

**Re: Mechaka**

**IN THE MATTER OF:**

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

**AND**

**YVES MECHAKA**

2009 IIROC 18

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

Hearing: September 8, 2008

Decision: April 7, 2009

(325 pars.)

**Hearing Panel:**

Me Jean Martel, Chair

Mr. Guy L. Jolicoeur

Mr. Yves Julien

**Appearances:**

Me Caroline Champagne and Me Sylvie Poirier, Enforcement Counsels — IIROC, Counsel for the  
Prosecution

Me John Bracaglia, Sarrazin Nicolo Bracaglia Inc., Counsel for the Respondent

**DECISION ON MOTION FOR DISMISSAL AND  
DECLINATORY EXCEPTION DUE TO LACK OF JURISDICTION**

**TABLE OF CONTENTS**

	<b>Par.</b>
I. <b><u>THE PROCEEDING</u></b> .....	1
II. <b><u>THE FACTS</u></b> .....	20
III. <b><u>THE PARTIES' ARGUMENTS</u></b> .....	32
3.1 Respondent's Position .....	32
3.2 IIROC's Position .....	40
IV. <b><u>THE QUESTIONS IN DISPUTE</u></b> .....	55
V. <b><u>AUTHORITY OF THE ASSOCIATION</u></b> .....	56
5.1 The securities industry's self-regulatory system in Québec .....	61

5.2	The Legal Capacity of the Association.....	72
5.3	Compliance of the CJR with the Association's Constitution. ....	88
5.4	Authorization of the Association to apply its rules.....	93
	5.4.1 <i>Authorization since July 2004</i> .....	99
	5.4.2 <i>The situation prior to July 2004</i> .....	117
5.5	Conclusion regarding the Association's authority .....	131
VI.	<b><u>LEGISLATIVE COMPLIANCE OF CONTINUING JURISDICTION RULES</u></b> .....	132
6.1	The obligation to act legally .....	143
6.2	The admissibility of the Respondent's action .....	153
6.3	Terms and conditions of the obligation to act legally.....	163
	6.3.1 <i>The obligation of regulatory deference</i> .....	167
	6.3.2 <i>The obligation of legislative compliance</i> .....	173
	6.3.3 <i>Are the CJR inconsistent with the law?</i> .....	183
	6.3.4 <i>Do the rules contradict the law?</i> .....	194
	A) <i>The situation since July 2004</i> .....	199
	- <i>The Taub decision</i> .....	199
	- <i>The preferred interpretation approach</i> .....	216
	- <i>Discussion of section 60 LAMF</i> .....	224
	- <i>Comparison of approaches in Ontario and Québec</i> .....	241
	B) <i>The Situation Prior to July 2004</i> .....	255
6.4	<i>The applicable CJR</i> .....	263
6.5	<i>Conclusions regarding the obligation to act legally</i> .....	271
VII.	<b><u>DOES IIROC HAVE JURISDICTION?</u></b> .....	272
VIII.	<b><u>DECISION</u></b> .....	281
	<b>APPENDIX: Comparison of LAMF / Other legislation</b> .....	

**DEFINITIONS**

“ASSOCIATION”:	1
“RECOGNIZING REGULATORS”:	99
“BDRVM”:	30
“BULLETIN”:	NOTE 6
“CA-I”:	12
“CA-P”:	16
“CONTRACT”:	43
“OSC”:	35
“CVMQ”:	21
“APPLICATION FOR REGISTRATION/APPROVAL”:	21
“RECOGNITION DECISION”:	47
“ORGANIZATIONAL DOCUMENTS”:	49
“IFORUM”:	3
“LAMF”:	30
“ARANESF”:	47
“LVM”:	2
“LVMO”:	34
“ALLEGED VIOLATIONS”:	2
“SRO”:	34
“OBLIGATION OF LEGISLATIVE COMPLIANCE”:	165
“OBLIGATION OF REGULATORY DEFERENCE”:	164
“IIROC”:	1
“MATERIAL PERIOD”:	4
“APPROVED PERSON”:	6

“RULES”	2
“CONTINUING JURISDICTION RULES”:	33
“REGULATED PERSONS”:	41
“MOTION”:	13
“CJR”:	33
“RVM”:	21
“TAUB”:	34

## I. THE PROCEEDING

- Petitioner-Respondent is brought before us as part of a disciplinary hearing pursuant to Part 10 of By-law 20 of the *Investment Dealers Association of Canada* or *IDA* (the “**Association**”), whose regulatory activities were taken over by the Investment Industry Regulatory Organization of Canada (“**IIROC**”) effective June 1, 2008.<sup>1</sup>
- The Notice of Hearing served on April 7, 2008, which Respondent has challenged, alleges some 13 violations (the “**alleged violations**”) of provisions of the Quebec *Securities Act* (L.R.Q., c. V-1.1) (“**LVM**”), and of the By-Laws, Regulations, Forms, Standards or Policies that govern the Dealer Members of the Association (“**the rules**”).
- IIROC alleges that most of the violations were committed while the Respondent was employed at iForum Securities Inc. (“**iForum**”), a securities brokerage firm which, between March 1 and April 25, 2001, was known as Norshield Securities Inc.
- These violations allegedly occurred over a period of nearly six (6) years (“**the material period**”) commencing in March 2001 – i.e. after the Association granted the Respondent the status of “*Approved Person*” – and ending in February 2007, when his approval as a registered representative and his securities trading activities simultaneously came to an end.
- Throughout this period, Association By-law 18.2, *Registered Representatives and Investment Representatives*,<sup>2</sup> provided that:
 

“[...] *No Member shall employ any person as a registered representative [...] in any province in Canada unless:*

(a) *Such person is registered [...] under the statute relating to the sale of securities in the province in which the person proposes to act as a registered representative [...];*  
[and]

(b) *Approval as a registered representative or investment representative has been granted by the Association in accordance with the provisions of this By-law.*”

(interpolation and emphasis added)
- “**Approved Person**”, in this context, means an individual who is “[...] *a partner, director, officer, employee or agent of the Dealer and is approved by [the Association] or another Canadian Self-Regulatory Organization to perform any function required under the rules.*”<sup>3</sup>
- For reasons that we will discuss later, it is important to situate each of the alleged violations in time.

<sup>1</sup> Because this matter relates to events that occurred both before and after IIROC took over the Association's regulatory activities, for the sake of conciseness, we have opted to use the present tense where possible, as if the Association were still in operation. Nevertheless, the necessary distinctions are made when the discussion demands it, notably in matters relating to comparative or historical aspects that involve both the Association and IIROC, or aspects that are specifically attributable to one or the other.

<sup>2</sup> See Book of Authorities CA-P, Vol. I, Tab 13.

<sup>3</sup> Association By-Law 1.1, *Interpretation and Effect*, approved as an IIROC Rule effective June 1, 2008: See IIROC *Transition Rule No. 1.2* and *Schedule B.1* to Transition Rule No. 1.

8. The Notice of Hearing states the following:

**"ILLEGAL PROMISSORY NOTES**

1. **In 2004 and 2005**, [...] the Respondent accepted approximately eight (8) orders for the purchase or renewal of promissory notes ..., for which there was no prospectus and no exemption [...].

2. **Between 2003 and 2005**, the Respondent failed to respect the minimum standards for retail account supervision [...]

**OFF-BOOK TRANSACTIONS**

3. **In November 2005**, the Respondent also had under his responsibility the accounts of approximately 57 clients of B2B Trust, [...] where said clients held approximately 27 different securities, [...], without said securities being recorded in the books of iForum Securities Inc. [...].

4. **In November 2005**, the Respondent failed to respect the minimum standards for retail account supervision, [...] such that 12 registered representatives employed at iForum Securities Inc. had under their responsibility the accounts of over 400 clients of B2B Trust, [...] where said clients held over 200 different securities, [...] without said securities being recorded in the books of iForum Securities Inc.

**TRANSACTIONS NOT PERMITTED UNDER THE TERMS OF THE APPROVAL GRANTED BY THE ASSOCIATION TO REGISTERED REPRESENTATIVES (MUTUAL FUNDS)**

5. The Respondent failed to respect the minimum standards for retail account supervision, [...] such that, **between May 2002 and October 2005**, two (2) registered representatives (mutual funds) in the employ of iForum Securities Inc. effected trades [...] in client accounts [...] whereas the approval granted by the Association did not permit them to do so.

6. The Respondent failed to respect the minimum standards for retail account supervision, [...] such that, **in November 2005**, two (2) registered representatives (mutual funds) in the employ of iForum Securities Inc. had under their responsibility the accounts of 143 clients of B2B Trust [...] where said clients held securities [...] without said securities being recorded in the books of iForum Securities Inc.

**DISTRIBUTION OF CONSOLIDATED PORTFOLIO STATEMENTS THAT DO NOT MEET ASSOCIATION STANDARDS**

7. **Between October 2003 and October 2005**, the Respondent failed to respect the minimum standards for retail account supervision [...] such that two (2) registered representatives in the employ of iForum Securities Inc. distributed to approximately 22 clients consolidated portfolio statements that did not meet the standards established by the Association.

**FAILURE TO RESPECT THE "KNOW-YOUR-CLIENT" RULE**

8. The Respondent failed to respect the minimum standards for retail account supervision [...] such that representatives in the employ of iForum Securities Inc. failed to comply with the "know-your-client" rule and to ensure the suitability of investment requirements with regard to their clients.<sup>4</sup>

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<sup>4</sup> The 8th count in the Notice of Hearing alleges that adherence to the minimum standards of supervision in question fell to the Respondent, in his capacity as officer in charge of retail account supervision at iForum, a brokerage firm

### ***FAILURE TO DISCLOSE A CONFLICT OF INTEREST***

9. *As of 2003, the Respondent failed to observe high standards of ethical and professional conduct and to respect the minimum standards for retail account supervision [...] such that clients of iForum Securities Inc. were not informed of the existence of a conflict of interest between iForum Securities Inc. and Mount Real Corporation before they invested in various promissory notes from MRACS Management Ltd. and Real Vest Investments Ltd.*

### ***FAILURE TO USE DUE DILIGENCE WITH RESPECT TO EXAMINATIONS***

10. *Between 2002 and 2005, the Respondent failed to use the required due diligence to correct numerous deficiencies observed during examinations by the Association's Sales Compliance Department and to comply with regulatory requirements [...].*

### ***FAILURE TO ESTABLISH AN ADEQUATE SUPERVISORY ENVIRONMENT***

11. *Between 2001 and 2005, the Respondent failed to establish and to maintain an environment that would allow adequate supervision of the activities of iForum Securities and ensure compliance with securities regulations [...].*

### ***FAILURE TO PROVIDE THE INFORMATION REQUIRED BY THE ASSOCIATION***

12. *From the time of his approval in March 2001 until February 2007, the Respondent failed to provide and to update the information required by the Association on the Uniform Application for Registration/Approval, concerning officer and director positions he held at Services administratifs Olympus United inc. and Les courtiers d'assurances Epycom inc. [...].*

### ***FAILURE TO COOPERATE***

13. *Since June 28, 2006, the Respondent has been in violation of Association By-laws 19.5 and 19.6, by refusing to provide the Association's investigators with such documents as they may require for their investigation."*

(emphasis added)

9. On April 18, 2008, the Respondent filed a plea of not guilty with the Association.
10. At the hearing on August 21, 2008, Counsel for the Respondent verbally filed a motion for dismissal of the disciplinary proceedings instituted against the Respondent and a preliminary declinatory motion against this Hearing Panel.
11. He argued the Association's lack of powers to institute proceedings and that of IIROC to oversee these proceedings, as well as this Hearing Panel's lack of jurisdiction to be seized of these matters, and to entertain and rule thereon.
12. He produced a book of authorities ("CA-I") and made representations to the Hearing Panel.
13. With the mutual consent of the parties, we allowed the subsequent production of a Substantiated Notice of Motion by the Respondent, which was done on August 22, entitled *Motion of Yves Mechaka regarding IDA's lack of jurisdiction* (the "**Motion**").
14. It is now up to us to rule on this Motion, which formally restates the grounds that were raised at the hearing on August 21. The Motion notably petitions that the Hearing Panel:

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where he held numerous responsibilities from March 1, 2001 to December 1, 2005, which is the date this firm's membership in the Association was suspended: See *infra*, par. 20 and 28.

“[...] *DECLARE the IDA without jurisdiction and authority over the affairs of its former member Mr. Mechaka;*

*ORDER the IDA [— or IIROC, acting in right of the Association, as we shall see —] to immediately cease and desist all hearings with respect to Mr. Mechaka; [and]*

*DECLARE itself without jurisdiction and authority over the affairs of Mr. Mechaka [...]*”.

(interpolation added)

15. On September 5, 2008, Counsel for the Prosecution filed a response challenging the Motion and asking that it be dismissed.
16. At a hearing on the following September 8, IIROC submitted its own book of authorities ("CA-P"), both parties presented their arguments, and judgment was reserved.
17. To rule on a motion of this nature, the Hearing Panel relies on the provisions of article 165 (4) of the Québec *Code of Civil Procedure* for inspiration, and accepts the facts in the matter as true (*Oznaga v. Société d'exploitation des loteries*, [1981] 2 S.C.R. 113, 115; *Bodi c. Nesbitt Burns ltée* (2002) REJB 2002-37171 (C.A.); Ferland & Emery, *Précis de procédure civile du Québec*, 4<sup>o</sup> éd., Vol. 1, s. III).
18. Furthermore, certain essential facts are admitted in the Respondent's Notice of Motion.
19. At this stage, it is important to determine, based on the allegations made in the Notice of Hearing and the exhibits filed in support thereof, or again on a clear and easily defined legal position, whether the Respondent has a *prima facie* right to have the disciplinary proceedings instituted against him in this matter dismissed (*Laliberté v. Agence nationale d'encadrement du secteur financier* (2004) J.E. 2005-284 (C.S.); *Code de procédure civile annoté 2008*, LegisPratique, pp. 244 *et seq.*). The Hearing Panel may also formally take into account the facts that are public knowledge which can help in this determination, such as the rules that were applied by the Association at the material time.

## II. THE FACTS

20. During the material period, the Respondent was registered as a securities representative and was approved by the Association to act on behalf of the following brokers — who, except for a brief time in December 2005, in the case of iForum,<sup>5</sup> were all members of the Association at the material times — and in the capacities mentioned below next to their name:

Material Time	Approved Functions	Member Firm
From March 1, 2001 to April 25, 2001	group savings representative branch manager director president chairman secretary officer responsible in Québec	Norshield Securities Inc. ("Norshield")
From April 25, 2001 to June 8, 2001	group savings representative branch manager director	(name change from Norshield to:) iForum Securities Inc.

