

## Re Tardif

IN THE MATTER OF:

THE RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF  
CANADA

AND

YVES TARDIF

2009 IIROC 32  
(1048-OCT-05.6)

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Québec District Council)  
Heard: September 15, 2008

Decision: July 7, 2009  
(88 paras.)

### Hearing Panel:

Jean Martel, Chair  
Guy L. Jolicoeur, Member  
Gilles Archambault, Member

### Appearances:

Caroline Champagne and Mathieu Cardinal, Enforcement Counsel — IIROC, Counsel for the Plaintiff  
Robert Brunet, Brunet & Brunet, Counsel for the Respondent

## DECISION ON A MOTION TO DISMISS AND DECLINATORY EXCEPTION FOR LACK OF JURISDICTION

### I. THE PROCEEDINGS

¶ 1 Petitioner-Respondent appears before us in connection with a disciplinary hearing under Part 10 of By-Law 20 of the Investment Dealers Association of Canada (**Association**).

¶ 2 The Notice of Hearing, which was served on the Respondent on March 11, 2008, alleges violations (**Alleged Violations**) to the rules, regulations and standards adopted by the Association to govern the conduct of the “Approved Persons”<sup>1</sup> of its Dealer Members (**Rules**).

¶ 3 The Alleged Violations are said to have occurred between March 8, 2004 and December 1, 2005 (**Relevant Period**), while the Respondent was in the employ of iForum Securities Inc. (**iForum**).

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<sup>1</sup>. An “Approved Person” in this context is a partner, director, officer, employee or agent of a dealer who has been approved by the Association to perform any function required under its rules: IDA By-Law No. 1, *Interpretation and Effect*, s.1

¶ 4 Even though the Respondent had not been an Approved Person for some time (about 27 months) at the time the Notice of Hearing was served on him, the Association invoked its continuing jurisdiction rules (**Continuing Jurisdiction Rules**)<sup>2</sup> to initiate these proceedings and cause this Panel to hear the matter and rule thereon.

¶ 5 On September 5, 2008, Counsel for the Respondent served the Investment Industry Regulatory Organization of Canada (**IIROC**), which assumed the self-regulatory activities of the Association as of June 1, 2008,<sup>3</sup> with a motion to dismiss alleging *inter alia* that the Plaintiff lacked jurisdiction to institute the proceedings before us.

¶ 6 This motion petitions the Hearing Panel to make the following findings:

“[...] *FIND that IIROC lacks the necessary jurisdiction and authority to exercise any investigative and disciplinary powers in respect of Mr Yves Tardif, who is a non-Member and non-registered representative;*

*ORDER IIROC immediately to discontinue all proceedings initiated against Mr Yves Tardif;*

*DECLARE that IIROC lacks the jurisdiction and the authority to institute proceedings against non-Member and non-registered representatives [...].” [TRANSLATION]*

¶ 7 On September 12, 2008, Counsel for the Plaintiff filed a response contesting the motion to dismiss and calling for a dismissal thereof.

¶ 8 At the hearing on September 15<sup>th</sup>, the parties submitted their authorities and presented their arguments, and the motion was taken under advisement.

## **II. THE FACTS**

¶ 9 During the Relevant Period, the Respondent was registered as a securities representative with the Quebec Securities Commission (which became the *Autorité des marchés financiers* (**AMF**) on February 1, 2004) and was approved by the Association to act for iForum, a Member firm of the Association.

¶ 10 To secure his registration and approval, the Respondent submitted a *Standard Application for Registration or for Certification of Natural Persons* (**Certification Application**) duly completed, signed and sworn by him, substantially in the form of Form 3 then prescribed by the *Securities Regulation* (R.R.Q., chapter V-1.1, r. 1).

