

Re Rail

IN THE MATTER OF:

**THE DEALER MEMBER RULES OF THE
INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA**

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

STÉPHANE RAIL

2008 IIROC 4

Investment Industry Regulatory Organization of Canada
(formerly the Investment Dealers Association of Canada)
Hearing Panel (Québec District)

Heard: January 15, 16 and 18, and March 4, 5 and 6, 2008

Decision: June 25, 2008

(103 paras.)

Hearing Panel:

Me Claire Richer

Mr. Jean Élie

Ms. Danielle Le May

Appearances:

Me Sébastien Caron, for Stéphane Rail

Me Diane Bouchard, for the Investment Industry Regulatory Organization of Canada

MAJORITY DECISION

Unofficial English Translation

I. PREAMBLE

Introduction

1. Following the transfer, in 2005, of two cases originally opened by the Bourse de Montréal, pursuant to complaints filed by two clients: Gestion H.C. Ltée and H.C. ("HC") in the first case, and P. inc. ("P. inc."), in the second case, relative to the conduct of the Respondent, Stéphane Rail ("Rail") in certain financial transactions while a Registered Representative of TD Securities Inc. ("TD"), the Investment Industry Regulatory Organization of Canada ("IIROC") launched its own investigation.

Particulars

2. At the close of its investigation, the IIROC, in a notice of hearing published on October 4, 2007, charged Rail with having committed the following violations:

Count 1

During the year 2000, while employed as a registered representative at TD Securities Inc. (hereinafter "TD"), the Respondent engaged in conduct unbecoming and detrimental to the public interest, when he engaged in outside business activities without the consent and without the knowledge of his firm, as follows:

1. by introducing one of his clients, HC, to another of his clients, PV, with the aim of facilitating the obtaining of a loan for PV, knowing that his firm had already determined that this loan was too risky and that such behaviour was not consistent with his responsibilities as a registered representative;
2. by introducing the owners of P. Inc., PP, DP and RG, to his current client, PV, in order to propose a financial solution, in the amount of \$3,000,000, to benefit PV, without the consent and without the knowledge of the firm and knowing that such behaviour was not consistent with his responsibilities as a registered representative, contrary to IDA By-law 29.1;

Count 2

In the year 2000, the Respondent, while employed with TD as a registered representative, made inappropriate use of personal and confidential information regarding two clients, HC and PV, by introducing them to one another in order to facilitate a financing project to benefit PV, thereby engaging in conduct unbecoming and detrimental to the public interest, contrary to IDA By-law 29.1;

Count 3

On or about September 18, 2000, while employed with TD as a registered representative, the Respondent failed to use due diligence to make sure that the cheque made by P. Inc., dated September 14, 2000, in the amount of \$333,000 and payable to COC, was properly invested in the account belonging to COC, thereby engaging in conduct unbecoming and detrimental to the public interest, contrary to IDA By-law 29.1;

Count 4

In June and July 2000, the Respondent, while employed with TD as a registered representative, failed to use due diligence and engaged in conduct unbecoming and detrimental to the public interest, by creating an investors group, to which he belonged, for the purpose of investing over \$150,000, when he knew or should have known, as a registered representative, that this stratagem constituted a means of illegally taking advantage of the provisions concerning the prospectus exemption stipulated in section 51 of the Québec Securities Act, contrary to IDA By-law 29.1;

Count 5

On or about June 22, 2000, while employed with TD as a registered representative, the Respondent engaged in conduct unbecoming and contrary to the public interest, by depositing in a personal capacity an amount of \$48,112 in the account of his client RS, for the purpose of making a private investment, contrary to IDA By-law 29.1;

Count 6

On or about July 18, 2000, the Respondent, while employed with TD as a registered

representative, engaged in conduct unbecoming and contrary to the public interest, by depositing in a personal capacity an amount of \$35,000 in the account of his client RS, contrary to IDA By-law 29.1;

Count 7

On or about October 30, 2000 and on or about March 1, 2001, the Respondent, while employed as a registered representative with TD, engaged in conduct unbecoming and contrary to the public interest, when he used TD letterhead without the latter's consent and without its knowledge, allowing P. Inc., and its shareholders, to believe that they were doing business with the firm, whereas it [P. Inc.] was never a client of the firm, contrary to IDA By-law 29.1.