<sup>5</sup> See *infra*, par. 28 and 29.

	president chairman secretary	(“iForum”)
From June 8, 2001 to June 8, 2005	officer responsible in Québec representative with unrestricted practice branch manager director	iForum
From June 8, 2005 to December 20, 2005	president chairman secretary officer responsible in Québec representative with unrestricted practice branch manager director	iForum
From December 20, 2005 to February 2, 2007	president chairman secretary officer responsible in Québec chief compliance officer ultimate designated person representative with unrestricted practice	Industrial Alliance Securities Inc. (“IA Securities”)

21. In order to be registered as a representative before the Commission des valeurs mobilières du Québec (CVMQ) and obtain the approval of the Association to act on behalf of one of its members, the Respondent had to submit a *Uniform Application for Registration/Approval for individuals* (the “**Application for Registration/Approval**”) duly completed and signed by him, and sworn, substantially in the form stipulated at the time in Form 3 prescribed by the *Québec Securities Regulation, R.R.Q., c. V-1.1, r.1* (“RVM”).
22. At the time, Form 3 included a clause entitled, “*Commitment of the Applicant and the Firm Responsible*”, which stipulates the following:
- “[...] We acknowledge that we are familiar with the by-laws, rules and regulations of the self-regulatory agencies mentioned in Question 4 [which referred expressly to the Association]. We agree to comply with them and we commit ourselves to remain informed of any amendments to them.*
- We acknowledge the jurisdiction of those bodies and the power to suspend or withdraw the rights conferred by registration. [...].*
- (the mention in brackets is ours)
23. Association By-law 18 further provides that every person whose application for approval as a registered representative has been accepted shall be subject to the jurisdiction of the Association, shall comply with the Rules of the Association as may be amended or supplemented from time to time.
24. His application for approval having been accepted, the Respondent enjoyed the privileges and advantages connected with the status of an Approved Person of the Association throughout the material period.

25. In early October 2005, following an examination of iForum's compliance, it became apparent to the Staff of the Association that the activities of this brokerage firm presented numerous irregularities.
26. On October 7, 2005, the Association notified iForum that it was initiating an investigation into the latter's regulatory compliance.
27. On or around November 24, 2005, it was the Respondent's turn to receive a similar notice, his own activities within iForum being also under investigation.
28. On December 1, 2005, iForum's membership within the Association was suspended.<sup>6</sup> The firm therefore ceased to exercise the rights and privileges of membership as of this date.<sup>7</sup>
29. A few days later, on December 20, 2005, the Respondent entered the employ of another Member firm of the Association, IA Securities, where he remained subject to the supervision and monitoring of the Association in the capacity of a registered representative and Approved Person.
30. On May 5, 2006, a hearing panel expelled iForum Securities from membership in the Association,<sup>8</sup> and in a decision rendered on February 28, 2007, under the authority of sections 152 LVM and 93(1) of *An Act respecting the Autorité des marchés financiers* (R.S.Q., chapter A-33.2) (the "AMF Act" or "LAMF"), the Bureau de décision et de révision en valeurs mobilières ("BDRVM") stripped iForum of the rights conferred on it by its registration as a dealer.<sup>9</sup>
31. As for the Respondent, he was dismissed from IA Securities on February 2, 2007; he had therefore had no direct tie with the Association or any of its Member firms for a little over 14 months when he was served with the Notice of Hearing.

### **III. THE PARTIES' ARGUMENTS**

#### **3.1 Respondent's Position**

32. The Respondent maintains that under the terms of section 60 LAMF, both the Association and IIROC have the power to regulate and supervise the conduct of persons who are their members, as regards the carrying on, in Québec, of an activity governed by the *Securities Act*. Therefore, this power would not exist with respect to those who are no longer members.
33. According to this interpretation, the Association would therefore not have the necessary authority to make and enforce rules ("**Continuing Jurisdiction Rules**" (CJR)),<sup>10</sup> by which it reserves disciplinary over a person who was approved to work for a Member firm of the Association for a certain time, but who, prior to being disciplined, ceased to have any ties with said Member firm of the Association, notably as a result of resignation or dismissal.
34. The Respondent alleges that the provisions of *An Act respecting the Autorité des marchés financiers* (notably section 60) which, in Québec, empower the Association to act as a self-regulatory organization ("SRO"), are written in terms that are practically identical to those of the provisions of the Ontario *Securities Act* (Revised Statutes of Ontario, chapter S-5) ("**LVMO**"), which the Divisional Court of that province recently analyzed in *Taub v. Investment Dealers Association of Canada* ("**Taub**").<sup>11</sup>

<sup>6</sup> Association Bulletin («Bulletin»), N° 3488, dated December 7, 2005.

<sup>7</sup> Regulation 600.1, *Suspended Members*.

<sup>8</sup> Bulletin No 3541, dated May 12, 2006.

<sup>9</sup> BDRVM, Decision 2006-016-01, February 28, 2007.

<sup>10</sup> We have qualified subsequent mentions of this expression as «2001» or «2004», depending on the version of the CJR that is applicable at the time.

<sup>11</sup> *Taub v. Investment Dealers Association of Canada* (2008) CanLII 35707 (July 15, 2008, H.J. Carnwath diss.; leave to appeal to the Ontario Appeal Court granted on November 6, 2008). The stay was granted on review of *Re Staff of the IDA and Stephen Taub* (2007) 30 OSCB 4739, an April 2, 2007 decision of the OSC, which at the time was sitting in

35. Respondent argues that, in this decision, the Ontario court interpreted section 21.1 LVMO as rejecting the Association's power to regulate and to institute disciplinary proceedings against individuals who – like the Respondent – were no longer, at the material time, registered as a representative with the appropriate securities regulator, the Ontario Securities Commission (the “OSC”), or approved by the Association to act on behalf of one of its Member firms.
36. The Respondent maintains that the same reasoning should be followed in Québec, and invites us to conclude that the Association exceeded the powers granted it under section 60 LAMF when it adopted and attempted to enforce the Continuing Jurisdiction Rules by which it authorized itself to institute proceedings against the Respondent in this matter.
37. It would therefore follow, according to the Respondent, that these Rules do not apply to him, and that they are unenforceable and without effect against him.
38. In addition, the Respondent argues that, by acting under the authority of the CJR to, on the one hand, continue the proceedings instituted against him by the Association and, on the other hand, seize itself of these proceedings and hold hearings in order to rule on the matter, IIROC and this Hearing Panel respectively assumed a jurisdiction over the Respondent that they no longer have since he left the Association and is no longer registered as a securities representative.
39. For these reasons, we should uphold his motion, decline jurisdiction and dismiss the disciplinary proceedings instituted in this matter.

### **3.2 IIROC's Position**

40. IIROC challenges the Respondent's claims, and cites numerous grounds which we reproduce here in essence.
41. It argues that, at the material time, the Association was a private entity whose activities included the regulation and representation of its member investment dealers, as well as the approved persons acting on their behalf in various capacities (we refer hereinafter in aggregate to these dealers and approved persons as “**Regulated Persons**”).
42. According to the prosecution, it is not the securities legislation or the *Act respecting the Autorité des marchés financiers* that confer on the Association the necessary power to realize the objectives stated in its Constitution, and notably, to make and enforce rules to this end. This capacity stems, rather, from the contractual relationship that binds it with its Regulated Persons, and the latter to each other.
43. In the Respondent's case, this relationship would have been established by presenting an Application for Registration/Approval, duly completed and sworn, and its acceptance by the Association. This transaction would have formed a contract (the “**Contract**”) that would validly bind Mr. Mechaka and govern his relationship with the Association and, in some respects, with the other Regulated Persons.
44. IIROC emphasizes that the rules adopted by the Association are part of this Contract, that the Respondent undertook to respect them and that he accepted the disciplinary jurisdiction of the Hearing Panel in the event of a violation of these rules.
45. IIROC argues that the Continuing Jurisdiction Rules (CJR) were validly approved and that they are *intra vires* the regulatory powers of the Association by virtue of the Contract that binds it to its Regulated Persons,<sup>12</sup> since the Association's Constitution states that the adoption of rules concerning the application of disciplinary measures and penalties against former approved persons are among its objects.

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review of a decision of a hearing panel of the Association in *Re Stephen Taub*, IDA District Council, June 25, 2006. In Ontario, Taub was followed by *Re Van Benthem and Petriccione*, IIROC Hearing Panel (Ont.), 6 Oct. 2008.

<sup>12</sup> Book of Authorities CA-P, Volume I, Tab 12, s.6.

46. As to the legality of the CJR, IIROC acknowledges that they were adopted within the framework of a self-regulatory activity of the Association which, in order to be legally carried out in Québec, had to meet monitoring and recognition requirements as determined by virtue of *An Act respecting the Autorité des marchés financiers*.
47. IIROC notes that, from 1983 until the recognition decision which granted the Association SRO status on July 13, 2004 (the "**Recognition Decision**"),<sup>13</sup> it was authorized to carry out its objects in Québec — and therefore, to adopt and enforce rules that permitted it to commence disciplinary action against former approved persons — under a specific provision of the *Securities Act*, section 351,<sup>14</sup> rather than the provisions of *An Act respecting the Agence nationale d'encadrement du secteur financier* ("**ARANESF**")<sup>15</sup> on which the Respondent is now relying to challenge the jurisdiction of this Hearing Panel.
48. IIROC adds that when the Authority exercised its discretion to recognize the Association as an SRO on July 13, 2004, it did so in accordance with the provisions of the ARANESF, after conducting an analysis to evaluate the merit of the Association's recognition application.
49. This work would have led to a thorough verification of the legislative compliance of the Constitution, By-laws and other Rules of the Association (its "**organizational documents**"), including its Continuing Jurisdiction Rules, and all, in principle, were approved by the Authority.
50. The prosecution alleges that the obligation to enforce the CJR was imposed on the Association as a condition of its recognition as an SRO by virtue of section 60 LAMF.
51. Just as the Association did before the hearing panel that entertained the disciplinary proceedings which it had initially instituted in *Taub*, IIROC emphasizes in an alternative argument that as soon as an Association rule is approved by the AMF, the hearing panel must enforce it and does not have the jurisdiction to question its enforceability on grounds that it is not consistent with the law.<sup>16</sup>
52. On the question of enforcing the *Taub* decision in Québec, IIROC argues that the legislative provisions on which the Court based itself in this case have no equivalent here; that the decision does not have the value of a precedent and is not binding on the Hearing Panel. It adds that, in any event, the decision is ill-founded in law and is of no help in ruling on the Respondent's motion.
53. IIROC concludes that the Continuing Jurisdiction Rules could validly be invoked by the Association to commence disciplinary proceedings in this matter, and that they can now be invoked before us to seek a penalty for the Respondent's failure to meet his commitments under the Contract, as well as for his alleged misconduct under the law and its regulations.
54. Consequently, IIROC requests that the Respondent's motion be dismissed.

#### **IV. THE QUESTIONS IN DISPUTE**

55. To rule on this motion, the Hearing Panel must answer the following questions:
  1. Did the Association have the necessary power to validly adopt rules to continue its jurisdiction and that of its hearing panel in order to commence disciplinary action against a former approved person?

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<sup>13</sup> *Recognition of the Investment Dealers Association of Canada as a self-regulatory organization under An Act respecting the Agence nationale d'encadrement du secteur financier* (R.S.Q., chapter A-7.03), Decision 2004-PDG-0083 dated July 13, 2004.

<sup>14</sup> S.Q. 1982, c. 48, s. 351; S.Q. 1984, c. 41, s. 71; S.Q. 1989, c. 48, s. 256; S.Q. 2002, c. 45, s. 694.

<sup>15</sup> The Act was subsequently renamed *An Act respecting the Autorité des marchés financiers*.

<sup>16</sup> See Stenographic notes (n.s.), 8 sept. 2008, p. 43.

2. Do the Continuing Jurisdiction Rules adopted by the Association respect the securities legislation in Québec, specifically Title III of *An Act respecting the Autorité des marchés financiers*, and are they enforceable against the Respondent at the material times in respect of the matter before us?
3. Can IIROC now exercise the authority of the Association which it has replaced, in order to continue these proceedings?

**V. AUTHORITY OF THE ASSOCIATION**

56. At the time the Respondent signed the Application for Registration/Approval and began his career in the service of a Member firm of the Association in the capacity of representative, the following Continuing Jurisdiction Rules applied:

Material Time	2001 Continuing Jurisdiction Rules	Reference
From March 1, 2001 to September 30, 2004	<p>[translation]</p> <p><i>21. For the purposes of By-law 19 and By-law 20, any Member and any Approved Person who obtained such approval pursuant to By-law 4, By-law 7 or By-law 18, shall remain subject to the jurisdiction of the Association, even if such Member or Approved Person has ceased to be a Member or an Approved Person of the Association, by virtue of these By-laws.</i></p> <p><i>No proceeding may be instituted by virtue of subsection 11 of this By-law [Disciplinary Hearing] against a former Member or an Approved Person who has ceased to be an Approved Person, unless a notice of hearing is served on such person no later than five years from the date on which such Member or Approved Person ceased to be a Member or Approved Person of the Association.<sup>17</sup></i></p>	By-law 20.21, <i>Approvals and Discipline</i>

57. The *By-law 19* and *By-law 20* to which the provision refers were titled “*Examinations and Investigations*” and “*Approvals and Discipline*” respectively.
58. In 2004, the Continuing Jurisdiction Rules were amended to extend the scope of their application to certain aspects. Nevertheless, the provision stating that the Association limits to five years the period during which it may continue to exercise its investigative and disciplinary jurisdiction over former Approved Persons remained unchanged.
59. Since then, and more specifically in February 2007, when the Respondent ceased to be an Approved Person, the Continuing Jurisdiction Rules were applied in the following form by the Association and, with the necessary adjustments, by IIROC, still in reference to *By-law 19* and *By-law 20*:<sup>18</sup>

<sup>17</sup> Our emphasis and comment.

<sup>18</sup> At the time, *By-law 19* still dealt with “*Examinations and Investigations*”, whereas *By-law 20* now concerned “*Association Hearing Processes*”.

Material Time	2004 Continuing Jurisdiction Rules	Reference
From October 1, 2004 to February 2, 2007 <sup>19</sup>	<p><b>20.7 Former Members and Approved Persons</b></p> <p><i>(1) For the purposes of By-law 19 and By-law 20, 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, subject to subsection (2).</i></p> <p><i>(2) An enforcement hearing under Part 10 of this By-law may be held in regard to a former Approved Person who re-applies for approval under Part 7 of this By-law, notwithstanding expiry of the time period set out in subsection (1).</i></p> <p><i>(3) An Approved Person whose approval is suspended or revoked or a Member who is expelled from membership or whose rights or privileges are suspended or terminated shall remain liable to the Association for all amounts owing to the Association.</i></p>	<p><i>Association Hearing Processes, Part 4, By-law 20.7</i></p>

60. After reviewing some of the aspects of the self-regulatory system that governed the Association and the Respondent in Québec during the period contemplated by these proceedings, we will answer the first question in dispute, by examining whether:

1. the Association had the necessary legal capacity to validly adopt the CJR for 2001 and 2004;
2. the adoption and application of these Rules were consistent with its objects; and
3. the Association, at the material time, had the authority in Québec to apply these Rules to former Approved Persons employed by its Member firms.

### **5.1 The securities industry's self-regulatory system in Québec**

61. In order to obtain and maintain the operating privileges conferred by registration in Québec, the full service dealer<sup>20</sup> must be a member of an SRO recognized by the AMF (s. 60 LAMF and 215 RVM).
62. The Association has benefited from such formal recognition in Québec since July 2004.
63. By definition, a securities industry SRO like the Association oversees the activities of its members or participants, as well as the qualifications and conduct of persons approved to perform regulated functions on their behalf.

