decision and forms an integral part hereof.

² Section 8215 of Enforcement Proceedings and Section 8428 of Rules of Practice and Procedure of IIROC's Consolidated Enforcement, Examination and Approval Rules (Consolidated Rules).

¶ 5 The Respondent's first contravention concerns his recommendation to purchase a security, which he made to three of his clients, whereas he had information regarding this security that had not been disclosed to the public and whereas he should have known that this information could affect the decision of a reasonable investor.

¶ 6 The Respondent's second contravention is his failure in his duty to protect the markets, by not taking the necessary corrective measures after executing a buy transaction in a security for his own account as well as that of a client, whereas he had information about the security that had not been disclosed to the public and which he should have known could affect the decision of a reasonable investor.

¶ 7 The agreed-upon facts occurred over a period of time that centered around the public announcement made on February 3, 2016, confirming the offer to purchase the corporation Rona Inc. (Rona) by the American corporation Lowe's Inc. (Lowe's).

¶ 8 In the days preceding the transaction, the Respondent obtained privileged information about Rona from one of his clients. The Respondent and four other of his clients were to benefit personally from this information.

¶ 9 Thus, in benefiting from said privileged information, each of the participants obtained, in a single week, nearly a 100% rate of return on their trades in the Rona security.

¶ 10 Following an internal investigation conducted by his employer, the Respondent was dismissed on February 24, 2016.

Sanctions

¶ 11 The parties suggest the following penalties and costs:

- a. A fine of \$25,000 for count 1;
- b. A fine of \$15,000 for count 2;
- c. Disgorgement of the net benefit, after tax, derived by the Respondent as a result of the trading activities in question, namely an amount of \$30,000;
- d. Prohibition of registration with IIROC in any capacity for a period of five (5) years, effective February 24, 2016;
- e. Strict supervision for twelve (12) months, in the event of reregistration;
- f. Costs to IIROC, in the amount of \$2,500.

¶ 12 The Respondent agrees to pay the above-mentioned amounts within thirty (30) days of the settlement's acceptance, or within any other timeframe agreed between the parties.

Role of the Hearing Panel and questions raised

¶ 13 The Hearing Panel reminds that its role, in the context of a settlement hearing, is to either accept or reject the settlement agreement. The Hearing Panel does not have the authority to amend at its sole discretion the settlement agreement.

¶ 14 It is important to recognize that, in a settlement process, the parties try, pursuant to their talks, to arrive at a joint recommendation where each can agree that the proposed sanction or sanctions are mutually acceptable. The motivations may differ depending on individual interests, but the goal is the same.

¶ 15 It would be counterproductive to the settlement process for an agreement that was signed and submitted to the hearing panel to be subjected to the fitness test; clearly, this would paralyze discussions between the parties and restrict the number of settlements. It must be kept in mind that any agreement is

beneficial to the parties in that it puts an end to the dispute quickly and economically; this is equally true for the disciplinary process.

¶ 16 According to the case law, in a settlement hearing, the hearing panel must only weigh the reasonableness of the proposed penalties. The hearing panel may not intervene simply because it finds the penalties too lenient, or too severe; that is not its mission.³ The hearing panel may only reject the settlement agreement if it is unreasonable and contrary to the public interest; the threshold for this test is high and its occurrence will most certainly be exceptional.

Discussion

¶ 17 The Hearing Panel has two tests to determine the reasonable nature of a settlement agreement: make sure that the proposed penalty falls within a reasonable range of sanctions already imposed in similar cases; and verify that the key factors in the Guidelines are taken into consideration.

¶ 18 Counsel for IIROC suggested a series of decisions that establish the reasonable range of appropriateness.⁴

¶ 19 In *Re Mackie*⁵ and *Re Mendelman*⁶, some of the offences identified pertain to the disclosure of privileged information. As for the penalties, they consist of fines in the order of \$100,000, as well as suspensions for one (1) year and three (3) years respectively. In the matter before us, the fines are less, but the period of prohibition is five (5) years.

¶ 20 The cases of *Re Azeff and Bobrow*⁷, *Re Béland*⁸ and *Métivier c. ACCOVAM*⁹ are characterized by the nature and high number of offences linked to disclosure of privileged information, serious misconduct by the offenders, as well as serious harm to the investing public and the integrity of the marketplace. Multiple and very heavy fines (in the order of \$250,000), lengthy suspensions (10 years) and a permanent ban characterize the penalties imposed in these matters.

¶ 21 It must be emphasized that this matter certainly does not have the breadth of the cases cited above since the offences occurred over a very short period of time, with no major economic impact. While the amount of the fines is at the low end of the range of appropriateness, the five-year prohibition of registration is at the upper end of this same range, and seems very severe.

¶ 22 On this score, the members of the Hearing Panel spoke with IIROC's legal counsel about the imposed sanctions in general, and the five-year prohibition of registration in particular.

¶ 23 Despite its questioning, the Hearing Panel cannot qualify the five-year prohibition sanction as unreasonable, considering moreover that the offence linked to the disclosure of privileged information is one of the most serious infringements of market integrity.