¶ 11 At the time, Form 3 contained the following statements and undertakings of the applicant for registration or certification and of the brokerage firm for which he would be called upon to carry on his activities:

“ [...] *We acknowledge that we are familiar with the by-laws, rules and regulations of the self-regulatory agencies mentioned in Question 4. We agree to comply with them and we commit ourselves to remain informed of any amendments to them.*

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<sup>2</sup> By-Law 20, *Association Hearing Processes*, Part 4, s. 7. These rules were adopted by the Association on October 9, 2003 and made public in draft form by its Recognition Regulators on May 14, 2004: see OSC Bulletin (2004) 27 OSCB 4813. They came into force on October 1, 2004: see *Association Hearing Processes -Amendments to By-law 20, amendments to corollary By-laws and establishment of Rules of Practice and Procedure*, IDA Bulletin No. 3325, September 2, 2004; and *Association Hearing Processes -Amendments to By-law 20*, IDA Bulletin No. 3330, September 20, 2004.

<sup>3</sup> For the sake of conciseness, the Hearing Panel has 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 so requires, particularly 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.

*We acknowledge the jurisdiction of those bodies and the power to suspend or withdraw the rights conferred by registration. [...] “*

¶ 12 Once his Certification Application was received, the Respondent enjoyed the privileges and advantages that came with the status of Approved Person of the Association throughout the Relevant Period.

¶ 13 On or about November 24, 2005, the Respondent was informed that the Association was initiating an investigation into his activities at iForum.

¶ 14 On December 1, 2005, iForum was stripped of its status as a Member of the Association and ceased to enjoy the privileges related thereto.<sup>4</sup> The Respondent ceased to be employed by the corporation and terminated his activities as a registered representative.

### **III. ARGUMENTS OF THE PARTIES**

#### **3.1 Respondent’s Position**

¶ 15 In support of his motion, the Respondent argues that the Plaintiff was granted its status as a self-regulatory organization (SRO) under *An Act respecting the Autorité des marchés financiers (AMF Act)*.

¶ 16 The Respondent argues that ss. 59 and 60 AMF Act are the provisions under which the AMF is permitted to recognize an SRO for the purpose of authorizing it to supervise an activity governed by a statute administered by the AMF and exercise its powers to this end.

¶ 17 The Respondent alleges that, under s. 60 AMF Act, the scope of the powers that a recognized SRO may exercise is restricted to persons who are members or participants thereof (and, by extension, to the registered representatives or Approved Persons through whom such persons act), and not to persons such as the Respondent who no longer have this status.

¶ 18 The Respondent relies on *Taub v. Investment Dealers Association of Canada (Taub)*,<sup>5</sup> in which an Ontario court held that s. 21.1 of the Ontario *Securities Act (OSA)* denied the Association the power to regulate and commence disciplinary proceedings against a person who is then no longer registered as a representative with the Ontario Securities Commission, nor authorized by the Association to act for any of its Dealer Members.

¶ 19 The Respondent maintains that the same reasoning must be applied in Quebec on the ground that the AMF is precluded from recognizing an SRO as having a power which exceeds the purposes for which such recognition may be granted under s. 60 AMF Act, a provision which refers only to the power to supervise and regulate Members, not persons who have ceased to be Members.

¶ 20 The Respondent invites us to find that by adopting its Continuing Jurisdiction Rules and invoking the same to initiate proceedings against him — an individual who at the time was no longer an Approved Person — the Association exercised a power which the AMF was powerless to grant; thus it would follow, according to the Respondent, that our Panel does not have jurisdiction to proceed with this case.

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<sup>4</sup> IDA Bulletin (**Bulletin**) No. 3488 of December 7, 2005, and Rule 600, *Suspended Members*, s. 1.

<sup>5</sup> *Taub v. Investment Dealers Association of Canada* (2008) CanLII 35707 (July 15, 2008, Carnwath J. diss.; leave to appeal to Ontario Court of Appeal granted on November 6, 2008). This decision was rendered on appeal from *Re Staff of the IDA and Stephen Taub* (2007) 30 OSCB 4739, an April 2, 2007 decision by the OSC which at the time was sitting in review of a decision by an IDA Hearing Panel in *Re Stephen Taub*, IDA District Council, dated June 25, 2006. In Ontario, *Taub* was applied by *Re Van Benthien and Petriccione*, IIROC Hearing Panel (Ont.), Oct. 6, 2008.