Correction

3. A misprint, which was pointed out at the start of the hearing, slipped into the Notice of Hearing, namely the client identified by the initials PV should have been identified by the initials LV. This decision will use the correct initials, namely LV.

Guilty Plea

4. The hearing was held over a six-day period, namely on January 15, 16 and 18, 2008 and March 4, 5 and 6, 2008. Upon resumption of the hearing on March 4, 2008, Rail, through his counsel, entered a guilty plea on counts 4, 5 and 6 of the Notice of Hearing, acceptance of which plea is hereby confirmed.

Dissent of Danielle Le May

5. During the deliberation that followed the hearing, it appeared that Ms. Danielle Le May did not agree with the undersigned on the meaning of the decision to be rendered on counts 1 a) and 2. Consequently, this decision is a decision of the majority of the members, namely the undersigned. Ms. Le May's dissent is reproduced at the end of this decision.

Motion to amend Count 1 b)

6. During the pleading on Count 1 b), IIROC's counsel submitted a motion to amend this Count because of an inadvertent error; in fact, the amount of \$3 million indicated in the said Count should have read \$1 million.
7. Rail's counsel objected to the motion by IIROC's counsel, invoking the fact that all the evidence relating to this Count was based on a \$1 million financial transaction, whereas the Count mentions \$3 million. Rail's counsel concluded, strictly based on this point, that IIROC's counsel had not succeeded in proving this Count.
8. Yet IIROC's evidence, the testimony of the parties, the witnesses called by each party, as well as Rail's defence, all refer to a \$1 million financial transaction.
9. IIROC's counsel produced a decision of the Disciplinary Committee of the Chambre de la sécurité financière du Québec in the matter of Me Micheline Rioux v. Poulin¹, in which this question of amendment of a complaint is raised. Several decisions are cited in this decision, which recites the principles established therein:

a) before amending a complaint, a disciplinary committee [TRANSLATION] "has the obligation to ensure that the amendment does not substantially alter the content of the complaint".²

b) [TRANSLATION] "The amendment of a complaint which does not result in an entirely new complaint with no bearing on the original complaint is accepted if the substance of the complaint is not changed, if the representative's rights are not jeopardized, and if there is no prejudice to

¹ *Chambre de la Sécurité financière, Comité de discipline, April 11, 2007, Dossier no CD00-0600*

² *Psychologues v. Bérubé, 2001 QCTP 86, paras. 34 and 38*

the right to a full and complete defence and the right to know the reason for the charge.”³

c) “The applicable standard for amendment is the same under the *Summary Convictions Act*. When a charge is reparable, you repair. To the extent that the evidence conforms with the right charge and the appellants have not been misled or irreparably prejudiced by the variance between the evidence and the information, the defect can and should be remedied.”⁴

10. In the case at hand, we are of the opinion that the substance of the question pertaining to Count 1 b) remains the same, regardless of the amount of money at stake. Indeed, the amendment requested does not substantially alter the content of Count 1 b) and Rail’s rights are not jeopardized due to the amendment.

11. Consequently, we accept the motion for amendment filed by IIROC’s counsel and correct Count 1 b) to read as follows:

“By introducing the owners of P. Inc., PP, DP and RG, to his current client, LV, in order to propose a financial solution to benefit LV, for an amount of \$1,000,000, without the consent and without the knowledge of the firm and knowing that such behaviour was not consistent with his responsibilities as a registered representative,”

II. COUNT 1 a)

12. To decide on Rail’s guilt on Count 1 a), it is necessary to determine whether Rail’s participation in the financial transaction between HC and LV constitutes an outside business activity within the meaning of the IIROC rules and whether this activity was carried on without the consent and without the knowledge of TD.

The evidence

13. The evidence showed that:

- a. LV, a client of Rail, contacted him at the beginning of 2000, in order to discuss the obtaining of a \$3,000,000 loan from TD secured by the securities he held in his account with TD;
- b. TD refused to acquiesce to this request because of the excessive concentration of LV’s securities;
- c. Subsequently, on his own initiative and without discussing this with TD, Rail contacted HC, another of his clients. HC wanted to increase his investment income and that of his holding company. Rail informed him of the possibility of making a short-term loan to another of his clients (LV); this \$3,000,000 loan would be secured and would bear a high interest rate;
- d. Rail participated actively in the preparation of the transaction, in particular by drafting or participating in the drafting of the related documents, particularly for the loan secured by LV’s securities and the orders to transfer funds from HC’s account to LV’s account;

14. The testimony heard and the exhibits filed at the hearing are to the effect that TD was not notified in advance by Rail that he proposed to participate in this transaction outside of TD’s operations, by putting two of his clients in contact, for the purposes, on the one hand, of facilitating the obtaining of a loan for LV and, on the other hand, of recommending a short-term investment project to HC.