<sup>19</sup> The Continuing Jurisdiction Rules of 2004 were adopted by the Association on October 9, 2003 and published in draft form by its Recognizing Regulators on May 14, 2004: see OSC Bulletin (2004) 27 OSCB 4813; Recognition Decision, whereas 1.22; and *infra*, par. 103 *et seq.* They came into force on October 1, 2004: see IDA Hearing Processes - Amendments to By-law 20, amendments to corollary By-laws and establishment of Rules of Practice and Procedure, IDA Bulletin N° 3325, September 2, 2004, and IDA Hearing Processes - Amendments to By-law 20, IDA Bulletin N° 3330, September 20, 2004 : see Book of authorities CA-P Vol. I, tabs 16 and 17.

<sup>20</sup> The full service securities dealer is one whose activities are not limited to certain specific forms of trading or investment covered by the securities regulations.

64. This oversight activity is exercised primarily by virtue of the rules that the SRO may adopt from time to time under the authority of its constituting documents, which grant it the necessary supervision rights and powers to ensure the compliance of its Regulated Persons.
65. The adoption and enforcement of these rules, as well as the mobilization by the SRO of sufficient resources to achieve this purpose, are mandatory to maintain its recognition under the *AMF Act*. This is why, among other controls, the rules are subject to the approval of the AMF. This approval may be express or tacit, depending on the case.
66. Membership in the Association is conditional on the undertaking, by the applicant for registration/approval, of a commitment to respect its rules and policies. The applicant must also agree to submit to the jurisdiction of the Association and consequently, to that of its disciplinary forum and processes.
67. The Respondent undertook such commitment and gave such consent in the Application for Registration/Approval, which he submitted to the Association in accordance with the requirements of Form 3 prescribed by the *Securities Regulation*<sup>21</sup> and by Association By-law 18 (*Registered Representatives and Investment Representatives*).<sup>22</sup> It is on this basis that the Association subsequently granted him the qualification that he was seeking, as well as the status of Approved Person.
68. The jurisprudence teaches us that when the Respondent submits such application to the Association and the latter accepts to be seized of it in order to grant him the status of Approved Person, there exists between them a valid and binding Statutory Contract (*Résolution Capital Inc. v. ACCOVAM* (2002) CanLII 10049; Soquij AZ-50158178; C.A.M., H.J. Dalphond; *Investment Dealers Association of Canada v. Dass* (2008) BCCA 413 (October 23, 2008); *Séguin v. Association canadienne des courtiers en valeurs mobilières* (2007) QCCS 1084, JE 2007-815 (C.S.), par. 18; *Re Séguin*, IDA Hearing Panel, June 29, 2007). This Contract, in some respects, also binds the Approved Person to the other Regulated Persons of the Association (*Ripley v. Pommier et al.* (1991) CANLII 24445).
69. It should be noted that the disciplinary justice structure set up by the Association, to which jurisdiction the Respondent agreed to submit, relies in large part on its CJR . As we have seen, these rules reserve the disciplinary jurisdiction of the Association for a period of five years from the date the person concerned ceases to be an Approved Person.<sup>23</sup>
70. Now let us look at whether the adoption and application of the CJR to the Approved Persons was duly authorized during the material period.

## **5.2 The Legal Capacity of the Association**

71. The Association was created in 1916, in the form of a non-profit association without juridical personality.<sup>24</sup> It retained this organizational structure until IIROC succeeded it on June 1, 2008.
72. It is a pan-Canadian voluntary organization that has maintained a presence in Québec since its creation.<sup>25</sup>
73. In its capacity as a recognized securities SRO, the Association is perceived, and treated under the law, as an organization that carries out responsibilities in the public interest. This reality is even more obvious

<sup>21</sup> *Securities Regulation*, Gazette officielle du Québec, Part 2, April 6, 1983, p.1616; see wording of form in Book of Authorities CA-P, tab 9; see also CVMQ *Policy Statement No. Q-9, Dealers, Advisers and Representatives*, s. 29 (12°) and 32 (1°), in Book of Authorities CA-P, tab 10.

<sup>22</sup> See supra, par. 23 and infra, note 31.

<sup>23</sup> See supra, par. 56 *et seq.*

<sup>24</sup> Recognition Decision, prec., s. 4. For purposes of applying the *Securities Act* and Regulations adopted under it, the Association is nonetheless deemed to be a "person" within the meaning of the said Act: s. 5.1 LVM.

<sup>25</sup> Recognition Decision, prec., s. 1.19.

when the organization exercises powers that have been formally delegated to it by the regulator, and accordingly acts in its stead.<sup>26</sup>

74. Despite this fact, the Association still retains its own character and structure as a legal person established for a private interest.
75. It is to this somewhat unique reality that the AMF was referring when, in its decision to recognize the Association as an SRO, it mentioned the following in clauses 1.12 and 1.13 of the recitals:<sup>27</sup>

*"[...] the recognition of a self-regulatory organization confers upon such organization a specific legal status which is derived from both private and public law;*

*[...]such specific legal status imposes upon the IDA, when implementing and enforcing its Rules and the securities legislation under which it exercises delegated powers or not, a duty to act in the public interest, for the protection of investors and with a view to fostering public and corporate trust in the IDA, its Members, their respective officers and representatives, and to ensure that the mission entrusted to the AUTHORITY under the Quebec Securities Act and under the ARANESF shall be completely fulfilled; [...]"*

76. In **Ripley v. Pommier et al.**, prec., the Nova Scotia Court of Appeal discussed the juridical status of the Association and the basis of its capacity to act. Here is what Judge Freeman had to say on the subject:

*"The nature of associations such as the IDA was considered by the Supreme Court of Canada in the case of Orchard v. Tunney (1957), 8 D.L.R. (2d) 273:*

*"In the absence of incorporation or other form of legal recognition of a group of persons as having legal capacity in varying degrees to act as a separate entity and in the corporate or other name to acquire rights, incur liabilities, to sue and be sued, the group is classified as a volunteer association. There are many varieties of this class ranging from business partnerships, labour unions, professional, fraternal and religious societies to social clubs. . ." (page 278)*

*Principles governing the relationship among the various members of voluntary organizations such as the IDA were considered in Stephen v. Stewart, [1944] 1 D.L.R. (305) where MacDonald, C.J.B.C. said in the British Columbia Court of Appeal:*

*"A volunteer organization, having no legal entity, has its most familiar form as a members club. Decisions on such clubs show that the relation of members to each other is purely contractual, the contract being found in the constitutional rules which they adopt." (page 311)"*

(emphasis added)

77. The capacity to self-regulate its members, granted the Association by its Constitution, as well as the specialized jurisdiction of its Hearing Panel, do not therefore find their source in the legislation governing corporations and legal entities,<sup>28</sup> but in the contract that is signed by each and all of the

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<sup>26</sup> S. 59 LAMF provides that only an entity whose objects are related to the mission of the Authority may be recognized as a self-regulatory organization in the securities industry. The mechanism for the delegation of functions and powers of the Authority to the SRO is one of the major distinctive elements of this type of organization. It helps distinguish their role from that of groups with purely private interests. Thus, when the SRO exercises a delegated function or power of the Authority, no proceedings may be brought against it by reason of official acts performed in good faith in the exercise of these functions (s. 32, par. 2 LAMF). Other provisions further distinguish it: for example, the Authority may confer on a rule established by a recognized SRO the force and effect of a regulation made under the Securities Act (s. 72 LAMF); likewise, the SRO has the obligation to carry on its activities so long as the Authority believes that termination of its activities may prove harmful to the public interest (s. 88 LAMF).

<sup>27</sup> See Book of Authorities CA-P, Vol. I, tab 4, p. 2.

<sup>28</sup> This was the case with the old Association, but is no longer so for IIROC. Indeed, given its incorporation by virtue of Part II of the *Canada Corporations Act* (R.S.Q. 1970, chapter C-32), IIROC is endowed with a juridical personality and

Association members in order to establish their existence contractually, bind themselves to their rules and decisions, and agree to conduct themselves accordingly.

78. As for the Association's rules, in principle, they only concern its co-contractors, even if they indirectly protect the clients of the Regulated Persons and the public in general under the terms of the securities legislation. They apply to the Regulated Persons both contractually and privately.
79. Québec jurisprudence has recognized this capacity of a voluntary organization, conferred by contract between its members, to subject the latter to rules of conduct, and to grant a domestic tribunal such as ours the disciplinary jurisdiction to apply these rules, along with penalties for failure to respect them (*Seney v. Chambre d'Immeuble de Montréal* (1980) 2 S.C.R. 555, 566, *Letellier v. Bourse de Montréal* (1999) R.J.Q. 2839 (C.A.), par. 45 and 55).
80. It is from this contractual relationship with and between its Regulated Persons, that the Association holds the necessary powers to achieve its objects and adopt rules that apply to them. The same goes for the disciplinary jurisdiction exercised by any hearing panel that it may form (*Morgis v. Thomson Kernaghan & Co.* (2003) CANLII 9999 (C.A. Ont.); *Ripley v. Pommier et al.*, prec.; *Re Charles K. Dass and Investment Dealers Association of Canada* (2007) BCSECCOM 262), *Séguin v. Association canadienne des courtiers en valeurs mobilières*, prec.).
81. IIROC has represented to the Hearing Panel that the execution of the Association rules was based exclusively on this contract. Although we agree with this statement fundamentally, it does require some clarification.
82. The Association, in addition to exercising powers granted it by its organizational documents with respect to Regulated Persons, is also invested with powers that have been formally delegated it by the Authority to help the latter ensure that its rules and the securities legislation are respected.
83. The binding force of these delegated powers with respect to the Regulated Persons does not arise from the contractual relationship that exists between them and the Association, but from the law itself and the Authority's delegation decision. Except for legislative provisions to the contrary, the Association exercises these powers under the same terms and conditions and according to the same processes as the Authority under the law, and its contract with its Regulated Persons has only a subsidiary application in this case.
84. In the Contract concluded between the Respondent and the Association, the Respondent represented that he knew its rules well,<sup>29</sup> and agreed under oath<sup>30</sup> to:
  1. submit to the jurisdiction of the Association, both before and after approval of his application for registration/approval; and to
  2. respect its rules, as may subsequently be amended from time to time, if the Association were to grant him the requested approval.<sup>31</sup>

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its powers to carry out the objects of the company stem from this law and the provisions of the Québec Civil Code concerning legal persons established for a private interest. Its juridical powers to regulate and oversee the conduct of its members in accordance with its Constitution therefore no longer stem solely from the Contract with its Regulated Persons.

<sup>29</sup> In fact, he had to attend a training to familiarize him with the rules so that he could qualify for registration, in accordance with the applicable regulations: see Rule 2900, *Proficiency and Education*, s. 3.

<sup>30</sup> Even though our Hearing Panel does not see it as a deciding factor, we are fundamentally in agreement with IIROC when it argues that by agreeing under oath to his contractual obligations, the Respondent conferred on them a formal character that is even less disputable, if only from the standpoint of giving his consent given to the Contract.

<sup>31</sup> Association By-law 18.11 in fact states: "18.11. Every person whose application for approval as a registered representative or investment representative of a Member has been accepted shall be subject to the jurisdiction of the Association, shall comply with the By-laws, Regulations, Rulings and Policies of the Association as the same are from time to time amended or supplemented and, if such approval is subsequently revoked, shall forthwith terminate his

85. It has been observed that the 2001 CJR, which were applicable at the time the Contract was entered into, already stipulated that the Association had the necessary jurisdiction to exercise its examination and investigation powers (By-law 19) and its disciplinary powers (By-law 20) with regard to the Respondent until the expiry of five (5) years from the date he ceased to be an Approved Person. These Rules were amended in 2004, but the aspect of continuing jurisdiction for the purpose of commencing disciplinary proceedings within the next five (5) years has remained unchanged.<sup>32</sup>
86. The Respondent therefore clearly undertook to comply with the rules of the Association for the entire period contemplated by these proceedings and he agreed that the Association could potentially, by invoking its 2001 or 2004 Continuing Jurisdiction Rules, take disciplinary action against him after he had ceased to be an Approved Person.<sup>33</sup>
87. It is consequently reasonable to conclude that the Association had all the necessary legal powers, by virtue of the contractual tie binding it to its Regulated Persons, to avail itself of its 2001 and 2004 Continuing Jurisdiction Rules in respect of the Respondent, a former Approved Person during the material period in this matter.

### **5.3 Compliance of the CJR with the Association's Constitution**

88. The Association's rules are adopted in accordance with the mission that it set for itself in its Constitution, rather than under the authority of the securities legislation (*Morgis v. Thomson Kernaghan & Co.* (2003 CanLII 5999, par. 10 (C.A. Ont.)).
89. This constituting document provides, notably, that the objects of the Association shall be to:

“2. [...] (a) [...] foster and [...] sustain an environment favourable to saving and investment, thus encouraging the accumulation of capital needed for continued economic development, for a rising standard of living and for the productive employment of a growing population;

(b) [...] encourage through self-discipline and self-regulation a high standard of business conduct among Members and their partners, directors, officers and employees and to adopt, and enforce compliance with, such practices and requirements as may be necessary and desirable to guard against conduct contrary to the interests of Members, their clients or the public;

(c) [...] to establish, and enforce compliance with, standards and requirements relating to capital market participants for the protection of Members, their clients and the public;  
[...]

6. [...] enact, amend, repeal and re-enact By-laws of the Association with respect to all matters pertaining to: [...] the disciplining of and the imposition of penalties [...] against [...] former [...] registered representatives and other employees of Members in respect of conduct or matters arising during the time such persons were approved in respect of a Member [...]”<sup>34</sup>

(emphasis added)

90. After reading these provisions, there can be no doubt that the IDA's Constitution empowers it to adopt and enforce rules to commence disciplinary action and, under the terms of a process set up for this purpose, to impose disciplinary penalties on former Approved Persons of its Member firms, as a result of actions or events that occurred while acting in their stead.

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or her employment as a registered representative or investment representative with the Member with whom he or she is employed at the time of such revocation.”: see Book of Authorities CA-P, Vol. I, tab 13, p. 3.

<sup>32</sup> See supra, par. 56 et seq.

<sup>33</sup> *Re Séguin*, IDA Hearing Panel, June 29, 2007.

<sup>34</sup> IDA, *Constitution*, s. 2: See BOOK OF AUTHORITIES CA-P, Vol. I, tab 12.

91. In this context, the Association's Continuing Jurisdiction Rules and the terms and conditions governing their application tie in perfectly with the objects which the Association has the capacity to accomplish.
92. There remains the question of the Association's right to exercise this capacity in Québec during the material period the Respondent allegedly committed the violations, namely from March 2001 to February 2007.