¶ 21 The Respondent further argues that there is *lis pendens* between the disciplinary proceedings currently before this Hearing Panel and other proceedings already commenced against him before the Disciplinary Committee of the *Chambre de la sécurité financière (CSF)*<sup>6</sup> and before the Penal Division of the Court of Quebec at the time he was served with the Notice of Hearing. On this point the Respondent produced a number of complaints and statements of offence entered against him.

¶ 22 The Respondent maintains that, as a result, the jurisdiction which IIROC claims to exercise before this Panel overlaps with that exercised against him before the CSF Disciplinary Committee and the Court of Québec, that such duplication is illegal and a violation of his fundamental rights and the principles of natural justice, which must be respected, and that the exercise of such jurisdiction constitutes an abuse of process.

¶ 23 In conclusion, the Respondent urges this Panel to allow his motion to dismiss, to decline jurisdiction and to dismiss as inadmissible the disciplinary proceedings brought against him in this matter.

### 3.2 IIROC's Position

¶ 24 The Plaintiff argues that, during the Relevant Period, the Association was a private entity carrying on regulatory and supervisory activities in Canada in respect of its Dealer Members and the Approved Persons acting on their behalf (collectively referred to as "**Regulated Persons**").

¶ 25 The Plaintiff further argues - and the Respondent admits in his motion - that the relationship between the Association and the Regulated Persons is strictly contractual and stems from the Agreement which binds it to the Regulated Persons and binds the Regulated Persons to one another (**Agreement**).

¶ 26 The Plaintiff specifies that the Rules adopted by the Association (including the Continuing Jurisdiction Rules) are part of this Agreement, that the Respondent agreed to comply therewith and that he accepted the disciplinary jurisdiction of the Hearing Panel in the event of a violation of such Rules.

¶ 27 The Plaintiff submits that the adoption of the Continuing Jurisdiction Rules was validly authorized by the Constitution of the Association and that such rules flow from the exercise of the self-regulatory powers which the Association clearly has available to it.<sup>7</sup> The Constitution provides that the adoption of Rules concerning the taking of disciplinary measures and the imposition of penalties against former Approved Persons forms part of its objects.

¶ 28 IIROC asserts that, from 1983 until the recognition order granting the Association SRO status on July 13, 2004 (**Recognition Order**),<sup>8</sup> the Association was authorized to carry out its objects in Quebec and thus adopt and enforce Rules which allowed it to take disciplinary action against former Approved Persons under a specific provision, being s. 351 of the *Securities Act* (R.S.Q., chapter V-1.1) (**QSA**).<sup>9</sup>

¶ 29 IIROC adds that the AMF made proper use of its discretion to grant the Association SRO status on July 13, 2004 after conducting a review of the Association's application for recognition, all of which pursuant to the provisions of *An Act respecting the Agence nationale d'encadrement du secteur financier (ANESF Act)*, subsequently renamed *An Act respecting the Autorité des marchés financiers*".

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<sup>6</sup> The *Chambre de la sécurité financière* is a self-regulatory organization created under *An Act respecting the distribution of financial products and services* (R.S.Q., chapter D-9.2) (**Distribution Act**) and exercising jurisdiction in matters of ethics over group savings plan representatives holding a certificate delivered under such Act. As stated in para. 1 of the Notice of Hearing, the Respondent was the holder of such a certificate from 1990 to January 2004, while acting on behalf of Investors Services Ltd., Rimac Financial Inc., Norshield Fund Management Ltd. and iForum Financial Services Inc.

<sup>7</sup> CA-P, Vol. I, Tab 10, s. 6.

<sup>8</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>9</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.

¶ 30 This review allegedly led to a thorough verification of the legislative compliance of the Constitution, By-Laws and other Rules of the Association (**Organizational Documents**), all of which were approved by the AMF as part of its Recognition Order.