15. Although Rail and his assistant testified that certain documents evidencing this transaction were transmitted to TD’s Credit Department, there is no evidence confirming the details of these documents or that TD received them.

16. By way of proof, when TD learned of the details of the transaction one year later, it asked Rail to resign on the spot for contravening its internal rules of conduct.

³ *Médecins v Laporte*, (1997) D.D.O.P 271, at pp. 288-9

⁴ *R. v Côté*, (1996) 3 S.C.R. 139, para. 92 (*Justice Lamer*)

Analysis

17. According to the evidence, Rail introduced one of his clients, HC, to another of his clients, LV, in order to facilitate the obtaining of a loan for the benefit of LV and drafted the documents to give shape to the transaction, knowing that TD had already refused LV this same loan, on the grounds that it was too risky.
18. We are of the opinion that this activity was carried on without the knowledge and without the consent of TD, because TD never consented in writing, the loan did not involve TD in any way, TD did not receive any fees or commission, and TD was only informed of the transaction after it was concluded.
19. This activity by Rail, which we consider to be outside the normal activities of a registered representative within the meaning of the IIROC rules, exposed his client, HC, to risks and losses which led to a public liability suit against TD and Rail. Moreover, we are of the opinion that Rail's behaviour constituted conduct unbecoming and detrimental to the public interest.
20. Consequently, Count 1 a) is well founded and Rail is found guilty in this regard.

III. COUNT 1b)

21. To decide on Rail's guilt on Count 1 b), it is necessary, as in the case of Count 1 a), to determine whether the fact that Rail introduced the three shareholders of P. inc. to LV constitutes an outside business activity within the meaning of the IIROC rules and whether this activity was carried on without the knowledge and without the consent of TD.

The evidence

22. The evidence showed that:
 - a) at the beginning of 2000, two other clients of Rail, namely PP and DP, asked Rail to advise them on reducing their tax burden;
 - b) Rail, who is not an expert in the matter, advised these two clients to consult a professional. Rail thus organized a meeting with Me SR, a tax lawyer, in March 2000. Rail attended the meeting but did not participate in the discussions;
 - c) the same day, after the meeting with the tax lawyer, DP accompanied Rail to LV's offices;
 - d) in June 2000, Rail was informed by PP and DP that they would invest in LV's companies, through a company (P. inc.) incorporated by them and RG; PP, DP and RG are the only three shareholders of P. inc. Moreover, P. inc. would not become a client of Rail;
 - e) P. inc., through one of its shareholders, asked Rail to have the funds invested in LV's companies transit through TD;
23. The evidence does not show whether Rail informed TD of these facts.

Analysis

24. According to the evidence, Rail's conduct relative to Count 1 b) differs from that of 1 a) in that Rail did not act as an intermediary at this stage but, rather, put his clients in contact with a professional (tax specialist), following their request to obtain an opinion.
25. We are of the opinion that a registered representative can put clients in contact with a competent professional, in this instance a tax specialist, for the purposes of advising them when he does not have the required competence.
26. Regarding Rail's visit to LV with DP, we are of the opinion, based on the evidence submitted, that this was for the purpose of introducing the two clients to each other, without discussion of a transaction. We are of the opinion that this meeting does not inherently constitute an outside business activity within the meaning of the IIROC rules.

27. Consequently, Count 1 b) is not upheld and Rail is found not guilty in this regard.

IV. COUNT 2

28. To decide on Rail's guilt on Count 2, it is necessary to determine whether Rail made inappropriate use of personal and confidential information regarding two clients, HC and LV.