#### **5.4 Authorization of the Association to apply its rules**

93. Since February 1, 2004,<sup>35</sup> section 60 LAMF requires that, in order to be authorized to monitor or supervise the conduct of its members in Québec, an SRO must be recognized by the Authority, "*on the conditions determined by the Authority*".
94. Section 59 LAMF provides moreover that an entity whose objects are related to the mission of the Authority<sup>36</sup>— even a group not endowed with juridical personality, like the Association — may, on the conditions determined by the Authority, be recognized as an SRO responsible for supervising an activity governed by the *Securities Act*, which is an Act referred to in Schedule 1 of *the Act respecting the Autorité des marchés financiers*.
95. The ICSA, the *International Council of Securities Associations*, defines as follows the distinctive characteristics of securities SROs:

*"SROs can be defined as non-governmental organizations that: (1) share a common set of public policy objectives including the enhancement of market integrity, market efficiency and investor protection; (2) are actively supervised by government regulators; (3) have statutory regulatory authority and/or authority delegated by the government regulator(s); (4) establish rules and regulations for firms and individuals subject to their regulatory authority; (5) monitor compliance with those rules and regulations; (6) have the authority to discipline firms and individuals that violate their rules and regulations; (7) include industry representatives on their Boards or otherwise ensure that industry representatives have a meaningful role in governance; and (8) maintain structures, policies and procedures intended to ensure that conflicts of interest between their commercial and regulatory activities are appropriately managed."*<sup>37</sup>

96. The description of the Association's activities in *Ripley v. Pommier et al.*, prec., shows that it fully meets these criteria.
97. Sections 59 and 60 LAMF therefore apply to the Association.
98. Given that the Association was only formally recognized as an SRO on July 13, 2004,<sup>38</sup> the question of the Association's authorization to apply its CJR to former Approved Persons in Québec must first be considered in the context that has prevailed since that date. We will then discuss the situation prior to this recognition.

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<sup>35</sup> See Decree 45-2004, January 21, 2004, of the Government of Québec which introduced this provision.

<sup>36</sup> This was clearly the case with the Association, as we have seen: see supra, par. 73 to 75.

<sup>37</sup> *Self-Regulation in Financial Markets: An Exploratory Survey*, International Council of Securities Associations, September 2006, p. 3.

<sup>38</sup> See supra, par. 47. The Association was also recognized as an SRO by virtue of the securities legislation of Alberta, British Columbia, Saskatchewan, Nova Scotia and Ontario ("the recognizing regulators"). The legislation provide a recognition mechanism analogous that of Québec for the entities that pursue self-regulatory activities in the securities sector in their territory.

#### 5.4.1 Authorization since July 2004

99. The Authority's Recognition Decision stipulates that the Association has an obligation, as a recognized SRO, to regulate and apply its rules to its members and Approved Persons, and to administer a disciplinary process. It does so in the following terms:

[TRANSLATION]

*“22.1 The IDA [...] shall [...] draft and pass such IDA Rules as are necessary or appropriate to govern and regulate all aspects of its activities and its internal affairs and, more particularly, shall govern and regulate to:*

*a) ensure that its Members and Approved Persons respect the applicable securities legislation, as well as the obligations of a contingency fund ;*

*b) prevent fraud or market manipulation;*

*c) help protect investors;*

*d) encourage business practices that are just, fair, and ethical;*

*e) ensure appropriate discipline;*

*f) encourage cooperation, and coordinate the efforts of the individuals and companies charged with regulating the industry, in order to clear, regulate and facilitate securities trades, and process the information regarding these trades ;*

*g) forbid unfair discrimination between investors, Members, Approved Persons or other individuals; and*

*h) avoid imposing limits on competition except as the Authority shall deem necessary for the protection of the public”*

(emphasis added)

100. This Decision renders the Association subject to meeting certain conditions specified therein.

101. Under section 60 LAMF, the Authority's discretion to determine such conditions is very broad. It allows it not only to oversee all aspects of the SRO's activities, its internal affairs, and the exercise of its self-regulatory function with regard to its Member firms, but also, indirectly, to monitor many aspects of the operation of these firms, such as their ownership structure, their solvency, their officers and employees, their good governance, their sound administration and their contractual activity in certain matters.

102. This discretion is principally exercised on two levels: first, in the appreciation of the fact that the entity applying to it for recognition must adequately meet certain statutory prerequisites; then, by determining other specific conditions which the entity will have to respect in order to keep the recognition that is granted it.

103. Regarding the statutory prerequisites, the entity aspiring to be recognized must notably demonstrate to the Authority:

1. that the entity has the resources (financial and otherwise) necessary to exercise its self-regulatory functions and powers in a fair, efficient and objective manner (s. 68 LAMF);
2. that the entity has the possibility of exercising its functions and powers without the risk of conflict of interest (s. 68 LAMF);
3. that its organizational documents allow unrestricted membership for any person who meets the admission criteria and ensure equal access to the services offered by the entity (s. 70 LAMF); and

4. that its organizational documents permit the imposition of disciplinary sanctions for any violation of the entity's rules or any contravention of the law (s. 70 LAMF), in the course of a public process that gives the interested parties the opportunity to present their observations (s. 81 and 82 LAMF).<sup>39</sup>
104. To establish that its rules met this last standard, the Association submitted, among other things, its By-law 20 and the related Rules of Practice and Procedure, for the Authority's consideration.<sup>40</sup>
105. These instruments included, at the time, the text of the 2004 Continuing Jurisdiction Rules, which the Association had already adopted and submitted for the approval of its other Recognizing Regulators in Canada.<sup>41</sup>
106. Under the terms of the Recognition Decision, the Authority deemed that all of the rules applied by the Association at the time met all of the prerequisites prescribed by *An Act respecting the Agence nationale d'encadrement du secteur financier*.<sup>42</sup>
107. Regarding the conditions that the Association had to meet in order to maintain its recognition after the fact, some expressly concerned By-law 20 and, consequently, the CJR entrenched therein. It is notable, for instance, that the Authority required the Association to amend certain aspects of By-law 20 and to adopt a French version of the by-law by August 1, 2004.<sup>43</sup>
108. Other conditions were imposed regarding the investigations conducted by the Association,<sup>44</sup> and therefore on By-law 19, *Examinations and Investigations*, to which the 2004 CJR specifically refer, as did the 2001 CJR before them.<sup>45</sup>
109. These conditions, and more particularly, the obligation placed on the Association to regulate for the purpose of "*ensuring proper discipline*" of its Approved Persons confirm that for the purposes of its recognition as an SRO, the Association's disciplinary mechanism was the object of a detailed examination by the Authority, at the conclusion of which the latter determined that the rules governing this mechanism were appropriate.
110. The Authority then confirmed, in its Recognition Decision, that the Continuing Jurisdiction Rules were necessary and that they had to be applied in accordance with their terms in order for the disciplinary process – which the Association was required to set up by law – to function adequately.
111. Subsequently, it would be up to the Authority to ensure that the conditions associated with the Association's recognition, including those relative to By-law 20 and the CJR, are respected.
112. To assist the Authority with this, the law places several monitoring mechanisms at its disposal.
113. In the matter of developing and adopting rules, this monitoring is exercised in various ways. Notably, the Authority:
  1. pre-approves any amendment to the rules according to the conditions it considers appropriate (s. 74 LAMF);

<sup>39</sup> On these different aspects, see the Recognition Decision, prec., notably section 6, *Fondement [Basis]*, section 8, *By-law 20*, and section 11, *Suffisance des ressources [Sufficiency of Resources]*.

<sup>40</sup> On this subject, see par. 1.22 of the recitals in the Recognition Decision, prec., which establishes this fact and which, in par. 1.6, terms it a "point d'importance", a point of importance to the Authority.

<sup>41</sup> See supra, note 19.

<sup>42</sup> Recognition Decision, prec., recital 1.21 and s. 8.1.

<sup>43</sup> Recognition Decision, prec., s. 8.1. Les Statuts de Modification/Amending By-laws referred to in paragraph e) of this s. 8.1 were expressly aimed at By-law 20. The recognizing regulators were unable to approve them in time to meet the deadline of August 1, 2004 set by the Authority, such that the 2004 Continuing Jurisdiction Rules did not take effect until the following October 1.

<sup>44</sup> See section 15 of the Recognition Decision, prec.

<sup>45</sup> See supra, par. 56 and 57.

2. inspects the affairs of the Association to ascertain their compliance (s. 78 LAMF);
  3. may (a) suspend the application of any provision of the Association's rules (s. 76 LAMF); (b) order it to amend a rule (s. 77 LAMF); or (c) order it to take a particular course of action to ensure the protection of the public (s. 80 LAMF).
114. As regards the enforcement of rules, in particular of the Association, the Authority monitors compliance on the basis of reports which must be filed as a condition of the Association's recognition.<sup>46</sup>
115. Since the Association's recognition, we have observed that none of these monitoring powers, or even its power to attach additional conditions on its recognition, have been exercised by the Authority in order to impose amendments on the CJR,<sup>47</sup> or to credit an interpretation of section 60 LAMF which has it that, in applying these rules, the Association exceeded the operational framework that the Authority imposed on it. On the contrary, everything indicates that the condition for recognition which consists in applying the CJR in disciplinary matters has continued to be required by the regulator.
116. For all of these reasons, we conclude that the Association was legally authorized to adopt and apply its Continuing Jurisdiction Rules following its recognition on July 13, 2004, and that it has remained so since.

#### 5.4.2 *The situation prior to July 2004*

117. But what about the Association's authorization to regulate its former Approved Persons and commence disciplinary proceedings against them for rule violations committed prior to the coming into force of *An Act respecting the Agence nationale d'encadrement du secteur financier* (which later became the AMF Act) and, more specifically, section 60 ARANESF?
118. In the early part of the period during which the Respondent is deemed to have committed the alleged violations — from March 2001 to January 31, 2004 — the recognition and regulation of SROs in Québec was not governed by the ARANESF, but rather by the provisions of Title VI of the *Securities Act*.
119. Section 169 LVM<sup>48</sup> stated at the time that:
- “169. To carry on business in Québec, a stock exchange or a securities clearing-house must be recognized by the Commission as a self-regulatory organization.*
- In no case may a professional association regulate transactions in securities by its members unless it is recognized by the Commission as a self-regulatory organization.”*
- (emphasis added)
120. Clearly, the wording of this section could theoretically have given rise to the same argument raised by the Respondent relative to the wording of section 60 LAMF.
121. In this case, however, that argument would have been without effect for the Association, since section 169 LVM did not apply to the latter until the enactment of *An Act respecting the Agence nationale d'encadrement du secteur financier* in 2004.
122. Rather, it was sections 351 LVM and 741 ARANESF which, from January 19, 1983 to January 31, 2004 initially,<sup>49</sup> and from February 1, 2004 to July 13, 2004,<sup>50</sup> governed the Association's SRO activity in Québec.

<sup>46</sup> See s. 15.4 of the Recognition Decision.

<sup>47</sup> We are referring here to the version of the Continuing Jurisdiction Rules published on May 14, 2004 by the Association's recognizing regulators: see *supra*, note 19.

<sup>48</sup> *Securities Act* (S.Q. 1982, c. 48), art. 169.

<sup>49</sup> We are referring here to the date of coming into force of s. 351 of the Securities Act (January 19, 1983) and the date (January 31, 2004) that immediately preceded its repeal by s. 694 ARANESF on February 1, 2004.

<sup>50</sup> In this case, the dates refer to the coming into force of s. 741 ARANESF (February 1, 2004), discussed later, and to the date the Association was recognized as an SRO by the Authority (July 13, 2004) pursuant to s. 60 ARANESF (LAMF).

123. At the time that the Respondent first became an Approved Person of the Association, section 351 LVM provided that:

*“351. On 19 January 1983, the self-regulatory organizations may continue to carry on their activities even if they do not meet the conditions prescribed in Title VI,<sup>51</sup> until the Commission, with the authorization of the Government, decides to grant or deny them recognition.”*

(emphasis and interpolation added)

124. We have already mentioned, in our discussion of the Association's legal capacity,<sup>52</sup> that the latter was carrying out securities self-regulatory activities in Québec on January 19, 1993 and well before, and continued to do so until June 2008, when IIROC took over these activities.

125. The Association was therefore among the SROs covered by section 351 LVM, and the Authority itself recognized this in 2004 in its Recognition Decision.<sup>53</sup>

126. Speaking of this provision in *Résolution Capital Inc. c. ACCOVAM*,<sup>54</sup> Judge Pierre Dalphond remarked that, in fact:

[TRANSLATION]

*"[...] nothing in the Securities Act takes away the IDA's disciplinary powers over its members; quite the opposite, for section 351 of the Act confirms its status as a self-regulatory organization unless and until the Securities Commission and the Government of Québec shall decide otherwise."*

127. Since neither the CVMQ, nor the government<sup>55</sup> decided otherwise until section 351 LVM was repealed on February 1, 2004, this provision continued to apply in the early part of the period contemplated by the proceedings instituted against the Respondent in this matter, and it authorized the Association to carry out in Québec, without formal recognition by the Regulator, all of the activities referenced in its Constitution, including disciplining former members approved under the authority of the 2001 CJR.

128. Similarly, when section 351 LVM was repealed by section 694 ARANESF on February 1, 2004, section 741 ARANESF granted the SROs formerly covered under section 351 and, therefore, the Association, a deadline of August 1, 2004 to obtain recognition in accordance with the new section 60 ARANESF (LAMF).

129. Until its recognition on July 13, 2004, the Association remained specifically authorized under the law to carry on its activities in Québec, and to fulfill its general mission to oversee its Regulated Persons, under the same conditions as those that were formerly reserved it under section 351 LVM.

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<sup>51</sup> Title VI of the Securities Act of the day (Self-Regulatory Organizations) corresponded, in the securities industry, to the provisions that are found today in Title III of the AMF Act (Self-Regulatory Organizations) which covers all sectors regulated by the Authority.

<sup>52</sup> See *supra*, section 5.2.

<sup>53</sup> Recognition Decision, *prec.*, art. 1.1.

<sup>54</sup> *Prec.*, par. 68.

<sup>55</sup> Section 351 of the Securities Act of 1983 was modified on July 12, 1989 to provide for the additional formality of prior authorization by the government: see S.Q. 1989, c. 48, s. 256.

130. Until this date, the Association therefore had full authority and powers, pursuant to its Constitution, to adopt and apply its 2001 Continuing Jurisdiction Rules to its Approved Persons, on the basis of the latter's contractual commitment to submit to their application.

### **5.5 Conclusion regarding the Association's authority**

131. In response to the first question in dispute, which we identified earlier,<sup>56</sup> we conclude that the Association had sufficient authority to validly adopt, and had the required authorizations to apply in Québec, for the entire period contemplated by the Notice of Hearing, the rules that continued its jurisdiction, and that of its Hearing Panel, in order to commence disciplinary proceedings against a former Approved Person within five(5) years from the moment that person ceased to be approved, for violations that occurred while the person held such approval.

## **VI LEGISLATIVE COMPLIANCE OF CONTINUING JURISDICTION RULES**

132. Now, let us examine the second question in dispute: are the CJR adopted by the Association under the authority of its Constitution in compliance with Québec legislation and, if applicable, are they enforceable against the Respondent at the material time?
133. Before examining this question, which presupposes the existence of an obligation of the Association to act legally, we must first decide whether the Respondent has the right to invoke the illegality of the CJR in the matter of the disciplinary proceedings commenced against him based on these Rules. Secondly, we must determine whether a Hearing Panel has the necessary jurisdiction to rule on this matter on a motion to dismiss and, as applicable, to declare these Rules unenforceable against the Respondent on grounds of legislative non-compliance.
134. We have seen that when the Respondent filed a duly completed and sworn application for registration/approval with the Association, and the latter accepted it, a valid Contract was formed between them.
135. In this Contract, the Respondent acknowledged that he was familiar with the rules of the Association, agreed to comply with them, undertook to keep himself informed of any changes in these rules, and finally, recognized the Association's jurisdiction and its power to suspend or withdraw the rights conferred on him by his registration. He was accordingly making commitments that were essentially the same for all Regulated Persons of the Association.
136. In principle, all of the rules adopted by the Association are part of the contract entered into with its Regulated Persons, and the exercise of the powers attributed it by these rules give rise to an equal number of contractual obligations on the latter's part.
137. This contract is not unilateral under the meaning of Article 1380 of the *Civil Code of Québec* ("CCQ"). It imposes obligations on both the Association and the Regulated Persons.
138. In return for their compliance with the Association's rules, or with the decisions made by the Association under their authority, the jurisprudence has, for instance, recognized the right of Regulated Persons to benefit from the services, advantages and privileges of a Member firm, an Approved Person or a Registered Representative, as applicable, that may be offered by the Association.
139. In fact, we have even seen that former Regulated Persons have been entitled to these benefits, an additional reason to give effect to Continuing Jurisdiction Rules that allow disciplinary proceedings to be commenced against them for violations committed while they were Members or Approved Persons of an SRO (see for example *Letellier c. Bourse de Montréal*, prec., par. 28, and 50 to 53, and *Re Staff of the IDA and Stephen Taub* (2007) 30 OSCB 4739, par.12).

