Unofficial English Translation

Re Sarkissian

IN THE MATTER OF:

THE RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

SARKIS SARKISSIAN

2008 IIROC 23

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

Hearing: October 17, 2008
Decision: November 3, 2008
(23 pars.)

Hearing Panel:
Claire Richer, Chair
Danielle Le May
Élaine Phénix

Appearances:
Caroline Champagne, Counsel for the Association
John Bracaglia, Counsel for the Respondent

DECISION REGARDING THE ARGUMENT OF LACK OF JURISDICTION

INTRODUCTION

¶ 1 Mr Sarkis Sarkissian became a registered representative employed by a member firm of the Association in August 2001 and ceased to be a registered representative upon being dismissed in August 2006.

¶ 2 In August and November 2005, while in the employ of a member firm, the Association advised the Respondent that it had initiated two investigations into his conduct.

¶ 3 In August 2007, the Association served the Respondent with a notice of hearing in which he was alleged to have committed 44 different violations while he was a registered representative.

¶ 4 The hearing before this Hearing Panel ("Hearing Panel") lasted for more than fourteen days, from March 17, 2008 to June 20, 2008.

¶ 5 At the close of the evidence on June 20, 2008, the Hearing Panel invited counsel for both parties to submit their respective arguments in writing not later than July 31, 2008, in view of the hearing on the arguments set for August 28, 2008.

¶ 6 Counsel for the Respondent argued *inter alia* that the Association, and consequently the Hearing Panel, lacked jurisdiction with respect to the Respondent.

¶ 7 On August 27, 2007, in the course of a telephone conference between both parties and the Hearing Panel, the Hearing Panel agreed to the request of counsel for the Association to submit their arguments on the issue of jurisdiction in writing, not later than September 12, 2008.

¶ 8 At a hearing held on October 17, 2008, the Hearing Panel heard both parties on this issue.

Arguments of the Respondent

¶ 9 The Respondent makes the following arguments to plead his position on the issue of lack of jurisdiction on the part of the Association and the Hearing Panel:

a) upon ceasing to be employed by a member of the Association, the Respondent ceased to be a registered representative subject to the Association;

b) notwithstanding the provisions of Association By-law 20.7(1), which provides that an approved person remains subject to the jurisdiction of the Association for a period of five years from the date on which he or she ceases to be an approved person, this section is inapplicable to the Respondent because ss. 59 and 60 of the *Act respecting the Autorité des marchés financiers*, R.S.Q. c. A-33.2 ("*AMF Act*"), under which the Association was recognized as a self-regulatory organization in Quebec, do not expressly grant such power to the Association;

c) a recent majority decision by the Ontario Divisional Court in the Taub case held that the Association has no authority in Ontario over "former members" as this is not expressly allowed under s. 21.1 of the *Securities Act* (Ontario), R.S.O., 190, c. S. 5, ("Ontario Securities Act"), which constitutes a restriction of the regulatory powers of the Association;

d) the *AMF Act* mirrors the Ontario Securities Act in that no reference is made therein to former members, as a result of which it is alleged that the Association has no authority over the Respondent, as he was a <u>former</u> registered representative at the time he was served with the notice of hearing.

Arguments of the Association

¶ 10 In response, the Association argues *inter alia* that:

a) the Association is a national self-regulating organization governed by its constitution, its by-laws and it regulations; it is not a statutory organization and its jurisdiction does not derive from a statute but "from its by-laws, regulations, policies and other regulatory requirements to which its Members bind themselves by contract to comply";

b) the *Autorité des marchés financiers* ("AMF") has recognized the Association as a self-regulatory organization in Quebec under Title III of the *AMF Act* and, more particularly, ss. 59 and 60 thereof;

c) this recognition is based on public interest and the protection of the public and was granted *inter alia* because "its (the Association's) by-laws and operating rules permit (…) d) the imposition of disciplinary measures in the event of a violation of its by-laws or <u>operating rules</u> (emphasis added) or of a breach of the law";