The evidence

29. The evidence revealed that:

- a. Rail held personal and privileged information regarding his client HC, including, *inter alia*, the high value of his portfolio and the fact that he was seeking high-yield investments and had a tolerance for risk;
- b. Rail also held personal and privileged information regarding LV. This information included the fact that he was seeking a large loan and that TD had refused him this loan on the basis of an excessive concentration of his securities;
- c. Rail acted as an intermediary between HC and LV in the matter of the loan transaction described in Count 1 a) and mentioned to LV that he had another client who might be able to grant him the loan refused by TD.

Analysis

30. Notwithstanding Rail's testimony to the effect that he received verbal permission from HC and LV to reveal their respective identities, we consider that Rail was imprudent not to have requested their written permission before disclosing confidential information concerning each of them.

31. Moreover, Rail breached his obligation to observe the high standards of ethics and conduct required by the IIROC rules when he formulated his recommendations to HC, on the basis of this confidential information.

32. Indeed, as a registered representative, Rail had to know and observe all of the IIROC Rules, including those contained in the Conduct and Practices Handbook, in which the following can be read on page 29⁵:

“Standard E- Confidentiality

Use of Confidential Information: Information regarding clients' personal and financial circumstances and trading activity must be kept confidential (...). Not only must registrants refrain from trading in their own accounts based on knowledge of clients' pending orders, but they must also refrain from using it as a basis for recommendations to other clients or passing this information along to any other parties.”

(our emphasis).

33. Moreover, we are of the opinion that Rail's conduct encouraged HC to grant LV the loan.

34. Rail's counsel argues that there is no misconduct because Rail received the authorization of each of his two clients before transmitting the confidential information.

35. For the reasons mentioned in paragraph 30 and following, we do not accept this argument.

36. Consequently, Count 2 is well founded and Rail is found guilty in this regard.

V. Count 3

37. To rule on Rail's guilt on Count 3, it is necessary to determine whether Rail failed to exercise due diligence to ensure that P. inc.'s cheque in the amount of \$333,000, payable to COC, was deposited in COC's account.

⁵ Manual – CSI – The Conduct and Practices Handbook Course, page 29 (as distributed at the hearing)

The evidence

38. The evidence revealed that:
- a. following discussions, P. inc. and LV entered into an agreement, providing for an investment of \$1,000,000 by P. inc. in companies controlled by LV;
 - b. this investment was to be disbursed in three equal instalments to COC's account with TD, as mentioned in paragraph 22 e) hereof;
 - c. a cheque by P. inc. dated September 14, 2000, representing the second instalment of \$333,000 and payable to the order of COC, was sent to Rail;
 - d. this cheque was never deposited in COC's account;
 - e. LV notified Rail by telephone that the cheque payable to COC should instead be deposited in HC's account. Rail then instructed his assistants to deposit the cheque in HC's account;
 - f. Rail's assistant recorded HC's account number on the cheque so that it would be deposited in HC's account. This assistant never spoke to LV in this regard;
 - g. TD's policy stipulated that cheques issued by third parties had to be deposited in the beneficiary's account and did not provide for the depositing of such a cheque in another account, despite written authorization;
 - h. P. inc. was never a client of Rail or TD;
 - i. no letter of authorization was produced and neither Rail nor his assistant received or saw such a letter.
39. Rail testified that the standard at TD was to allow a cheque to be deposited in an account other than that of the beneficiary, on condition of obtaining a letter of authorization from the beneficiary.

Analysis

40. P. inc. is a third party according to TD's policy.
41. We are of the opinion that a registered representative has an obligation to make sure at all times that his firm's policies are followed rigorously regarding the files for which he is responsible. Moreover, he cannot escape this obligation by assuming, among other things, that other members of his team or his firm have followed the policies.
42. In the present case, Rail omitted to ensure that P. inc.'s cheque was actually deposited in COC's account and, in so doing, he failed to use due diligence under the IIROC's Rules of Conduct, to which he is subject.
43. Moreover, he did not even ensure the existence of the letter of authorization that he alleges allowed an exception to TD's policy.
44. Consequently, Count 3 is well founded and Rail is found guilty in this regard.

VI. COUNT 7

45. To decide on Rail's guilt on Count 7, it is necessary to determine whether he used TD letterhead without the knowledge and without the consent of TD and whether this use created confusion, by allowing P. Inc. and its shareholders to believe that they were doing business with TD.

The evidence

46. The evidence showed that Rail transmitted documents by fax to P. inc. on October 30, 2000 and March 1, 2001 in response to a specific request by one of P. inc.'s shareholders.