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<sup>56</sup> See supra, par. 55.

140. In this matter, the Respondent alleges that the Association is seeking to grant itself before us, by applying the 2004 CJR, a jurisdiction that it does not have, since even if these Rules are part of its Contract, they could not be enforceable against him on grounds of their non-compliance with section 60 LAMF.
141. In order to follow the Respondent's reasoning in this regard, given that the Association's capacity and power to adopt rules do not stem from statute, but from the contract with its Regulated Persons, we would first have to conclude that:
1. the Association itself has an obligation to act legally by virtue of this contract when regulating its members and approved persons;
  2. if the Association violates this obligation by adopting a rule and then seeking to avail itself of it in a disciplinary proceeding against a Regulated Person, this rule may be declared unenforceable by a Hearing Panel on a motion by this Regulated Person.

142. Let us see if that is the case.

### **6.1 The obligation to act legally**

143. The regulated Contract meets the general rules for the interpretation of civil contracts. Under the terms of the *Civil Code of Québec*, in interpreting a contract, the nature of the contract, the circumstances in which it was formed, the interpretation which has already been given to it by the parties or which it may have received, and usage, are all taken into account (Art. 1426 CCQ).
144. Similarly, regarding the content of contracts, Article 1434 CCQ states that:
- "1434. A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law."*
145. This rule applies to the Contract between the Association and the Respondent, when it or its rules are silent on a given point (*Seney c. Chambre d'Immeuble de Montréal* (1980) 2 S.C.R. 555, 567). It ensures that any provisions that, according to usage, equity, or the law itself, are an implicit part of the agreements that the parties intended to make, shall be deemed included in this Contract without any need to mention them.
146. These implicit provisions bind the parties in the same right as the express provisions, and either party may require their execution, provided it has the necessary interest to do so.
147. The Respondent has essentially argued before us that the Association could not obtain against him, in a disciplinary proceeding, in order to give itself jurisdiction, the execution of a contractual rule that is inconsistent with a provision of the *AMF Act*.
148. Considering the backup rules of the *Civil Code of Québec* that apply to the regulated Contract, we must grant him reason on the merits of this argument, for it is implicit that the regulated Contract to which the Association is a party obligates it to act in accordance with the law, to the benefit of the Regulated Persons and the public.
149. This conclusion is inferred from the principle that, by virtue of the contract that binds it with its Regulated Persons, and in accordance with its Constitution, the Association has a duty to adopt and apply rules that support the pursuit of objects that are related to the mission of the Authority (s. 59 LAMF).
150. It is also inherent in this contract that, as part of its self-regulatory role, the Association is obligated to – at the very least – do what is required of it by law, or is formally demanded of it by its regulator, in the performance of its supervision powers.

151. The conditions for recognition of the Association moreover confirm the existence of this regulatory duty of the Association, when they require it to apply to its Members and Approved Persons rules that ensure the enforcement of securities legislation in their regard.
152. It is difficult to imagine how one could, in the circumstances, grant it a capacity to adopt rules that would contravene this legislation or, in its capacity as a recognized SRO, contravene the *AMF Act*.

## **6.2 The admissibility of the Respondent's action**

153. The second preliminary matter to examine resides in the right of the Respondent to effectively challenge the Association's failure to regulate legally, in order to have the disciplinary proceeding against him dismissed. Does he have this right, and does the Hearing Panel have the jurisdiction to rule on it if it is invoked?
154. IIROC has argued, as did the Association, moreover, in a formal motion presented to the hearing panel that entertained the disciplinary proceedings in *Taub*, that the moment a rule of the Association has been approved by the regulator, the hearing panel would have no other option but to enforce it, and would not have the jurisdiction to declare it unenforceable against a respondent, on grounds of the Association's failure to act legally by adopting it.<sup>57</sup>
155. We cannot uphold this interpretation.
156. The Hearing Panel has the necessary jurisdiction to rule on any matter relating to the execution of the Contract between the Association and the Regulated Persons, in particular the enforcement of the rules that govern the conduct of an Approved Person.
157. Once the Authority has exercised its discretion and approved a rule of the Association, it must be assumed that the Authority has satisfied itself that the rule:
1. adequately serves the purposes for which its approval was required; and
  2. respects the regulator's own mission to effectively regulate the conduct of securities professionals.
158. Moreover, we have a duty to show, at minimum, the same deference that a court of justice would show this determination by a specialized regulatory organization whose view in the matter would initially stand as the authority in the matter (*Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission* (2001) 199 D.L.R. (4th) 577 (CSC); *Pezim v. British Columbia (Superintendent of Brokers)*, 1994 2 S.C.R. 557).
159. For this reason, in the absence of valid grounds to the contrary, proof of which is the responsibility of the person making the allegation, a rule of the Association that has been either expressly or tacitly approved by the Authority must be presumed valid and enforceable against the Regulated Persons by virtue of the contract that binds them, pursuant to its terms.
160. This presumption becomes all the more compelling in that it appears, as in the case of the Recognition Decision, that the discretion to grant such approval was knowingly exercised in the public interest (s. 67 LAMF) and in a *reasonable* manner, according to the meaning that would be given this term in a judicial review context (*Dunsmuir v. New Brunswick* (2008) SCC 9; 1 S.C.R. 190; 291 D.L.R. (4th) 577; *Investment Dealers Association of Canada v. Dass* (2008) BCCA 413).
161. However, if it is established that, in order to commence disciplinary proceedings before us, the Association relied on a rule whose adoption led it to violate its own contractual obligation to act legally, the Respondent in the matter may have this rule declared unenforceable in his regard, and will be entitled to have these proceedings dismissed on a motion for dismissal.

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<sup>57</sup> See stenographic notes, n.s., 8 sept. 2008, p. 43 and infra, par. 200 to 202.

162. The Hearing Panel shall then render the appropriate decisions, notably to prevent this rule from being invoked unlawfully before it in order to seek disciplinary penalties against an Approved Person or a former Approved Person.

### **6.3 Terms and conditions of the obligation to act legally**

163. In our opinion, the Association's obligation to act legally may be stated in two ways:

1. first, as an obligation of regulatory deference to the actions and decisions of the recognizing regulator which now has oversight of the Association;
2. secondly, as an obligation of compliance with the enactment that enables the Association to act in the capacity of an SRO and a delegate of the Authority.

164. The contract between the Association and its Regulated Persons implicitly includes the obligation for the Association to apply rules to the Approved Persons. Said rules, in addition to being consistent with its vocation and its organizational documents,<sup>58</sup> also comply with the recognition conditions imposed on it by the Authority, and with the other decisions which the latter may make from time to time in the exercise of its powers. This is its "**obligation of regulatory deference**".

165. Moreover, the Association has the contractual obligation to adopt rules whose purpose and scope<sup>59</sup> comply with the legislation that governs its self-regulatory activity. This is its "**obligation of legislative compliance**".

166. Let us examine whether, as the Respondent claims, the Association failed in one or another of these obligations by adopting its Continuing Jurisdiction Rules.

#### **6.3.1 The obligation of regulatory deference**

167. In relying on its CJR to institute disciplinary proceedings in this matter, the Association, in our opinion, acted with all due deference to the actions and decisions of the Authority in its regard.

168. We have already ruled that, by virtue of section 351 LVM, section 741 ARANESF, or the Recognition Decision rendered under section 60 LAMF, depending on the era concerned, the Association had the necessary legal capacity to adopt its Continuing Jurisdiction Rules in 2001 and 2004, that these Rules were consistent with the objects stated in its Constitution, and that the Association was duly authorized to adopt them and to avail itself of them against the Respondent.

169. We have also satisfied ourselves that the Continuing Jurisdiction Rules were part of the Association's recognition conditions and that they met these conditions.

170. What's more, we have observed that the Recognition Decision, in sections 14.1 and 14.2, imposes on the Association a duty to act on a disciplinary level and, consequently, a duty to apply the CJR . Indeed, these sections state that:

[TRANSLATION]

*14.1 The IDA must take such disciplinary measures as are required in respect of its Members and Approved Persons in the event of a violation of the IDA Rules.*

*14.2 The IDA must cooperate with the AUTHORITY to ensure that the conduct of its Members and Approved Persons is in compliance with the Securities Legislation and with the obligations of a contingency fund, notably as concerns the application of norms or*

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<sup>58</sup> On this point, see *Senex c. Chambre d'Immeuble de Montréal* (1980) 2 R.C.S. 555, 567.

<sup>59</sup> Justice Forget of the Court of Appeal, in *Letellier v. The Montreal Exchange*, prec., alluded to "*au cadre et à l'esprit de la Charte de la Bourse*" [the framework and spirit of the Exchange's enabling statute] in reference to this same concept of *purpose or scope* of the Association's rules: see paragraph 17 of the ruling, «*Sur l'ultra vires de l'article 4205*» [On the *ultra vires* of Section 4205].

*standards prescribed by such a fund (the "Obligations of a Contingency Fund") and it must take appropriate disciplinary measures in regard of said Members and Approved Persons in the event of a violation of the Securities Legislation or the Obligations of a Contingency Fun.*

(emphasis added)

171. This is exactly the duty that the Association has discharged in this matter, under the conditions prescribed by the Authority.
172. From the angle of regulatory deference, the motion brought by the Respondent is therefore inadmissible.

### **6.3.2 The obligation of legislative compliance**

173. The Association has a contractual obligation with respect to its Regulated Persons, to adopt rules whose purpose and scope *comply* with securities legislation and with the *AMF Act*; and which, in other words, are not inconsistent on any important point, nor do they expressly contradict these enactments.
174. Were it otherwise, we would be recognizing the Association's right to derogate, on the basis of its regulated contract, from the application of these two laws of public order,<sup>60</sup> and even from the application of its own rules which confer on a hearing panel the jurisdiction to impose penalties for the violation, by a Regulated Person, of the application of a federal or provincial securities statute.<sup>61</sup>
175. The Association could not, therefore, under the authority of the contract with its Regulated Persons, avail itself before us of rules that cannot be established as inconsistent on some substantial point or in express contradiction of a provision of these laws, nor further seek to punish their non-observance with a disciplinary measure.
176. The Respondent presented us with a textual argument based on a comparison between section 60 LAMF and the provisions of the Ontario *Securities Act* (LVMO) which, in his opinion, are substantially the same as those found in the Québec statute.
177. He maintains that the provisions of Title III of the *AMF Act* are substantially similar to those of sections 21.1 LVMO and following, recently interpreted in *Taub v. Investment Dealers Association of Canada*,<sup>62</sup> and that we need to draw our inspiration here from the Ontario Divisional Court's reasoning in this matter.<sup>63</sup> This is his only argument.
178. He relies on the majority interpretation upheld in this ruling to argue that, where section 60 LAMF states that the Association *may not oversee or regulate the conduct of its members* without the recognition of the Authority, it must be viewed as an intention to limit the SRO powers granted the Association.
179. He cites this interpretation as an authority to argue that the regulatory powers or the rules resulting from the Association's regulatory activity could only be exercised or enforced in respect of persons who held the status of Member firms or Approved Persons at the very moment that the Association initiated this exercise or enforcement action, which was not his case when the Notice of Hearing was served on him.
180. In light of the principles outlined above, the Respondent therefore proposes the following grounds:
  - a. the CJR are inconsistent on an important point or in express contradiction of section 60 LAMF;
  - b. the Association failed in its contractual obligation to act legally by adopting them;

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<sup>60</sup> Which would be contrary to the law and, consequently, impeachable: see s. 41.4 of the *Interpretation Act* (R.S.Q., chapter I-16) and Art. 9 CCQ, and *Letellier c. Bourse de Montréal*, prec., par. 17, «*Sur la reconnaissance contractuelle du 30 mai 1976*» [On the contractual recognition of May 30, 1976].

<sup>61</sup> See By-law 20, prec., s. 33 (1)(a). If the Association failed to respect its rules, it would also be contravening its conditions for recognition: See Recognition Decision, prec., s. 22.1 (a); supra, par. 99 *et seq.*

<sup>62</sup> Prec., supra, note 11.

<sup>63</sup> See stenographic notes, n.s., 8 sept. 2008, p. 106.

- c. accordingly, the contractual commitment that he made to be bound by the CJR is non-binding; and
- d. the Association may not now avail itself of these Rules against him.

181. We have already determined that the CJR, once expressly or tacitly approved by the Authority, had to be presumed valid and binding with respect to the Respondent according to their terms, unless he could establish the existence of a valid case justifying the reversal of this presumption.

182. Now let us see if the Respondent has managed this, based either on the facts of the matter, or on a clear legal position.

### 6.3.3 *Are the CJR inconsistent with the law?*

183. The Association's Continuing Jurisdiction Rules stem from a will to ensure effective protection of the clients of investment dealers and the public in general, by maintaining the obligation of Regulated Persons to account for any conduct that contravenes the rules, for a period of five years after they have left the ranks of the Association.

184. These CJR afford the Association the advantage of being able to discharge more effectively the responsibilities and powers granted it by the regulator, in respect of persons whose misconduct is only discovered after they have voluntarily or involuntarily ceased to act as an Approved Person or a registered representative.<sup>64</sup>

185. They are also useful in establishing a disciplinary *res judicata* situation relative to a violation of the rules or a contravention of the securities legislation, which can subsequently be taken into account to assess the fitness of a former Approved Person to return to the industry and reregister as a representative.

186. From this angle, the CJR meet the self-regulation objectives stated in the Association's Constitution and its Recognition Decision. It is also evident that these objectives are consistent with the principles generally promoted by securities legislation, the *AMF Act*, and the missions they respectively confer on the Authority.<sup>65</sup>

187. The Hearing Panel might add that the existence, in the *Securities Act*, of section 153 concerning the surrender of a registrant's registration is additional confirmation that the principle of the CJR, in and of itself, is not inconsistent with the securities legislation.

188. Indeed, section 153 LVM stipulates that:

*"153. A registrant wishing to cease carrying on business shall apply to the Authority to surrender his registration.*

*The Authority may, on the conditions it determines, suspend the registration or impose conditions or restrictions on the registration during examination of the application for surrender.*

*The Authority may impose such conditions as it may determine on the surrender, and shall accept it where, in its opinion, the interests of clients and investors are sufficiently protected.*

*The Authority remains competent in respect of any acts prior to the surrender."*

(emphasis added)

189. Under the terms of section 9, par. 3, and sections 62 and 63 LAMF, certain powers and functions provided for in this section were delegated to the Association during the process leading up to its

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<sup>64</sup> On this point, see *Letellier c. Bourse de Montréal*, prec., par. 53.