¶ 24 Considering the particularities of this matter, the Hearing Panel is satisfied that the proposed sanctions fall within a reasonable range of appropriateness.

³ *Re Jacob* 2017 IIROC 17, March 6, 2017; *Poulin c. R.* 2010 QCCA 1854, October 13, 2010

⁴ *Re Milewski* 1999 I.D.A.C.D No 17, July 28, 1999

⁵ *Re Mackie Research Capital Corporation & MCarthy* 2019 IIROC 28, October 3, 2019

⁶ *Re Mendelman* 2016 IIROC 14, March 29, 2016

⁷ *Re Azeff & Bobrow* 2015 ONSEC 29, August 24, 2015

⁸ *Re Béland* 2010 IIROC 53, November 18, 2010

⁹ *Métivier c. ACCOVAM* 2005 QCBDRVM 6, February 17, 2005

¶ 25 As for the Sanction Guidelines, the parties have accurately identified the relevant factors. Among others, the clients suffered no financial harm, the Respondent has no disciplinary history in a career of nearly 20 years, and he presents no risk of reoffending.

¶ 26 The Hearing Panel therefore concludes that the parties fulfilled their mandate. The sanctions imposed on the Respondent will act as a deterrent that ensures market integrity.

Conclusion

¶ 27 For these reasons and as was ruled at the hearing, the Hearing Panel accepts the agreement submitted by the parties.

Dated at Montréal, on the 9th day of May, 2020.

Robert Monette

Danielle Le May

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 IIROC Staff (Staff) and Christian Desmarais (the Respondent).

PART II - JOINT SETTLEMENT RECOMMENDATION

2. Staff and the Respondent 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 Respondent agrees with the facts set out in Part III of this Settlement Agreement.

Registration History

4. The Respondent was a registered representative with IIROC from February 10, 1998, until February 24, 2016.
5. During this period, the Respondent was, among others, employed with Desjardins Securities Inc. (DS), until his dismissal on February 24, 2016.
6. Since February 24, 2016, the Respondent is no longer employed with any IIROC Dealer Member.

Relevant Facts

The client LC and the Respondent

7. On January 28, 2016, the client LC contacted the Respondent by telephone to have the latter purchase

shares in Rona Inc. (Rona) for his account, for a value of \$30,000.

8. At around 13:10 that same day, the Respondent therefore proceeded to purchase 2,500 shares in Rona on behalf of his client LC, at an average cost of \$11.81 per share.
9. At around 13:20, the Respondent proceeded to purchase 5,000 Rona shares for his own account, at an average cost of \$11.81 per share.
10. At around 14:15, the Respondent had a discussion with his client LC, during which the latter allegedly informed him of the reasons why he had decided to purchase Rona shares at that time.
11. In addition to the explanations of the client LC's checks and analyses of Rona, one of the reasons invoked by the latter is that he had learned that a due diligence audit of Rona had allegedly been conducted recently.
12. Until that moment, the Respondent had never, since 2015, purchased Rona shares for his own account, nor recommended the purchase of this security to his clients.

The client DB

13. On January 29, 2016, at a prescheduled meeting with his client DB, the Respondent recommended to the latter that he purchase shares in Rona.
14. During this meeting, the Respondent and DB communicated with LC, as the latter was better able to answer some of DB's questions on this investment opportunity.
15. During this discussion, LC mentioned that there were apparently a few rumours circulating about the issuer Rona.
16. DB ultimately accepted the Respondent's recommendation, who proceeded that same day to purchase 4,000 shares at an average cost of \$11.99 per share.

The clients MB and GO

17. Still on January 29, 2016, the Respondent met with his client GO in his office.
18. GO is MB's spouse and has an Authorization to Trade in her account.
19. At this prescheduled meeting, the Respondent recommended the purchase of Rona shares to GO.
20. The Respondent proceeded that same day to purchase 1,700 shares in GO's TFSA account, at an average cost of \$12.29 per share.
21. The Respondent also purchased 1,700 shares in MB's TFSA account, at an average cost of \$12.30 per share, in accordance with the instruction given in this regard by GO, pursuant to his Authorization to Trade in his spouse's account.
22. For both GO and MB, the cost of purchasing these Rona shares represented, at the time, the maximum contribution permitted in their respective TFSA accounts.

The client DG

23. On February 2, 2016, the Respondent met with his client DG at the latter's home.
24. During this prescheduled meeting, the Respondent recommended the purchase of Rona shares to DG.
25. The Respondent proceeded that same day to purchase 2,000 shares, at an average cost of \$11.67 per share.