These operating rules included Association By-law 20.7(1) at the time of the decision;

d) by registering as a registered representative, the Respondent agreed, by written contract and under oath, to submit to the jurisdiction of the Association during the entire time that he was registered as a representative of a member of the Association and for an additional period of five years after the termination of his employment with such firm;

e) it is unacceptable that the Respondent should be able unilaterally to shed himself of his obligations, previously agreed to under oath, because he was dismissed before receiving the notice of hearing;

f) the Hearing Panel is not bound by the Taub judgement rendered in Ontario; furthermore, this judgement is erroneous in law and contains a forceful dissent.

Discussion

¶ 11 When it was still known as the Investment Dealers Association (IDA), the Association was recognized as a self-regulatory organization on July 13, 2004 by AMF Decision No. 2004-PDG-0083 (the "Decision") under Title III and, more particularly, under s. 68 of *An Act respecting the Agence nationale d'encadrement du secteur financier* (now the *AMF Act* since 2004).

¶ 12 Recognition was granted based on a number of considerations, including the following:

> "1.7 - WHEREAS THE AUTHORITY has reviewed the Application and the comments received pursuant to ss. 7, 8, 68, 69, 70 and 71 of the ANESF Act;
>
> 1.18 - WHEREAS Quebec is a civil law jurisdiction, with the unique regulatory environment which that entails;
>
> 1.21 – WHEREAS, subject to the terms and conditions set forth herein, the AUTHORITY is satisfied that IDA Rules and Regulations are in compliance with ss. 69 and 70 of the ANESF Act;
>
> 1.22 - WHEREAS By-law 20 and the Rules of Practice and Procedure thereunder were passed by the IDA on October 9, 2003 and were approved and published by the recognizing regulators pursuant to the Coordination Agreement of May 14, 2004;
>
> 1.31 - WHEREAS the recognition of the IDA as a self-regulatory organization under the ANESF Act is in the public interest as it fosters *inter alia* the efficient supervision of the Quebec financial industry, the promotion of the development and smooth running thereof, and the protection of the public;"

¶ 13 Section 60 of the *AMF Act* provides that a "legal person, a partnership or any other entity may monitor or supervise the conduct of its members or participants (...) only (emphasis added) if it is recognized by the Authority as a self-regulatory organization, on the conditions determined by the Authority".

¶ 14 Before responding to the argument of the Respondent, who claims that the provisions of s. 60 of the *AMF Act* prevent the Association from regulating its former members under By-law 20.7(1), we would like to evoke certain judgements which address the role of the Association.

¶ 15 In **Pezim v. British Columbia (Superintendent of Brokers)**, 1994 2 S.C.R. 557, the Supreme Court of Canada described (at para. 60) the role of self-regulatory organizations in the larger framework of the securities industry:

> "60. *Within this large framework of securities legislation, there are various government administrative agencies which are responsible for the securities legislation within their respective jurisdictions. The Commission is one such agency. Also within this large framework are self-regulatory organizations which possess the power to admit and discipline members and issuers…"*

¶ 16 In **Morgis v. Thompson Kernaghan & Co.** (2003) 65 OR (3d) 321, para. 30 reads as follows:

"30. *I agree. The IDA, as recognized by the Commission, is organized for the purposes of regulating the standards of practice and business conduct of its member firms and their representatives to promote the protection of investors and the public interest...*"

¶ 17 In **2007 BCSECCOM 262** regarding the Dass matter, upheld by the Court of Appeal of British Columbia on October 23, 2008, the British Columbia Securities Commission ("BCSC") held, in respect of s. 26(1) of the British Columbia *Securities Act*:

"38. *In our opinion, (…) the purpose of the section is* <u>*not to authorize*</u> (emphasis added) *recognized self-regulatory bodies to regulate,* <u>*but to impose a duty*</u> (emphasis added) *on them to regulate.*

41. (…) *It follows that the section does not limit the self-regulatory body's authority…"*

¶ 18 Furthermore, the courts have consistently held that the Association's regulatory powers do not derive from a statute, but rather from its by-laws, regulations and policies to which its members bind themselves by contract to comply. For example, in **Ripley v. Investment Dealers Assn. (Business Conduct Committee)**, (1990) NSJ No. 295 Action SH No. 72667, the Court of Appeal of Nova Scotia stated on page 5 with reference to the Association:

"It is not specifically empowered under any statute, although its existence is recognized in some securities legislation. It has its own constitution, by-laws and regulations to which its members bind themselves by contract to comply."