<sup>65</sup> See supra, par. 73 et seq.

recognition: notably the function of receiving surrender applications from representatives and, consequently, the power to accept them and, where applicable, impose conditions on the surrender.

190. The clause in the last paragraph of section 153 LVM maintains, at the very least, the Authority's jurisdiction to exercise, in respect of a former representative, even if it accepted the representative's application to surrender his registration, all the powers that it might have exercised against said representative relative to the latter's regulated actions while he was registered.
191. We therefore see in this legislative clause a mechanism that bears a striking resemblance to that of the CJR.
192. Far from being inconsistent in the context of exercising delegated powers under section 153 LVM, the purposes and scope of the CJR are intended, rather, as regards a same representative, to maintain the Association's investigative and disciplinary jurisdiction in the same way that this section maintains the Authority's supervision and monitoring powers.
193. We are therefore a long way from inconsistency, important or otherwise, between the Continuing Jurisdiction Rules and the *AMF Act*, given the terms of the Association's Recognition Decision, and the conditions imposed thereupon by the Authority. What's more, the securities legislation itself supports this conclusion.

#### **6.3.4 Do the rules contradict the law?**

194. The burden of establishing the existence of an *express contradiction* between a rule of an SRO approved by the Authority and a provision of the law can but be onerous, given the presumption that the Authority approved the CJR in accordance with its mission, after satisfying itself that the rules respected the legislation which is its responsibility to administer.
195. The test we think is appropriate to apply here was inspired from the following passage taken from Judge Dickson's opinion in *Multiple Access v. McCutcheon* (1982) 2 S.C.R. 161, 191, which concerns the contradictory application of standards established by two authorities (in this case, the federal parliament and a provincial legislature) acting according to their respective jurisdiction:

*"In principle, there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation as where one enactment says "yes" and the other says "no"; "the same citizens are being told to do inconsistent things"; compliance with one is defiance of the other..."*
196. In other words, we must ask ourselves whether it was clearly established for the Hearing Panel that applying the rule necessarily implies defying the law, whether from the standpoint of the SRO seeking to apply it or the individual who is required to comply with it.
197. We must examine this question of express contradiction between the CJR and section 60 LAMF in chronological sequence, for a number of reasons:
  1. A substantial number of the allegations against the Respondent predate the coming into force of section 60, the provision purported to be the source of the alleged contradiction;
  2. The CJR that applied at the different times these violations are alleged to have been committed are different;
  3. The legislative provisions that allowed the adoption and application of the 2001 CJR are also different from those that applied in regard to the 2004 CJR .
198. Which is why we will first examine the situation that had prevailed since the recognition of the Authority, i.e. from the date that section 60 LAMF effectively began to apply to the Association – we will discuss the *Taub* ruling in this context – and then use the same process to examine the situation that preceded the recognition of the Association. Finally, we will determine which of the CJR, between those of 2001 and 2004, apply to the disciplinary proceedings instituted here.

A) *The situation since July 2004*

*The Taub decision*

199. The essential facts of the *Taub* decision are very similar to the facts of the matter before us. We reproduce here the description of the more relevant facts, which appeared in the OSC decision, *Re Staff of the IDA and Stephen Taub*,<sup>66</sup> rendered on April 2, 2007, and which was subsequently appealed before the Divisional Court:

*"[7] The Applicant first became a registered representative in or about June 1988. He was involved in the securities industry from 1988 to 2004.*

*[8] In 1995 and in 2001, the Applicant and his respective employers, [...] completed and signed a Uniform Application for Registration/Approval ("the Applications") prior to the Applicant commencing employment as a registered representative with each of Brant and Research. [...]*

*[13] In or about September 2004, the Applicant ceased being a registered representative and a member of the IDA. The Applicant has not been registered with the IDA since that time and has indicated that he has no intention of returning to an occupation regulated by the IDA or to be a member of the IDA.*

*[14] IDA Staff commenced disciplinary proceedings against the Applicant on October 21, 2005, alleging various breaches of the Association's by-laws and rules. [...]*

*[15] IDA Staff alleged that, from November 1998 to June 2003, the Applicant contravened IDA By-law 29.1 [...]."*

*[18] On June 8, 2006, IDA Staff served a motion record seeking an order requiring the Applicant to deliver forthwith his response in the IDA Disciplinary Proceeding because he had not complied with the consent order requiring that he file his response by a certain date.*

*[19] On June 12, 2006, the Applicant brought a motion seeking a declaration that the IDA lacked jurisdiction to proceed against him because he was no longer a member of the Association."*

200. On June 15, 2006, the Association produced its response to the motion to dismiss, and a few days later, it filed its own preliminary motion with the Hearing Panel, requesting that the latter declare itself not competent to hear Mr. Taub's motion, on grounds that it did not have the necessary jurisdiction to refuse to apply the CJR and find for the latter.<sup>67</sup>

201. Finally, on August 1, 2006, the Hearing Panel upheld the Association's motion, at the same time dismissing that of Mr. Taub. The latter petitioned the OSC to have both decisions reviewed.

202. The OSC proceeded *de novo* to review the Respondent's motion, and concurred with its dismissal. Indeed, it considered that it was no longer up to it to rule on the decision that had allowed the Association's motion.

203. In its decision, the OSC began by recalling the relevant provisions of the Ontario Securities Act, which state the following:

*"21.1 (1) The Commission may, on the application of a self-regulatory organization, recognize the self-regulatory organization if the Commission is satisfied that to do so would be in the public interest. [...]*

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<sup>66</sup> *Re Staff of the IDA and Stephen Taub*, prec., note 11.

<sup>67</sup> After consideration of the argument put forth by this motion of the Association, we have already concluded that the latter could not be upheld and that we in fact did have jurisdiction, on the grounds outlined supra, section 6.2.

(3) A recognized self-regulatory organization shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices.

(4) The Commission may, if it is satisfied to do so would be in the public interest, make any decision with respect to any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized self-regulatory organization.

**21.6** No by-law, rule, regulation, policy, procedure, interpretation or practice of a [...] recognized self-regulatory organization [...] shall contravene Ontario securities law, but a [...] recognized self-regulatory organization [...] may impose additional requirements within its jurisdiction."<sup>68</sup>

204. At the conclusion of a process that, in many respects, echoes the reasoning that we have just followed and our own conclusions in the matters of the organization of the Association, the contractual relationship between the Association and its members, and the authorization of the CJR by the Association's Constitution, the OSC expressed the opinion that:

"[58] As a recognized SRO, the IDA may adopt by-laws that are binding on the Association's members. The enactment of the IDA's constitution and By-law 20.7 [the 2004 Continuing Jurisdiction Rules] is within the jurisdiction of the Association to govern its members and is grounded in its contractual relationship with them. This power to impose additional requirements is expressly recognized in section 21.6 of the Act. In our view, section 21.6 does not limit or restrict what by-laws, rules, regulations or other regulatory requirements the IDA may adopt, provided such provisions do not contravene Ontario securities laws. In our view, By-law 20.7 does not contravene Ontario securities laws."

(interpolation added)

205. According to the Ontario regulator, section 22.1 (3) LVMO did not impose any definition or restriction on the regulatory instruments covered therein, therefore conferring on the Association all the necessary latitude to adopt Continuing Jurisdiction Rules and apply them to former members and approved persons.

206. After noting that the regulations established by the Association "*constitute part of the fabric of securities regulation in this province*", the OSC indicated that, as far as it was concerned, it would be contrary to the public order to allow Mr. Taub to evade the application of these regulations at will, by resigning from the Association.<sup>69</sup>

207. This opinion of the OSC, which we deem equally applicable in the case of a dismissal as in the resignation of a representative, concurs in essence with the writings of Justice Forget in *Letellier v. The Montreal Exchange*,<sup>70</sup> who expressed a similar viewpoint:

*"Counsel for Letellier argues that his client did not resign, but that he was deprived of his status as a result of the expulsion of B.G.O., a decision which stems from the Exchange. But if Letellier is correct in asserting that the Exchange has no jurisdiction over an ex-member, the resignation — if it is possible without the Exchange's approval — would have the same effect and this person would thus free himself from all liability.*

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<sup>68</sup> We have appended to this decision, for reference purposes, a comparative table of the provisions of section 60 of the *AMF Act*, and those of the *Ontario Securities Act*, the *Alberta Securities Act* (R.S.A. 2000, chapter S-4) and the *Saskatchewan 1988 Securities Act* (S.S. chapter 42.2, as amended) which were discussed and taken under consideration in *Taub*.

<sup>69</sup> Par. 62 of the decision.

<sup>70</sup> *Letellier v. The Montreal Exchange*, prec., par. 52 and 62.

*Without even invoking notions of protection of the public, it seems unacceptable to me that a party can free itself unilaterally from its contractual obligations."*

208. This is a viewpoint that carries all the more weight in the matter at hand, in that the contractual obligations resulting from the CJR, which the Respondent wants declared non-binding in his regard, are precisely intended to protect clients who have had dealings with a former Approved Person, as well as the general public.
209. On appeal, after determining that the crucial question it needed to ask was who the law was intending to regulate,<sup>71</sup> the Divisional Court was of the opinion that it had a duty to intervene and review the OSC decision, because the OSC's conclusion that the Association could validly regulate its former members seemed unreasonable to it. On this score, the Court applied to the facts its own interpretation of the judicial review criteria established by *Dunsmuir*.<sup>72</sup>
210. Regarding the representations made by the Association, to the effect that its jurisdiction to commence disciplinary proceedings against former members stemmed from its rules and not from the Ontario *Securities Act*, that by adopting its CJR it had not violated the provisions of the Act, and that these provisions, even if they imposed on the Association an obligation to regulate and monitor, contained no restriction as to who could be so regulated and monitored, the court expressed its disagreement:
- "[40] Recognition of a self-regulatory organization under the Act makes the organization subject to the limitations and obligations of the Act. This legislative intent is reflected in s. 21.6 of the Act which requires that by-laws of self-regulatory organizations must not contravene Ontario securities law. Regulation of "members" rather than "former members" is such a limitation."*
211. Justice Pierce, on behalf of the majority, took comfort in the fact that the securities legislation of Alberta and Saskatchewan – two of the provinces where, incidentally, the Association is recognized as an SRO and regulated by recognizing regulators similar to the Authority – was more explicit than the Ontario legislation on the question of former members, targeting them expressly for continuing jurisdiction, in terms identical to the Association's CJR.<sup>73</sup>
212. It is what led him to say in par. 44 of the decision, based on this comparison of the enactments concerned, that: *"the plain meaning of s. 21.1 (3) of the Act cannot be stretched to include the discipline of former members without doing violence to the meaning of the statute. "Members" and "former members" are not interchangeable terms. Such an interpretation of the governing statute is unreasonable."*
213. With due respect for the process that led the Ontario court to this conclusion, the Hearing Panel considers that its decision in *Taub* does not represent a valid precedent in Québec for a number of reasons, which we discuss below.
214. Some have to do with the major differences that exist between the Québec and Ontario enactments. Others are linked to the normative approach that Québec law has opted to use, which is radically distinct

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<sup>71</sup> An approach reprised by Counsel for the Respondent to suggest that it was the one to take: see stenographic notes, n.s., Sept. 8, 2008, pp 101 and 102.

<sup>72</sup> *Dunsmuir v. New Brunswick*, prec.

<sup>73</sup> See *infra*, appended to this decision, A comparative table of certain securities legislation.

We note that in *Re McBain et als v. Investment Dealers Association of Canada* (Financial Services Commission of Saskatchewan, unreported, February 6, 2006; appeal dismissed (2007) SKCA 70, it was decided that *"the IDA has no authority to regulate former members or former approved persons either under its bylaws or in contract, it has no jurisdiction to regulate MacBain and Neufeld. Accordingly their appeals are allowed and the stays of the disciplinary proceedings against them are granted"*, based on *Chalmers v. Toronto Stock Exchange* (1989), 70 OR. (2nd) 532, a ruling whose relevance in Québec is somewhat peripheral because of the jurisprudence established by the Québec Court of Appeal in *Letellier v. The Montréal Exchange*, prec. It is therefore appropriate, according to the Hearing Panel, that *Chalmers* was not argued before it, by either party.

from that followed by the Ontario lawmakers, not to mention the lawmakers of Alberta and Saskatchewan.

215. Before moving on to the discussion of these issues, it is appropriate to review the principles that must be followed in our interpretation of the provisions of the *AMF Act*.

*The preferred interpretation approach*

216. The *Act respecting the Autorité des marchés financiers* is intended, notably, to protect consumers against unethical, abusive or fraudulent practices and give individuals and enterprises access to various dispute resolution mechanisms (s. 8 (5°) LAMF).
217. The Act ensures that the role of a securities SRO to regulate and supervise the conduct of its regulated persons is subject to a recognition requirement and, subsequently, to continuous supervision by the Authority.
218. Read according to this scheme and the overall provisions of Title III of the Act, section 60 LAMF reflects a very clear will of the lawmaker to recognize the importance of the contribution made by the SROs to the regulation and supervision of the securities industry in Québec, where they in fact have had legislative permission to continue to operate since 1983.
219. This contribution aims to protect the SRO members and their clients, but also the efficiency of the financial system, and the public in general.
220. As for the *Securities Act*, which governs the Association's sector of activity and forms the very core of its action, it stipulates in section 276 that the mission of the Authority is:

*"1) to promote efficiency in the securities market;*

*2) to protect investors against unfair, improper or fraudulent practices;*

*3) to regulate the information that must be disclosed to security holders and to the public in respect of persons engaging in the distribution of securities and in respect of the securities issued by these persons;*

*4) to define a framework for the activities of the professionals of the securities market and organizations responsible for the operation of a stock market."*

221. Both the *AMF Act* and the *Securities Act* accordingly aim to protect the public against fraud, notably by making sure that persons who engage in financial intermediation or consulting activities, such as the Approved Persons of the Association, have integrity and behave honestly (*Gregory & Co. v. Quebec Securities Commission* (1961) S.C.R. 584, 588). The trust that thus results among investors, as well as the participants and users of the financial markets, indirectly protects the national economy (*B.C. Securities Commission v. Branch* (1995) 2 S.C.R. 3).
222. Considering their objects, these two statutes must receive such fair, large and liberal construction as will ensure their attainment and the carrying out of their provisions, according to their true intent, meaning and spirit.<sup>74</sup>
223. It is therefore this approach that will guide us in our examination of section 60 LAMF.

*Discussion of section 60 LAMF*

224. Section 60 LAMF states the following in its French and English versions:

*"60. Une personne morale, une société ou "60. A legal person, a partnership or any*

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<sup>74</sup> See *Interpretation Act* (R.S.Q., chapter I-16), s. 41.