47. The evidence did not reveal that:
- a. the use of TD fax cover pages by a registered representative without the knowledge and without the consent of TD was prohibited;
 - b. that P. inc. and its shareholders believed, because of this use, that they were dealing with TD.

Analysis

48. We are of the opinion that the use of a firm's letterhead, including the fax cover pages, should be governed uniformly and specifically in the industry.
49. Although Rail should have acted more prudently in faxing the documents to P. inc., by providing more information on the cover page, it is difficult to consider that the recipient could have believed it was dealing with TD under the circumstances.
50. Consequently, the Count is not upheld and Rail is found not guilty in this regard.

MAJORITY DECISION

51. CONSEQUENTLY, the undersigned:
- take note of the guilty plea of the Respondent Rail to Counts 4, 5 and 6 of the Notice of Hearing;
 - find the Respondent Rail guilty on Counts 1 a), 2 and 3;
 - find the Respondent Rail not guilty on Counts 1 b) and 7.
52. The parties shall be summoned to a penalty hearing, on a date to be determined by the National Hearing Coordinator, in order to hear their representations regarding penalties.

Me Claire Richer, Chair of the Hearing Panel
Mr. Jean Élie, Member of the Hearing Panel

REASONS OF MS. DANIELLE LE MAY, DISSENTING

Preamble

53. Further to my discussions with my colleagues during the deliberation process, I participated in writing the majority decision regarding the Motion to amend Count 1 b) and Counts 1 b) and 7. On Count 3, I agree with my colleagues regarding Rail's guilt, but I will add certain comments. Moreover, regarding Counts 1 a) and 2, I outline the reasons for my dissent below.

Count 1 a)

54. With all due respect for the contrary opinion, I am of the opinion that Rail did not engage in an outside business activity without the knowledge and without the consent of his firm when he introduced HC to LV.
55. Member Regulation Notice MR-0434, dated November 17, 2006, which was mentioned in the pleadings, indicates that "a "business activity" (or "employment") is one for which direct or indirect payment/compensation received for services or employment (i.e. "remuneration") is effected or expected".
56. Moreover, the definition of "activity" in the *Robert* dictionary refers to an overall idea of a person's actions and work, his occupation and the situation of a person who is doing his job; this word conveys an idea of continuity over time.

57. The transaction in which Rail participated was not an “activity”. It does not meet the definition of activity.
58. The IIROC rules, when they refer to “outside business activity”, do not cover a transaction of the type described in the circumstances of Count 1 a).
59. Indeed, an “outside business activity” of a registered representative requires a declaration in the National Registration Database (NRD). Let us suppose that the loan by HC to LV had been specifically authorized by TD. Would it have been necessary, to comply with the rules, that this transaction, termed an outside business activity, be reported in the NRD?
60. With all due respect for the contrary opinion, we are not dealing with an outside business activity in this case.
61. During arguments given by the legal counsel of both parties, the members of the Hearing Panel were given a document entitled “Conduct and Practices Handbook Course” and the Hearing Panel was referred to pages 22 and 23, more specifically to example C.
62. Based on this example C, where reference is made to “dealings in securities outside of the normal business of the firm”, sometimes referred to as “selling away” or “outside deals”, IIROC’s counsel concludes that any outside business activity requires the firm’s written authorization.
63. Yet “outside business activity” is not synonymous with “outside deal”. Under Count 1 a), Rail is charged with having engaged in outside business activities by participating in the financial transaction between HC and LV, not with having participated in an outside deal. This may have been an outside deal, but surely not an outside business activity.
64. This having been said, even if I concluded, as my colleagues did, that Rail’s actions under Count 1 a) constitute an outside business activity, I am of the opinion that the evidence does not allow the conclusion that this was done without the knowledge and without the consent of TD.
65. For the unrestricted practice dealers who serve a “retail” clientele, their work is organized through “retail” branches directed by a branch manager.
66. The branch manager is the person in charge of supervision of all of the branch’s activities. This is also the resource person to whom the investment advisors refer as needed. A branch manager is the “authority” or, if you prefer, the management representative at the branch. In this matter, the branch manager is TD’s representative.
67. During his examination, Mr. Christopher Climo, Chief Compliance Officer of TD at the time, testified that he had not authorized the transaction between HC and LV, nor had any other person in his department, because the compliance department did not have a role to play in this transaction: “*It was a credit and operations issue. And so, we played no real role in the transaction.*”⁶
68. Whom did Rail have to address to obtain TD’s consent? Rail testified that during the negotiations between HC and LV on the amount of securities to be pledged as security for repayment of the loan that HC was granting to LV, he informed his branch manager that the deal would be closed shortly. His branch manager allegedly reminded him not to forget to have the interested parties sign a document releasing TD from liability.⁷
69. This release from liability exists and was filed as Exhibit P-24. It is not logical to think that the idea for this release of TD from liability could have originated from HC or LV. Moreover, it is plausible, as Rail testified, that the branch manager, who was part of TD’s management and who cared about protecting TD’s interests, reminded Rail not to forget to have his clients sign a release from liability.
70. If he had not authorized Rail’s involvement in the negotiations between HC and LV, the branch manager