¶ 31 The Plaintiff alleges that the duty to enforce the Continuing Jurisdiction Rules was imposed on the Association as a condition of its recognition as an SRO under the AMF Act, that the provisions of such Act differ from those on which the Court relied in *Taub*, that such decision is not a controlling authority in the province of Quebec and that it cannot be binding upon this Panel.

¶ 32 Thus, according to the Plaintiff, the Association could properly invoke its Continuing Jurisdiction Rules to conduct an investigation and institute disciplinary proceedings in the present case, on the one hand, and on the other to seek before this Panel a penalty for non-compliance by the Respondent with the Rules which he was required to respect under his Agreement with the Association.

¶ 33 Finally, as regards the exception of *lis pendens* raised by the Respondent, the Plaintiff responds that the facts alleged against the Respondent before the CSF Disciplinary Committee and the Penal Division of the Court of Québec are not the same, as they arose before any contractual relationship was formed between the Respondent and the Association by the filing of his Certification Application with the Association.

¶ 34 Consequently, IIROC is seeking the dismissal of the Respondent's motion.

#### IV. THE ISSUES

¶ 35 The Respondent's motion essentially raises two questions:

1. Do IIROC and the Association have jurisdiction to exercise their investigative and disciplinary powers in respect of a former Approved Person? and
2. Do the proceedings brought against the Respondent before the CSF Disciplinary Committee and the Penal Division of the Court of Québec cause *lis pendens* to arise in the present case, thereby making the current proceedings brought by the Association inadmissible?

¶ 36 To rule on these issues, one must first determine whether the Respondent has shown a *prima facie* right to the dismissal of the proceedings brought against him in this case, on the basis of the facts alleged in the Notice of Hearing, of the evidence adduced in support thereof and of the facts of which the Panel takes judicial notice, or on the basis of a clear, obvious and easily definable situation of law (*Oznaga v. Société d'exploitation des loteries et courses du Québec* [1981] 2 S.C.R. 113, 115; *Bodi v. Nesbitt Burns Ltd.* (2002) REBJ 2002-37171 (CA); Ferland and Emery, *Précis de procédure civile du Québec*, 4<sup>th</sup> ed., Vol. 1, s. III; *Laliberté v. Agence nationale d'encadrement du secteur financier* (2004) J.E. 2005-284 (SC); *Code de procédure civile annoté 2008*, LegisPratique, at 244 ff.; *Baillargeon et Pelletier v. Hamelin* (2009) QCCDBQ 17, at para. 14 (Quebec Bar Disciplinary Committee)).

#### V. DOES THE ASSOCIATION HAVE JURISDICTION?

¶ 37 The first question which must be answered pertains to the Association's corporate authorization and leave to act as an SRO and enforce its Rules in Quebec at all material times under these proceedings.

¶ 38 The Constitution of the Association provides that its objects *inter alia* are as follows:

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>10</sup> (emphasis added)

¶ 39 Pursuant to such provisions, the Association in fact adopted and enforced, in two different forms throughout the Relevant Period, Rules which allowed it to conduct investigations, commence disciplinary action and penalize former Approved Persons having worked for its Dealer Members, so that they may be held accountable for their conduct as representatives of such Dealer Members.

¶ 40 The first relevant Continuing Jurisdiction Rules applied from March 1, 2001 to September 30, 2004 and were in force at the time the Respondent submitted his Certification Application to the Association.

¶ 41 Such Rules provided that, for the purposes of its inspections and investigations and its disciplinary process, "...any Approved Person who obtained such approval ... shall remain subject to the jurisdiction of the Association, even if ... Approved Person has ceased to be...an Approved Person" subject, as regards disciplinary proceedings brought against a former representative, to the condition that "...a notice of hearing and particulars is served on such person no later than five years from the date on which such ... Approved Person ceased to be [an] Approved Person..."

¶ 42 In submitting his Certification Application to the Association, the Respondent agreed to comply with these provisions and submit to the jurisdiction of the Association and of its Hearing Panel.