*toute autre entité ne peut encadrer ou réglementer la conduite de ses membres ou ses participants relative à l'exercice au Québec d'une activité régie par une loi visée à l'annexe 1 que si elle est reconnue par l'Autorité à titre d'organisme d'autoréglementation, aux conditions que cette dernière détermine."*

(emphasis added)

225. A first reading of this provision shows that it is the conduct of the member within the framework of a regulated activity that is the principal criterion chosen to justify the Authority's intervention with the entity concerned. In this regard, the approach is coherent with the objective to define a framework for the activities of the professionals of the securities market, as set out in section 276 (5°) LVM.
226. This is the first point of divergence with the interpretation opted for by the majority of the Ontario Divisional Court in *Taub*.
227. In regard to Québec law, the real question to ask, in fact, is not to determine who the law applies to, as that Court did, but rather what it applies to. Indeed, the goal of the recognition mechanism that is the subject of section 60 LAMF is not to regulate persons according to their membership or not in an SRO, but rather their securities-related practices and activities, in pursuit of an objective to prevent unfair, improper or fraudulent practices and thus protect the public.<sup>75</sup>
228. Essentially, the Continuing Jurisdiction Rules apply solely to examinations, investigations and discipline relative to the misconduct of a Member of the Association or of an Approved Person acting on a Member's behalf. What's more, the conduct in question is that of the interested person while an Approved Person subject to the jurisdiction of the Association.
229. On this basis, one wonders in vain how the Association's CJR could have been perceived as *expressly contravening* the provisions of section 60 LAMF, within the meaning given this expression above.<sup>76</sup> Far from deviating from the Act, they seem to us, quite the contrary, to be entirely in keeping with its true objective.
230. A second point of divergence between the situation in Québec and that which prevails in Ontario lies in the statutory obligation to regulate its members, which section 21.1 (3) LVMO imposes on a recognized SRO.
231. Indeed, this section provides that:
- " 21.1 (3) A recognized self-regulatory organization shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices."*
- (emphasis added)
232. This obligation has no equivalent in *An Act respecting the Autorité des marchés financiers*.<sup>77</sup>

<sup>75</sup> This finding, fully justified here by the enactments, coincides in this regard with the interpretation suggested by the minority opinion of Justice Carnwath in *Taub* (prec., par. 61).

<sup>76</sup> See supra, par. 194 to 196.

<sup>77</sup> See supra, par. 224. We would, moreover, come to the same conclusion in regard to section 26 (1) of the British Columbia Securities Act, which was interpreted by the British Columbia Securities Commission in *Re Charles K. Dass and Investment Dealers Association of Canada* (2007) BCSECCOM 262, par. 38. In a judicial review context, this

233. In Québec, the contractual relationship that exists between the Association and its Regulated Persons is not completed, modified or limited by the law. Quite the contrary, considering the application of the general rules of the *Civil Code of Québec*, and notably Article 1434 CCQ, the contract formed between them has a much greater scope, and it is that contract, and not the law, that serves as the infrastructure for securities self-regulation in this province.<sup>78</sup>
234. Section 21.6 LVMO, which provides that the rules of a recognized SRO shall not contravene Ontario securities law, even though they may, within the limits of the SRO's jurisdiction, impose additional requirements, was the subject of diverse representations in the three proceedings that examined Mr. Taub's motion to dismiss. The comments that resulted seem, to us, to give this provision a meaning that deviates from the true intention of the Ontario lawmakers.
235. In the final analysis, the Divisional Court reckoned that section 21.6 imposed a restrictive interpretation on the provisions of section 21.1 (3) LVMO,<sup>79</sup> with the result that, in Ontario, the Association would, of necessity, solely be vested with authority to act in regard to those who are Members and Approved Persons at the time that the Association enforces a regulation or commences disciplinary proceedings against them.
236. With respect, the desired aim of section 21.6 LVMO seems, to us, to be much more to ensure the application, by the recognized SRO, under the supervision of the OSC, of rules that meet the legislative and regulatory standards that arise from Ontario securities law, so that the investor and the Ontario public benefit at all times, under the terms of these rules, from a level of protection that at least equals that which the lawmakers of that province consider appropriate.
237. Indeed, we have seen that the Association is a recognized SRO whose rules apply in several provinces and must therefore be approved by as many recognizing regulators – among them, the Autorité des marchés financiers in Québec – in the application of their respective securities legislation. In this context, section 1.6 LVMO ensures that, to maintain its recognition in Ontario, the Association must only impose on its Regulated Persons across Canada rules that are consistent with those that the Ontario lawmakers choose to enact for the benefit of the Ontarians in their province.
238. Here again, section 21.6 LVMO has no equivalent in the *Act respecting the Autorité des marchés financiers*.
239. It follows that, in Québec, we do not, as the court ruled in Ontario in *Taub*, have specific legislative instructions that influence the application of the general principles of interpretation which, according to Québec law and the established jurisprudence, must guide us here.
240. Consequently, from the strict standpoint of statutory interpretation, the decision rendered in *Taub* by the Ontario Divisional Court cannot, in Québec, have the value of precedent credited it by the Respondent in support of his motion's conclusions.

*Comparison of approaches in Ontario and Québec*

241. The structure for legislative intervention that enables SROs to be subject to supervision is fundamentally different in Québec, if compared with that of Ontario.
242. Sections 21.1 to 21.7 LVMO clearly stipulate an obligation of recognition for SROs, as does section 60 LAMF, but they attach certain terms and conditions that, at times, affect the member activities regulation function and, at times, the legality of such regulation, with all of the interpretation issues that this may imply.

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interpretation was judged acceptable by the Court of Appeal of British Columbia in *Investment Dealers Association of Canada v. Dass* (2008) BCCA 413.

<sup>78</sup> See supra, sections 5.2 and 6.2.

<sup>79</sup> See supra, par. 210 *et seq.*

243. Thus, as we have already seen, the obligation of the recognized SRO to regulate its members and their representatives is contained directly in the law, in section 21.1 (3) LVMO.
244. The Québec approach is substantially different. The will to serve the public with a securities regulation framework that can evolve with trade practices while remaining relevant and effective has resulted in the Authority being awarded broad discretionary powers to attach any conditions it deems appropriate to its SRO recognition process.
245. The concept of supervision and regulation of the conduct of a member of an SRO, in the context in which it is used in section 60 LAMF, is not limited by it. It becomes much more of a general objective, a non-restrictive framework for intervention that can be modulated according to the recognition conditions set by the Authority, as opposed to a threshold beyond which the Authority and the SRO would lose all jurisdiction if the member left the latter's ranks.
246. In Québec, the SRO can legally adopt and apply to its members any rules it deems appropriate, provided that it has the legal capacity to do so, that these rules are consistent with the objective of regulating and supervising said members (in the sense of *necessary or useful to this end*), that they meet the requirements of the law and its conditions for recognition and, finally, that they be approved by the Authority.
247. This broad and liberal construction, consistent with the *Interpretation Act*, agrees with the provisions of *An Act respecting the Autorité des marchés financiers* which, in section 70 notably, requires the Authority to review and approve all aspects of the recognition candidate's constituting documents, its governance, and its operating rules, before granting it recognition.
248. This statute ensures that it is the Authority itself that, within the framework of the recognition process, shall determine whether, yes or no, the rules submitted by the SRO *regulate and supervise the conduct of its members* in an appropriate manner. It can even, by using its discretion to set conditions for recognition by virtue of section 60 LAMF or its other statutory supervision powers,<sup>80</sup> add or complete matters that must be the subject of rules within the Association, and the enforcement of which it considers necessary in order for the members of the Association to be adequately regulated and supervised from the standpoint of protecting the public.
249. As a result, in Québec, the regulatory framework governing the recognized SRO, in most of the important aspects of its governance, its operation and its disciplinary function, is defined by decision of the Authority, rather than by express statutory obligations, as in Ontario.<sup>81</sup>
250. This is why, here in Québec, to return to the discussion of the obligation to regulate its members that is imposed on the Association by section 21.1 (3) LVMO, the corresponding obligation is found in the Authority's recognition decision,<sup>82</sup> not in the AMF Act.
251. For these reasons, we are of the opinion that section 60 LAMF is not a generator of authority, nor does it set limits on the capacity or jurisdiction of the Association. It simply makes the accomplishment of its mission to regulate and supervise its members in the conduct of an activity governed by the *Securities Act* conditional on obtaining permission and meeting the conditions set by Authority. From this standpoint, there is still no possible parallel with the legislative interpretation upheld in *Taub*.
252. Consequently, the concept of *member regulation and supervision activity* found in section 60 LAMF corresponds, in our opinion, to the body of activities that an SRO's constituting documents authorize it

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<sup>80</sup> Including the power to approve or suspend, from time to time, the application of a rule (ss. 74-76, AMF Act) or to order the amendment of a constituting document (s. 77, AMF Act).

<sup>81</sup> This regulatory framework covers, for example, governance, the decision-making process, operations, the regulatory role, enforcement and, of course, the disciplinary mechanism that section 70 LAMF requires the SRO to put in place before it can be recognized.

<sup>82</sup> See *supra*, par. 99.

to carry out, pursuant to the terms and conditions which the Authority has approved or prescribed by decision, and does not have the restrictive meaning that the Respondent wishes to give it.

253. Also, given our conclusions that the CJR are part of the conditions for recognition of the Association, established by virtue of section 60 LAMF, we consider that there is no express contradiction between the Rules, this section of the Act, and the other provisions of Title III of the *Act respecting the Autorité des marchés financiers*.

254. The motion brought by the Respondent, from the angle of a possible express contradiction of the law by the CJR, therefore cannot succeed.

#### **B) The Situation Prior to July 2004**

255. The textual argument raised by the Respondent to move our Hearing Panel to decline jurisdiction is no more admissible concerning the alleged violations that occurred prior to the Association's recognition.

256. On the one hand, section 60 LAMF, which forms the basis of this argument, and which, according to the Respondent, justifies the application in Québec of the thesis set forth in *Taub*, did not govern the Association at the material time.

257. On the other hand, the adoption and application of the 2001 Continuing Jurisdiction Rules had never been subject to any requirement of Title VI of the *Securities Act*, or even of Title III of *An Act respecting the Agence nationale d'encadrement du secteur financier* before the Association obtained its recognition in Québec.

258. On the contrary, this application of the CJR was expressly authorized by the transitional provisions which we discussed earlier.<sup>83</sup>

259. Furthermore, until the Association was recognized as an SRO and became subject to the application of Title III of *An Act respecting the Agence nationale d'encadrement du secteur financier*, the Continuing Jurisdiction Rules were authorized by its Constitution, their adoption and application were permitted by law, and they were enforceable against the Respondent, under the terms of the regulated Contract that bound him to the Association.

260. The Association could therefore validly avail itself of them to bring disciplinary proceedings against the Respondent before our Hearing Panel, for alleged violations that occurred before July 13, 2004, the date of the Recognition Decision.

261. It did this, notably by applying Continuing Jurisdiction Rules which, at the time the Respondent entered into his Contract with the Association to become a registered representative and Approved Person in 2001, required those who ceased to have this status to account for their conduct before the Association's disciplinary forum for an additional period of five years after termination of this status. This obligation did not change under the CJR of 2004.

262. For all these reasons, the Hearing Panel is of the opinion that the proceedings commenced in this matter, for alleged violations that predate July 13, 2004, which is the date when Title III of *An Act respecting the Agence nationale d'encadrement du secteur financier* began to apply to the Association, were done so validly, pursuant to sections 351 LVM and 741 ARANESF, and that the arguments based on the *Taub* decision invoked by the Respondent in support of his motion have no application in this case.

#### **6.4 The applicable CJR**

263. The essence of the Continuing Jurisdiction Rules is to set a time limit during which the Association and the Hearing Panel maintain their existing jurisdiction to investigate, to institute or hear disciplinary remedies against investment dealers and their representatives, the exercise of which is based on a cause

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<sup>83</sup> See supra, section 5.4.2.

of action (the misconduct or violation) that arose before they lost their status as Members or Approved Persons of the Association.

264. These Rules are therefore intended solely to govern the manner in which existing rights are exercised and, from this standpoint, by analogy with a legislative measure, we believe that they merely establish a rule of pure procedure (Côté, *Interprétation des lois*, 3rd ed., 1999, p. 233), by permitting the exercise, before the expiry of the five-year time limit, of an investigative or disciplinary jurisdiction that was born before this time limit began to run.
265. The authorities teach us that, in this case, the rule of pure procedure has a retrospective effect, and governs all past situations the moment it takes effect (Pigeon, *Rédaction et interprétation des lois*, p. 46). This includes, in the matter before us, the situations that arose throughout the material period, even those that preceded the coming into force of the 2004 Continuing Jurisdiction Rules.
266. By virtue of his Contract with the Association, the Respondent acknowledged, as of 2001, the disciplinary jurisdiction of the Association and its Hearing Panel. He agreed to be subject to it for the full term of his approval by the Association, and for an additional period of five years, under the terms and conditions of the 2001 Continuing Jurisdiction Rules, as might be amended from time to time.
267. Our earlier comparison of the wording of the 2001 and 2004 CJR<sup>84</sup> demonstrates that these Rules have not changed substantively between the moment the Respondent became an Approved Person and the moment he ceased to have that status, nor even when the Association instituted these proceedings on April 7, 2008.
268. Even though amendments were made in 2004, the fact remains that these did not fundamentally alter the rights and obligations of the parties as regards investigations and the commencement of disciplinary proceedings, under the terms of the Contract which they initially entered into when the Respondent received his approval in 2001.
269. This finding is sufficient, in our opinion, to conclude that the Association could validly avail itself of the 2004 CJR and commence disciplinary proceedings against the Respondent for violations of LVM and regulations, which he allegedly committed throughout the material period, and even at a time when it was the 2001 CJR that applied. By the same token, the Hearing Panel itself had jurisdiction to be seized of and entertain these proceedings in accordance with the applicable rules of the Association and the law.
270. Consequently, from the angle of the Association's obligation of legislative compliance, the motion brought by the Respondent is dismissed.

### **6.5 Conclusions regarding the obligation to act legally**

271. In response to the second question in dispute, which we identified above, we conclude that the *Taub* decision, assuming that it is well-founded in Ontario law, is inapplicable in Québec and cannot be cited as an authority, and that the CJR adopted by the Association in pursuit of the mission that it set for itself in its Constitution are consistent with the securities legislation and *An Act respecting the Autorité des marchés financiers*, and are enforceable against the Respondent at the material time of the proceedings instituted against him in this matter.

## **VII. DOES IIROC HAVE JURISDICTION?**

272. The third and final question in dispute now invites the Hearing Panel to examine whether IIROC has the power to exercise before it the jurisdiction of the Association, which it replaced, so as to be able to continue the disciplinary proceedings commenced against the Respondent in this matter.