⁶ Transcript of testimony, Vol. 3, p. 65, lines 16 to 18

⁷ Transcript of testimony, Vol. 5, p. 168, lines 1 and 2 and p. 169, lines 1 to 4 and 21 to 25 and p. 170, lines 1 to 10

would not have reminded Rail to sign a document releasing TD from liability: he would have prohibited him outright from continuing his involvement in the transaction.

71. In such a context, in my opinion, the transaction was not made without the knowledge and without the consent of TD.
72. Nor was the transaction made without the knowledge of TD. In any case, Rail or his assistant LP did not attempt to hide anything regarding the transaction, whether from the Credit Department, the Compliance Department or the branch manager.
73. Rail's assistant testified that she forwarded to TD's Credit Department in Toronto all of the documentation relating to the transaction between HC and LV, namely the "Billet à demande" [Demand Note] (Exhibit P-5.6), HC's authorization addressed to TD to issue a cheque drawn on his account to COC (Exhibit P-5.8), the bill for consulting fees (Exhibit P-5.7) and the letter releasing TD from liability (Exhibit P-25.7).
74. LP spoke to TD's Credit Department personnel in Toronto. Moreover, it was the Credit Department that decided to use an electronic funds transfer to transfer the money from HC's account to LV's account, instead of by cheque, as specified in HC's authorization.
75. A few days after the transaction, Rail had to explain the transaction to his branch manager, who had received a request for an explanation from Toronto regarding the transaction in question. Rail testified that he showed all the documents to his branch manager who, after examining them, gave him his "OK" and said "he would talk to Toronto".
76. The next day, Rail found in the entries in TD's electronic systems that the money had been taken out of HC's account and deposited in COC's account.
77. In his testimony, Rail affirms that, one week after the transaction, he received a "query" from TD's Compliance Department in Toronto; he was asked for explanations of the transaction between HC and LV. Rail responded to the "query" on the same document, which he returned to Toronto within the prescribed time limit.
78. The "query" could not be produced before the Hearing Panel. To this effect, the witness Christopher Climo said in his testimony that documents, particularly "queries" have been lost at TD: "*With respect to G.H.C., there has been an examination. I think that it's fair to say that certain compliance queries I believe it was, the originals couldn't be located, yes, I think that's true.*"⁸
79. This part of Mr. Climo's testimony gives credibility to Rail, who maintains he responded to a "query", even though this document could not be produced.
80. In my opinion, the evidence did not show that the said transaction was made without the knowledge of TD.
81. Finally, contrary to my colleagues, I am of the opinion that Rail did not participate actively in the transaction; it is certain that Rail spoke to HC about LV's loan project. According to his testimony, Rail thought of HC because he occasionally makes this kind of loan, which brings him very high returns, which is in fact what he is looking for. From then on, his role was only incidental.
82. There is no doubt in my mind that HC made his decisions on his own, that he did not need Rail to suggest financial setups or the form the surety he wanted should take, and that as the lender, he set his own requirements and imposed his own conditions; Rail only prepared the documentation as instructed by HC and LV.
83. Consequently, for all these reasons, I do not accept Count 1 a) against Rail.