¶ 43 When, based on such undertaking and consent to jurisdiction, the Association subsequently granted him certification and Approved Person status effective March 8, 2004, a valid and binding regulated Agreement was entered into between them (*Resolution Capital Inc. v. IDA* (2002) CanLII 10049; Soquij AZ-50158178; C.A.M., Dalphond J.; *Investment Dealers Association of Canada v. Dass* (2008) BCCA 413 (October 23, 2008); *Séguin v. Investment Dealers Association of Canada* (2007) QSC 1084, JE 2007-815 (SC), at para. 18; *Re Séguin*, IDA Hearing Panel, June 29, 2007).

¶ 44 In such Agreement, the Respondent represented to the Association that he was conversant with its Rules and agreed under oath to:

1. submit to the jurisdiction of the Association both before and after the approval of his Certification Application; and
2. comply with such Rules, as amended from time to time thereafter.<sup>11</sup>

¶ 45 Since October 1, 2004,<sup>12</sup> the Continuing Jurisdiction Rules of the Association have been codified in By-Law 20, *Association Hearing Processes*, as follows:

**"20.7 Former Members and Approved Persons**

*(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).*

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<sup>10</sup> IDA Constitution, s. 2.

<sup>11</sup> Pursuant to IDA By-Law 18.11, every person whose application for approval as a registered representative of a Dealer Member has been accepted shall be subject to the jurisdiction of the Association, shall comply with the Rules and Rulings 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 or her employment as a registered representative.

<sup>12</sup> Supra, note 2.

*(2) An enforcement hearing under Part 10 of this By-law may be brought against 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).*

*(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.*  
(Emphasis added)

¶ 46 It is clear from the wording of this text and the preceding 2001 version thereof that the Association has since then reserved investigative and disciplinary jurisdiction over its former Approved Persons for a period of five years from the date on which they cease to be Approved Persons.

¶ 47 Throughout the Relevant Period, the Respondent contractually submitted to such jurisdiction, as provided by the Rules of the Association.

¶ 48 Furthermore, the application of such Rules to Approved Persons was perfectly legal throughout such period.

¶ 49 Before June 13, 2004, the self-regulatory activities of the Association in Quebec were permitted under s. 351 QSA and s. 741 ANESF Act.

¶ 50 Commencing on February 1, 2004, ss. 59 and 60 AMF Act granted the AMF the power to recognize SROs to authorize them to regulate the conduct of their Members, as follows:

*“59. A legal person, a partnership or any other entity whose objectives are related to the mission of the Authority may, on the conditions determined by the latter, be recognized as a self-regulatory organization responsible for supervising an activity governed by an Act referred to in Schedule 1.*

*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.” (Emphasis added)*

¶ 51 On July 13, 2004, pursuant to such provisions and after reviewing the Constitution, by-laws and operating rules of the Association,<sup>13</sup> the AMF granted it SRO status. The validity of such Recognition Order is not in dispute.

¶ 52 The recent decision of the IIROC Hearing Panel in **Re Méchaka** (2009) IIROC No. 18 (**Méchaka**) on a motion and in circumstances very similar to those before us serves as a controlling authority on the following points:

1. the Continuing Jurisdiction Rules of the Association and the implementing provisions thereof are consistent with the objects whose pursuit form the Association’s mission;
2. the Association had sufficient authority for the valid adoption of such Continuing Jurisdiction Rules and held all the approvals required to enforce the same in Quebec throughout the Relevant Period;

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<sup>13</sup> Such review by the AMF was compulsory under ss. 68 to 70 AMF Act.

3. these Rules form an implicit part of the Agreement under art. 1434 of the *Civil Code of Québec (CCQ)*; and
4. the Respondent is bound by such Rules under the consent and undertaking validly agreed to with the Association in accordance with such Agreement.

¶ 53 Given its corporate authorization and capacity to act as an SRO and enforce its Rules in Quebec at all material times, the Association validly brought a disciplinary action against the Respondent in the present case as a result of the no less valid exercise of its investigative powers.

¶ 54 The second question which must be examined is whether the Continuing Jurisdiction Rules which the Association claims to enforce to afford this Panel the jurisdiction to hear these proceedings are binding upon the Respondent under the Agreement to which he was a party or whether such Rules are, as he claims, unenforceable against him owing to the fact that they are allegedly incompatible with s. 60 AMF Act.