The February 3, 2016, announcement

26. On the morning of February 3, 2016, Lowe's Inc.'s offer to purchase Rona was publicly announced.
27. The Rona share price, which had closed at \$11.77 the day before, stood at \$23.44 when the markets opened on February 3, 2016.
28. That same day, after checking with DS Compliance, the Respondent proceeded to sell the Rona shares purchased previously by himself and his clients LC, DB, GO, MB and DG.
29. The gross gains generated as a result of these trades are described in the table below:

| Purchase Date | Client | Number of Shares | Average Price (\$) | Cost (\$) | Date of Sale | Sale Price (\$) | Gain (\$) | % (simple rate of return) |
|---------------|---------------------|------------------|--------------------|-------------------|--------------|-------------------|-------------------|---------------------------|
| 28-janv-16 | LC | 2500 | 11,81 | 29 522,00 | 03-févr-16 | 58 450,00 | 28 928,00 | 97,99% |
| 28-janv-16 | Christian Desmarais | 5000 | 11,81 | 59 072,00 | 03-févr-16 | 116 900,00 | 57 828,00 | 97,89% |
| 29-janv-16 | DB | 4000 | 11,99 | 47 951,00 | 03-févr-16 | 93 520,00 | 45 569,00 | 95,03% |
| 29-janv-16 | MB | 1700 | 12,30 | 20 909,00 | 03-févr-16 | 39 746,00 | 18 837,00 | 90,09% |
| 29-janv-16 | GO | 1700 | 12,29 | 20 894,00 | 03-févr-16 | 39 746,00 | 18 852,00 | 90,23% |
| 02-févr-16 | DG | 2000 | 11,67 | 23 334,00 | 03-févr-16 | 46 760,00 | 23 426,00 | 100,39% |
| | | 16 900 | | 201 682,00 | | 395 122,00 | 193 440,00 | |

30. Following an internal investigation conducted by DS, the Respondent was dismissed on February 24, 2016.
31. The Respondent's net gain from these trades is \$30,000, after tax.

PART IV – CONTRAVENTIONS

32. By engaging in the conduct described above, the Respondent contravened IIROC Dealer Member Rule 29, as follows:

Count 1

Between January 29 and February 2, 2016, the Respondent recommended the purchase of a security to three of his clients, whereas he had information regarding this security that had not been disclosed to the public and whereas he should have known that this information could affect the decision of a reasonable investor, contrary to IIROC Dealer Member Rule 29.1.

Count 2

On or around January 28, 2016, the Respondent failed in his duty to protect the financial markets by not taking the appropriate measures in the circumstances, when, after executing a buy transaction in a security for his own account, as well as for the account of a client, he learned information about the security that had not been disclosed to the public and which he should have known could affect the decision of a reasonable investor, contrary to IIROC Dealer Member Rule 29.1.

PART V - TERMS OF SETTLEMENT

33. The Respondent accepts the following penalties and costs:
 - a) A fine of \$25,000 for count 1;
 - b) A fine of \$15,000 for count 2;
 - c) Disgorgement of the net benefit, after tax, derived by the Respondent as a result of the trading

activities in question, namely an amount of \$30,000;

- d) Prohibition of registration with IIROC in any capacity for a period of five (5) years, effective February 24, 2016;
- e) Strict supervision for twelve months, in the event of re-registration;
- f) Costs to IIROC in the amount of \$2,500.

34. If the Hearing Panel accepts this Settlement Agreement, the Respondent agrees to pay the amounts referred to above, namely a total sum of \$72,500, within thirty (30) days of such acceptance, unless otherwise agreed between Staff and the Respondent.

PART VI – STAFF COMMITMENT

35. If the Hearing Panel accepts the Settlement Agreement, Staff will not initiate any further action against the Respondent 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 paragraph below.
36. If the Hearing Panel accepts this Settlement Agreement and the Respondent fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Rule 8200 against the Respondent. 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

37. The Settlement Agreement is subject to acceptance by the Hearing Panel.
38. 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.
39. Staff and the Respondent agree that this Settlement Agreement will form 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 Respondent does not appear at the settlement hearing, Staff may disclose additional relevant facts, if requested by the Hearing Panel.
40. If the Hearing Panel accepts the Settlement Agreement, the Respondent agrees to waive all rights, under IIROC rules and any applicable legislation, to any further hearing, appeal and review.
41. If the Hearing Panel rejects the Settlement Agreement, Staff and the Respondent may enter into another settlement agreement; or Staff may proceed to a disciplinary hearing based on the same or related allegations.
42. The terms of this Settlement Agreement are confidential unless and until this Settlement Agreement has been accepted by the Hearing Panel.
43. The Settlement Agreement will become available to the public upon its acceptance by the Hearing Panel and IIROC will post the full text 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.
44. If this Settlement Agreement is accepted, the Respondent agrees that neither he nor anyone on his behalf will make a public statement inconsistent with this Settlement Agreement.
45. The Settlement Agreement shall become effective and binding upon the Respondent and Staff as of the date of its acceptance by the Hearing Panel.

PART VIII – EXECUTION OF THE SETTLEMENT AGREEMENT

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

DATED this 20th day of January, 2020.

Witness

(s) Christian Desmarais

Christian Desmarais

Respondent

DATED this 22nd day of January, 2020.

(s) Linda Vachet

Witness

(s) Francis Larin

Francis Larin

Senior Enforcement Counsel, on behalf of
Enforcement Staff of IIROC

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