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<sup>84</sup> *Supra*, par. 56 *et seq.*

273. IIROC was incorporated on March 17, 2008, by virtue of Part II of the *Canada Corporations Act*, (R.S.C. 1970, c. C-32). It has legal personality and, in Québec, has the capacity to carry out the objects of the company, conferred on it by the Act and by the provisions of the *Civil Code of Québec*.
274. On May 2, 2008, IIROC was recognized as an SRO under Title III of *An Act respecting the Autorité des marchés financiers*.<sup>85</sup> As such, it monitors and supervises, in Québec, the conduct of the investment dealers who are its members, and that of their Approved Persons.
275. Effective June 1, 2008, it was authorized by the Authority to continue the person of the Association in accordance with transitional conditions determined by a rule adopted to this end, the French version of which was approved by the Authority on May 29, 2008:<sup>86</sup> *Règle transitoire No 1 adoptée conformément à l'article 1 du Statut 13 de la Société* [Transition Rule No. 1 Made Pursuant to By-Law 13.1 of the Corporation] ("**Transition Rule No. 1**").
276. Transition Rule No. 1 aims to ensure that the self-regulatory activities previously carried out by the IDA are taken over by IIROC in accordance with its Dealer Member Rules and that it is continued as before, in the same manner and under the same conditions, with respect to the Dealer Members and Approved Persons (Transition Rule No. 1.2.1.)
277. It clearly establishes the will to maintain the jurisdiction acquired by the Association over situations prior to June 1, 2008, including those that are at the origin of these disciplinary proceedings.
278. As for exercising this jurisdiction, IIROC took over this aspect effective June 1, under the terms of section 1.9 (1)(a) of the *Hearing Committee and Hearing Panels Rule*, as set out in Schedule C.1 of Transition Rule No 1. This rule provides that:

**"1.9. Enforcement Proceedings**

*(1) Any Enforcement Proceeding commenced by the IDA IDA [...] in accordance with their respective rules prior to June 1, 2008:*

*(a) in respect of which a hearing panel has been appointed, shall be continued by the Corporation on behalf of the IDA [...], as applicable, and shall proceed in accordance with the by-laws, decisions, directions, policies, regulations, rules, rulings and practice and procedure of the IDA [...], as applicable, in effect and applicable to such Enforcement Proceeding at the time it was commenced;"*

279. This is precisely the case here.
280. Consequently, IIROC is validly authorized to take over the proceeding in this matter and to exercise the jurisdiction acquired by the Association, in accordance with the latter's rules as applicable from time to time for the period contemplated by these proceedings.

**VIII. DECISION**

281. **WHEREAS** Respondent is brought before this Hearing Panel for a disciplinary hearing pursuant to Part 10 of By-law 20 of the Association, wherein IIROC alleges that, between March 2001 and February 2007 (the material time), Respondent committed several violations of the *Québec Securities Act* and the Association rules;

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<sup>85</sup> *Reconnaissance de l'Organisme canadien de réglementation du commerce des valeurs mobilières à titre d'organisme d'autorégulation en vertu de la Loi sur l'Autorité des marchés financiers*, L.R.Q., c. A-33.2, Décision N° 2008-PGG-0126, Book of authorities, CA-P volume I, tab 6.

<sup>86</sup> Decision 2008-OAR-018, *Ajout de règles et approbation de modifications à la version anglaise de la Règle transitoire N-1*.

282. **WHEREAS** at the material time, Respondent was registered as an investment representative, was granted the status of Approved Person by the Association and, in this capacity, acted on behalf of certain of its member dealers;
283. **WHEREAS** he ceased to be an Approved Person of the Association more than 14 months before he was served with the Notice of Hearing on April 7, 2008;
284. **WHEREAS** during the material time, the Association adopted or applied Continuing Jurisdiction Rules (CJR) that permit it to exercise its powers in the matter of inspections, investigations and disciplinary proceedings relative to the conduct of an Approved Person, up to five (5) years after the latter has ceased to be an Approved Person;
285. **WHEREAS** the Association has availed itself of these Rules to commence disciplinary proceedings against the Respondent in this matter;
286. **WHEREAS** Respondent filed a motion (the motion) by which he requests that these proceedings be dismissed and that our Hearing Panel declare itself without jurisdiction to entertain the matter;
287. **WHEREAS** in support of his motion, Respondent invokes that in adopting its CJR, the Association exceeded the powers granted it under section 60 of *An Act respecting the Autorité des marchés financiers* (“LAMF”) to monitor or supervise the conduct of its members, and not its former members;
288. **WHEREAS** as a former Approved Person of the Association, Respondent argues that these CJR are without effect against him, and that they are unenforceable in his regard;
289. **WHEREAS** Respondent is relying on the interpretation set down in *Taub v. Investment Dealers Association of Canada* (2008) CANLII 35707 (*Taub*) to argue that where the text of section 60 LAMF provides that the Association may only monitor or supervise the conduct of its members, it can no longer do so in respect of those who have ceased to have this status;
290. **WHEREAS** IIROC is challenging this motion and requesting its dismissal;
291. **WHEREAS** in order to be registered as a representative and obtain Association approval, Respondent signed under oath and delivered to the Association a *Uniform Application for Registration/Approval for individuals* that was substantially similar to Form 3 prescribed by the *Securities Regulation*;
292. **WHEREAS** on this form, Respondent made a commitment to respect the Association rules, as may be amended from time to time ;
293. **WHEREAS** when Respondent presented this duly completed form to the Association and the latter accepted it, thereby granting him the status of Approved Person, a valid Contract (the Contract) was concluded between the Respondent and the Association and, in some respects, between the Respondent and the Members and Approved Persons of the Association (the Regulated Persons);
294. **WHEREAS** the capacity to regulate its Regulated Persons granted the Association by its Constitution, as well as the specialized jurisdiction of its Hearing Panel, find their source in the contract entered into by all of the Association members, and by each of them, for purposes of contractually establishing the existence of said Association and Hearing Panel, and binding themselves to their rules and decisions, and agreeing to act in accordance therewith;
295. **WHEREAS** by virtue of the contractual tie that links it with its Regulated Persons, the Association had the necessary legal capacity to avail itself of its 2001 and 2004 Continuing Jurisdiction Rules against the Respondent, a former Approved Person at the material time;
296. **WHEREAS** the Association's Constitution provides that its objects are, notably, to enact rules for the purpose of disciplining former Approved Persons of its member dealers and, under the terms of a process established to this end, to impose penalties on them for conduct or matters arising during the time such persons were approved in respect of a Member;

297. **WHEREAS** the Association's Continuing Jurisdiction Rules and procedures for their application are therefore consistent with the objects that the Association has set itself to carry out as its mission;
298. **WHEREAS** the Association is a securities self-regulatory organization (SRO), and was recognized in this capacity on July 13, 2004, in a decision of the Authority, by virtue of Title III of *An Act respecting the Agence nationale d'encadrement du secteur financier* (ARANESF), which subsequently became *An Act respecting the Autorité des marchés financiers*;
299. **WHEREAS** effective that date, the Association's Continuing Jurisdiction Rules became part of its conditions for recognition, as determined by virtue of section 60 LAMF, and the Association was legally authorized to apply these CJR in Québec;
300. **WHEREAS** prior to this date, effective January 19, 1983, the Association was specifically authorized, by section 351 LVM and section 741 ARANESF, to carry on its activities in Québec and fulfill its general mission to supervise its Regulated Persons;
301. **WHEREAS** during the material time ending with its recognition as an SRO, the Association had full authority and power, in accordance with its Constitution, to adopt and apply its 2001 Continuing Jurisdiction Rules to its Approved Persons, based on the latter's contractual commitment to submit to their application;
302. **WHEREAS** the Association had sufficient authority to validly adopt its CJR, and held the required authorizations to apply them in Québec throughout the material period;
303. **WHEREAS** article 1434 of the *Civil Code of Québec* applies to the Contract concluded between the Association and the Respondent, when this Contract or the Association's rules are silent on a given point;
304. **WHEREAS** this article ensures that all provisions that, by usage, equity, or law, are implicitly part of the Contract shall be deemed to be included, which is notably the case with the Continuing Jurisdiction Rules;
305. **WHEREAS** it is implicit that the Contract imposes on the Association, for the benefit of the Regulated Persons and, notably, the Respondent, an obligation to act in accordance with the law;
306. **WHEREAS** in its Decision of Recognition of the Association as an SRO, the Authority deemed all of the rules applied at the time by the Association, including the Continuing Jurisdiction Rules, to have met all of the prerequisites of *An Act respecting the Agence nationale d'encadrement du secteur financier* (which became the AMF Act (LAMF));
307. **WHEREAS** an Association rule that has, like the CJR, been either expressly or tacitly approved by the Authority must be presumed valid and binding on the Regulated Persons, by virtue of the Contract that binds them and in accordance with its terms and conditions;
308. **WHEREAS** in this matter, the presumption of compliance is all the more compelling in that, in the context of the Recognition Decision, the Authority's discretion to approve the CJR appears to have been knowingly exercised in the public interest and in a reasonable manner;
309. **WHEREAS** this presumption is not absolute, and may be reversed for a valid reason, proof of which shall lie upon the person making the allegations;
310. **WHEREAS** the Respondent has the right to apply, by motion, to the Hearing Panel to have the disciplinary proceedings instituted in this matter dismissed, on grounds that the CJR are unenforceable against him because they were adopted, or were applied against him, in violation of the Association's contractual obligation to act legally;
311. **WHEREAS** in order for his motion to succeed, the Respondent must demonstrate, based on the facts alleged in the Notice of Hearing and the evidence filed in support thereof, and given a clear and easily

defined position under the law, that his *prima facie* right is sufficiently clear to reverse the presumption of compliance of the CJR;

312. **WHEREAS** an IIROC Hearing Panel has the necessary jurisdiction to rule on any disciplinary matter involving the enforcement of its rules in respect of an Approved Person and, notably, to hear and rule on the Respondent's motion;
313. **WHEREAS** the Association's obligation to act legally translates first as an obligation of regulatory deference to the acts and decisions of the recognizing regulator that has oversight of the Association;
314. **WHEREAS** in applying its Continuing Jurisdiction Rules to institute disciplinary proceedings in the present matter, the Association acquitted itself of this obligation, for it was acting in complete deference to the acts and decisions of the Authority in its regard;
315. **WHEREAS** the Association's obligation to act legally also translates into an obligation of compliance with the enactment that permits it to act in the capacity of an SRO and a delegate of the powers of the Authority;
316. **WHEREAS** this obligation of legislative compliance means that the Association may not, under the authority of the contract with its Regulated Persons, avail itself before a hearing panel of rules that can be established as inconsistent on some material point, or in express contradiction to a provision of the *Securities Act* or *An Act respecting the Autorité des marchés financiers*, both of which are public policy statutes, and that the Association may not further punish the non-observance of such rules with a disciplinary measure;
317. **WHEREAS** under the terms of the Association's Recognition Decision and the conditions thus imposed by the Authority, there is no incompatibility between the Continuing Jurisdiction Rules and these statutes, a conclusion that is moreover supported by the existence of a continuing jurisdiction clause in section 153 LVM;
318. **WHEREAS** to establish that there is an express contradiction between the CJR and these statutes, the Respondent must demonstrate to the Hearing Panel that the application of these Rules necessarily involves breaking the law, whether from the standpoint of the Association which is seeking to enforce them or of the Regulated Person who is forced to comply with them;
319. **WHEREAS** the record of this matter, as constituted, reveals no express contradiction between the CJR, section 60 LAMF, and the other provisions of Title III of *An Act respecting the Autorité des marchés financiers*;
320. **WHEREAS** in this respect, the *Taub* decision does not represent a valid precedent in Québec and the Respondent's arguments based on this decision have no application in this matter;
321. **WHEREAS** in regard to the proceedings commenced against the Respondent for misconduct that occurred prior to July 13, 2004 – on which date section 60 of *An Act respecting the Agence nationale d'encadrement du secteur financier* (which subsequently became the AMF Act (LAMF)) notably became applicable to the Association – those proceedings were validly instituted by virtue of the CJR under sections 351 LVM and 741 ARANESF;
322. **WHEREAS** the Association could validly avail itself of the 2004 CJR and commence disciplinary proceedings against the Respondent for misconduct that allegedly occurred during the material period, and by the same token, the Hearing Panel had the necessary jurisdiction to be seized of and entertain these proceedings in accordance with the applicable legislation and rules of the Association, and that the Hearing Panel still has jurisdiction to continue this hearing;
323. **WHEREAS** IIROC is validly authorized to continue this matter and to exercise the jurisdiction acquired by the Association, in accordance with the latter's rules as they were applicable from time to time during the material period;

324. **WHEREAS** Respondent has not demonstrated to the Hearing Panel a *prima facie* right to have these disciplinary proceedings dismissed or justifying that it decline jurisdiction to entertain and rule on these proceedings.

325. **CONSEQUENTLY**, *the Committee* :

**DISMISSES** the motion;

**CONFIRMS** that the Association had the jurisdiction to commence disciplinary proceedings against the Respondent in this matter and that the Hearing Panel had the jurisdiction to hear the matter;

**CONFIRMS** that IIROC has the necessary jurisdiction to take up the matter and continue these proceedings, and that the Hearing Panel has the jurisdiction to continue to hear and decide this matter;

**REQUESTS** that the Hearing Coordinator convene a Set Date Hearing for proof and hearing, as soon as counsel can be heard.

Montréal, April 7, 2009.

**Jean Martel**, Chair

**Guy L. Jolicoeur**, Panel Member

**Yves Julien**, Panel Member

\* \* \* \* \*

## APPENDIX

### COMPARISON OF THE AMF ACT (LAMF) WITH THE PROVISIONS CONCERNING SROs DISCUSSED IN TAUB

<u>LAMF</u>	<u>Ontario Securities Act</u>	<u>Alberta Securities Act</u>	<u>Sask. Securities Act, 1988</u>
<p>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.</p>	<p>21.1 (1) The Commission may, on the application of a self-regulatory organization, recognize the self-regulatory organization if the Commission is satisfied that to do so would be in the public interest.</p> <p>21.1 (2) A recognition under this section shall be made in writing and shall be subject to such terms and conditions as the Commission may impose.</p>	<p>64 (1) The Commission may, on the application of a self-regulatory organization, recognize the self-regulatory organization if the Commission considers that it would not be prejudicial to the public interest to do so.</p> <p>64 (2) The recognition of a self-regulatory organization under this section shall be made in writing and is subject to any terms and conditions that the Commission may impose.</p>	<p>21(2) On the application of a person or company, the Commission may, in writing, recognize the applicant as a self-regulatory organization where it is satisfied that:</p> <p>(a) to do so would be in the public interest; and</p> <p>(b) the applicant has satisfied or can satisfy all conditions with respect to self-regulatory organizations prescribed in the regulations and by the Commission. [...]</p> <p>(4) The Commission may impose any terms and conditions on the recognition of a self-regulatory organization that it considers appropriate.</p>
<p>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.</p>	<p>21.1 (3) A recognized self-regulatory organization shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices.</p>	<p>64 (4) A recognized self-regulatory organization shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with the bylaws, rules, regulations, policies, [...] of the self-regulatory organization.</p>	<p>21 (5) A self-regulatory organization shall, subject to this Act, the regulations and any decision made by the Commission, regulate the standards and business conduct of its members.</p>

[no equivalent in Québec]	21.6 No by-law, rule, regulation, policy, procedure, interpretation or practice of a [...] recognized self-regulatory organization [...] shall contravene Ontario securities law, but a [...] recognized self-regulatory organization [...] may impose additional requirements within its jurisdiction.	[no equivalent in Alberta]	[no equivalent in Saskatchewan]
[no equivalent in Québec]	[no equivalent in Ontario]	64 (5) The authority of a self-regulatory organization to regulate the operations and the standards of practice and business conduct of its members and their representatives under subsection (4) extends to (a) any former member, (b) any former representative of a member, and (c) any former representative of a former member, with respect to that person's operations and conduct while a member of the self-regulatory organization or a representative of a member [...].	21 (5.1) A self-regulatory organization may commence proceedings to regulate the standards and business conduct of a person [...] with respect to that person's [...] operations and conduct while the person [...] was a [...] representative of a member of the self-regulatory organization pursuant to subsection (5) within a period of two years after the date that: [...]. (b) in the case of an individual who was a representative, the individual ceased to be a representative of a member.

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