¶ 55 We must first and foremost bear in mind that, once approved by the AMF — and they were in fact approved on July 13, 2004 as a result of the AMF Recognition Order — a Rule of the Association is in principle deemed to be valid and binding upon its Members and Approved Persons, unless it is established that valid grounds for invalidity exist (*Méchaka*, at para. 159).

¶ 56 In *Méchaka*, it was determined that, under the Agreement which binds it to its Members and Approved Persons, the Association has a duty to act lawfully in the exercise of the supervisory and regulatory powers granted to it as a recognized SRO. Furthermore, if it is established that, to institute disciplinary proceedings, the Association relied on a Rule whose adoption led it to violate such duty, any respondent in such proceedings could cause such Rule to be declared unenforceable against him or her and such proceedings to be dismissed on a motion to dismiss.<sup>14</sup>

¶ 57 This duty of the Association to act lawfully can be broken down into two distinct obligations: the first, termed “*duty of deference to the rules*”, consists in applying to Approved Persons Rules which, in addition to being consistent with the Association’s mission and Organizational Documents,<sup>15</sup> are in compliance with the conditions for recognition imposed upon the Association by the AMF and any other order which the AMF may issue from time to time in the exercise of its regulatory powers; the second duty requires the Association to comply with legislation which allows it to act as an SRO and assignee of the powers of the AMF (*Méchaka*, at paras. 163 *ff.*).

¶ 58 As regards the Association’s duty of deference to the rules, we note that the Association validly discharged such duty by adopting and enforcing its Continuing Jurisdiction Rules.

¶ 59 The AMF Recognition Order is unequivocal in requiring the Association to act in a disciplinary capacity:

[TRANSLATION]

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

*14.2 The IDA shall cooperate with the AUTHORITY to ensure that the conduct of its Members and Approved Persons is in compliance with Securities Legislation and with the obligations agreed to in respect of a Contingency Fund, particularly as regards the enforcement of*

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<sup>14</sup> *Re Méchaka*, supra, at para. 161.

<sup>15</sup> On this point, see *Senez v. Montreal Real Estate Board* [1980] 2 S.C.R. 555, 567.

*standards prescribed by such a fund (the "Obligations of a Contingency Fund") and it shall take such disciplinary measures as are required in regard to such Members and Approved Persons in the event of a violation of Securities Legislation or the Obligations of a Contingency Fund."* (emphasis added)

¶ 60 These requirements were imposed by the regulator based on a review of the Rules enforced at the time by the Association, as is still required under the AMF Act. Among such Rules was the 2001 version of its Continuing Jurisdiction Rules.

¶ 61 However, nothing in the Respondent's allegations leads us to conclude that Continuing Jurisdiction Rules with substantially the same effect as those of 2001, adopted and enforced effective October 2004 with AMF approval, could be considered as departing from the Association's mission, Organizational Documents or from the conditions of recognition of the Association.

¶ 62 To the contrary, the Continuing Jurisdiction Rules are consistent with the self-regulatory objectives set forth in the Association's Constitution and Recognition Order, which are compatible with the principles generally promoted by securities legislation, the AMF Act and the various blocks of the mission entrusted to the AMF:

1. the Continuing Jurisdiction Rules aim to protect the players of the industry and the general public by requiring accountability for their conduct on the part of Members and Approved Persons for a period of 5 years after quitting the ranks of the Association;
2. their goal is to help the Association to efficiently exercise the powers and carry out the duties recognized by the AMF with respect to persons whose misconduct is revealed after they have ceased, willingly or unwillingly, to be Approved Persons; and
3. they also permit the evaluation of the fitness of a former Approved Person, who in the past contravened the Rules or securities legislation, to return to the industry and reregister as a representative of a Member.

¶ 63 As regards the Association's duty of legislative compliance in connection with self-regulation and discipline, we are also of the opinion that the Association discharged this duty faithfully by adopting and enforcing its Continuing Jurisdiction Rules and that the Respondent has not overturned the presumption of the validity thereof.

