

# Re Marston

IN THE MATTER OF:

**THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA (THE ASSOCIATION)**

AND

**WILLIAM JOHN MARSTON**

2009 IIROC 7

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

Heard: December 12, 2008

Decision: January 29, 2009

(16 paras.)

## **Hearing Panel:**

Me Guy Lafrance, Chair

Mr. Gilles Archambault, Panel Member

Ms. Éline Phénix, Panel Member

## **Appearances:**

Me Caroline Champagne, Counsel for the Association

Me John Bracaglia, Counsel for the Respondent

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## **REASONS FOR DECISION**

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### ***UNOFFICIAL ENGLISH TRANSLATION***

1. At the hearing on December 12, 2008, the Respondent filed a motion regarding the Hearing Panel's lack of jurisdiction to hear this case.

### **The facts**

2. The Respondent was approved to work in the securities industry, in the employ of an IDA Member firm, on September 28, 2001.
3. The Respondent ceased to be registered on March 30, 2006, following his dismissal by IDA Member firm Industrial Alliance Securities Inc.
4. On November 19, 2008, the Association served a Notice of Hearing on the Respondent, charging him with nine counts concerning events that occurred before March 30, 2006.
5. In his motion, the Respondent maintains that the Association, and consequently the Hearing Panel, has no jurisdiction because he is no longer a member of said Association.

### **Argument put forth by the Respondent**

6. Title III of the Act respecting the Autorité des marchés financiers (“AMF Act”), R.S.Q. c. A-22.1 is the law governing the specialized self-regulatory bodies in the securities industry.
7. The Association, in accordance with sections 59 and 60 of the AMF Act, was recognized as a self-regulatory organization in Québec.
8. The aforesaid section 60, which reads as follows:

"60. A legal person, a partnership or any other entity may monitor or supervise the conduct of its members or participants as regards the carrying on, in Québec, of an activity governed by an Act referred to in Schedule 1 only if it is recognized by the Authority as a self-regulatory organization, on the conditions determined by the Authority."
9. Consequently, the Association cannot have jurisdiction over non-members, even though Association By-law 20.7 states that:

"7- (1) ... , any Member and any Approved Person shall remain subject to the jurisdiction of the Association for a period of five years from the date on which such Member or Approved Person ceased to be a Member or an Approved Person of the Association..."

#### **Argument put forth by the Association**

10. The Association is a national self-regulatory organization specialized in the highly regulated securities industry. It is a non-profit association of brokers founded in 1916 and is governed by its Incorporating Document, By-laws, and Rules and Regulations.
11. The Association is not a statutory organization; it draws its authority from its By-laws, Rules and Regulations, Policies and other regulatory requirements, which its members contractually agree to follow.
12. Just because the Autorité des marchés financiers has recognized the Association as a self-regulatory organization (SRO) does not mean that it loses the authority granted it contractually over ex-members.
13. The Respondent, upon his registration, signed a written contract and agreed under oath to submit to the jurisdiction of the Association for the term of his approval as a registered representative of the Member firm of the Association, as well as for an additional period of five years after termination of his employment with said Member firm.
14. In the matter of "Staff of the Investment Industry Regulatory Organization of Canada" (the Association) and Sarkis Sarkissian (Respondent), an identical motion was filed and the hearing panel issued its decision on November 3, 2008.
15. The aforementioned hearing panel dismissed the respondent's motion, on grounds with which the current Hearing Panel agrees:

#### **“ D. 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 not to authorize (emphasis added) recognized self regulatory bodies to regulate, but to impose a duty (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 its 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 recognizes the Association “as a self-regulatory organization to carry out (emphasis added) its activities in Quebec” (para. 2.1); and
- b) such recognition “is based (emphasis added) inter alia on its (i.e., the Association’s) constitution, by-laws and operating rules, including the IDA Rule Book which is a part thereof (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**

16. Consequently, the Hearing Panel
  - dismisses the Respondent’s motion
  - and orders the continuation of the hearing on a date to be determined by the Hearing Coordinator.

MeGuy Lafrance, Chair of the Hearing Panel  
Mr. Gilles Archambault, Panel Member  
Ms. Éline Phénix, Panel Member

MONTREAL, this 29th day of January 2009

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