Count 2

⁸ Transcript of testimony, Vol. 3, p. 103, lines 18 to 22

84. In my opinion, the evidence presented at the hearing does not allow me to conclude that there was an inappropriate use of personal and confidential information regarding two clients, HC and LV.
85. Rail testified that when LV brought up his \$3 million loan project again, specifying that he was willing to pay high interest, he thought of speaking to his other client, HC, who he knows occasionally grants high-risk loans.
86. Rail does not deny that he spoke to HC about LV and to LV about HC. However, he did so anonymously. It was only when HC got back to him, saying that he was interested in the deal, that Rail asked for authorization to reveal his identity.
87. I am of the opinion that Rail did not engage in conduct unbecoming and detrimental to the public interest, because in the discussions he had with his two clients, HC and LV, their identity was not revealed.
88. As worded, Count 2 alleges that Rail introduced his two clients to each other to benefit his client LV. I do not accept this assumption. In my opinion, Rail had no interest in favouring his client LV over his client HC.
89. Consequently, I do not accept Count 2 against Rail.

Count 3

90. Although I agree with my colleagues' opinion regarding the guilty verdict on Count 3, I would like to make the following comments.
91. IIROC filed at the hearing a TD procedure entitled "*Cheque Acceptance Policy*", as Exhibit P-36.1. Paragraph 2 of this policy stipulates:

"Third Party cheques (issued by a non-client) are only acceptable if made payable to the depositing client or if made payable to TD Evergreen for the account of the client."
92. It was explained to the Hearing Panel that this policy concerned the deposit of cheques in an account other than the account of the cheque's beneficiary. This assertion is erroneous.
93. In my opinion, this policy concerns the case of a TD client who would want to deposit, in his brokerage account, a cheque issued by a third party who is not a TD client. In such a case, the TD policy tells us, to be acceptable, the cheque must be issued in the name of the client or in the name of TD Evergreen. This policy in no way refers to depositing cheques in an account other than the account of the cheque's beneficiary.
94. Consequently, in my reflection on Rail's guilt on Count 3, I did not take this policy into account.
95. Moreover, I believe Rail and LP when they testify that, at TD, at least at the Quebec City branch, by obtaining written instructions to this effect from the cheque's beneficiary, TD's back office in Toronto accepted to deposit a cheque in another client's account. The question thus becomes whether there were written instructions by LV, in the name of COC, to deposit in HC's account the cheque issued by P. inc. to the order of COC.
96. What is clear from the evidence heard before the Hearing Panel is that there were verbal instructions. Indeed, upon receipt of the cheque, Rail communicated with LV to inform him of this. LV then instructed him to transfer the amount to HC's account. Rail told us he gave his assistants instructions in this regard.
97. The assistant LP told us in her testimony that if she wrote HC's account number on the cheque for deposit, this is because she received instructions to deposit that cheque. Moreover, she admitted quite honestly that she did not remember having seen LV's letter of instruction authorizing the cheque issued to COC to be deposited in HC's account.⁹

⁹ Transcript of testimony, Vol. 4, p. 46, line 25 and p. 15, p. 55, lines 8 and 9

98. Although he affirms that it is impossible, in his opinion, to deposit a cheque in a third party's account without the written authorization of the cheque's beneficiary, Rail admits he did not see the letter of authorization.¹⁰
99. As presented, the evidence does not allow the conclusion that LV's letter authorizing the deposit in HC's account of the \$333,000 cheque issued to the order of COC actually exists.
100. Given this lack of evidence, I must conclude that there was no letter of authorization and that, consequently, the said cheque should have been deposited in COC's account.
101. I agree with my colleagues' opinion that Rail failed to use due diligence under the IIROC's Rules of Conduct, to which he is subject, by not ensuring, in the absence of a letter of authorization from the beneficiary, that the cheque was deposited in COC's account. Like my colleagues, I find Rail guilty on Count 3.
102. Nonetheless, it is troubling to observe that if such a letter of authorization does not exist, the deposit could be made anyway. Indeed, in such a scenario, it can easily be imagined that any front office employee, simply by indicating an account number on a cheque, can have it deposited in his account, without any person in the back office refusing to proceed with the deposit due to the absence of an authorization from the cheque's beneficiary.
103. In my opinion, it would be appropriate for the brokerage firms to tighten their back office controls on cheque deposits in all their forms.

Danielle Le May, Panel Member

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¹⁰ Transcript of testimony, Vol. 5, p. 90, line 2, p. 123, line 19 and p. 124, line 18