¶ 19 As stated by the BCSC in the aforementioned decision **2007 BCSECCOM 262** regarding the Dass matter, more particularly in paras. 28 and 29:

"28 – *(…) Recognition means that the Commission acknowledges the self-regulatory body to be an acceptable component of that regulatory scheme. (…)*

29 – (…) A recognized self-regulatory body would not be a credible part of the regulatory scheme if it failed to regulate the conduct of its members. (…)"

It will be recalled that "that regulatory scheme" had been previously described in **Pezim**, referred to above in para. 15.

¶ 20 As for this Hearing Panel, we do not believe that the provisions of s. 60 of the *AMF Act* preclude the Association from regulating its former members.

To the contrary, we share the opinion of the BCSC in **2007 BCSECCOM 262** (the Dass matter) regarding the scope of s. 26(1) of the *Securities Act*, RSBC 1996, c. 418, which is to say that we are of the opinion that the objective of Title III of the *AMF Act,* and more particularly of ss. 59, 60, 64 and 68 thereof, is not to authorize the Association to regulate its members, but to impose a duty on the Association to regulate it members, in accordance with its constitution, regulations and by-laws, including By-law 20.7(1) which provides that the Association retains jurisdiction over a registered representative for a period of five years following the date on which such representative ceases to be registered.

Also, AMF Decision No. 2004-PDG-0083 is clear:

a) it <u>recognizes</u> the Association "as a self-regulatory organization to <u>carry out</u> (emphasis added) its activities in Quebec" (para. 2.1); and

b) such recognition "<u>is based</u> (emphasis added) *inter alia* on its (i.e., the Association's) constitution, by-laws and operating rules, <u>including the IDA Rule Book which is a part thereof</u> (emphasis added); (…)" (para. 6.1 a)).

Furthermore, in its recognition order No. 2008-PDG-0126 issued as a result of the reorganization of the Association on June 1, 2008, the AMF reiterated this position by stating clearly in para. 8 a) of Schedule A that the Association "establishes rules governing its members and other persons subject to its jurisdiction".

¶ 21 For all of the above reasons, we cannot subscribe to the Respondent's arguments and, rather, we agree with the arguments put forward by the Association.

¶ 22 Not only do we not agree with the Respondent's arguments, but we resolutely repeat the words of the Honourable Justice Smith in para. 46 of the recent decision (October 23, 2008) of the Court of Appeal of British Columbia in **Dealers Association of Canada *et al* v. Charles K. Dass**:

> "*(…) a decision that the IDA could not discipline former members despite their agreement to submit to IDA jurisdiction for five years after termination of their membership would undermine the regulatory scheme. A non-compliant member would be able to avoid any oversight of his conduct simply by resigning and any general deterrence to be gained by findings of misconduct and consequential penalties would be lost. Such a result would diminish investor protection and damage public confidence in the regulatory system. It would accordingly be unacceptable to hold that the appellant could so easily shed himself of a contractual commitment entered into in part for the protection of the investing public."*

Conclusion

¶ 23 **FOR THESE REASONS**, this Hearing Panel:

- dismisses the Respondent's arguments as to lack of jurisdiction on the part of the Association and, consequently, of the Hearing Panel in the case at bar; and
- orders the parties to continue the hearing to hear the other arguments of the two parties in the case at bar, at a date to be fixed by the Coordinator of Hearings.

Claire Richer, Chair of the Hearing Panel

Danielle Le May

Élaine Phénix