¶ 64 The Respondent has recommended that the Hearing Panel should in this regard seek inspiration in the reasoning applied in *Taub* on the basis of two arguments:

1. under s. 60 AMF Act, the Association may not supervise or regulate the conduct of its Members without recognition by the AMF; this therefore must be construed as an intention to restrict the Association's powers as a recognized SRO; and
2. according to this interpretation, the Association exceeds its powers if it exercises its investigative and disciplinary powers over individuals who have ceased to be Members or to be authorized to act on behalf of a Member.

¶ 65 In *Taub*, the Divisional Court of Ontario held that by adopting Rules governing the conduct of persons who were no longer Approved Persons, the Association exceeded the legislative framework by which it was governed in such province and, to that extent, its Rules contravened the provisions of the OSA and could not serve as a basis for the exercise of a disciplinary jurisdiction in respect of such persons.

¶ 66 *Méchaka* provides a detailed analysis of *Taub*. The Hearing Panel distinguishes *Taub*, pinpoints the material structural differences between the Ontario Securities Act and the QSA, and interprets s. 60 AMF Act in the light of the objectives of the Quebec legislators.

¶ 67 We find this analysis, which it is pointless to repeat at length here, entirely applicable to the case at bar, and it allows us to conclude that the Continuing Jurisdiction Rules adopted by the Association as part of its mission are consistent with Quebec securities legislation and the AMF Act, and that they are wholly applicable to and enforceable against the Respondent at all material times under the proceedings brought against him in the present case. Two decisions rendered in similar cases by two Quebec Hearing Panels, being *Re Sarkissian* (2008) IIROC Notice 08-2189 and *Re Marston* (2009) IIROC Notice 09-0076, are in full agreement.

¶ 68 We are also of the opinion that IIROC, which was duly authorized by the AMF to continue the legal personality of the Association effective June 1, 2008, is validly authorized to exercise the jurisdiction acquired by the Association in the case at bar and to continue these proceedings, in accordance with the transitional rules set forth in its *Transition Rule No. 1 made pursuant to By-Law 13.1 of the Corporation*.

## VI. THE EXCEPTION OF LIS PENDENS

¶ 69 The Respondent argues that IIROC's complaint is based on the same facts as those alleged in the proceedings brought against him before the CSF Disciplinary Committee and the Penal Division of the Court of Québec. He maintains that there is lis pendens and thus the disciplinary action instituted against him by the Association must be dismissed.

¶ 70 The record in this case, as constituted, shows that three cases are pending, including the one brought before this Panel by the Association, which give rise to such an argument.

¶ 71 On January 24, 2007, a statement of offence containing 91 counts was served upon the Respondent at the initiative of the AMF in its capacity as Plaintiff before the Penal Division of the Court of Québec. The AMF alleges that the Respondent on several occasions acted as a securities adviser without being registered as such, provided false or misleading information about securities trades and took part in the distribution of forms of investment without a prospectus, contrary to the provisions of the *QSA*.

¶ 72 Furthermore, on or about February 6, 2008, the syndic of the CSF instituted disciplinary proceedings against the Respondent in file No. CD00-076 of the Disciplinary Committee of such organization. The Respondent is alleged to have breached the Rules of Ethics of the CSF by committing various violations under the *Distribution Act*, the *Regulation respecting the rules of ethics in the securities sector*, the *QSA* and the *Securities Regulation*.

¶ 73 In the case at bar, the Notice of Hearing served upon the Respondent alleges that the Respondent contravened certain provisions of By-Laws of the Association while he was employed by or a representative of iForum, a Member of the Association at the time.

¶ 74 The preliminary exception of lis pendens (art. 165(1) of the *Code of Civil Procedure (CCP)* is governed by the same principles as those which apply to the exception of *res judicata* (art. 2848 CCQ) (*Rocois Construction Inc. v. Québec Ready Mix Inc.* [1990] 2 S.C.R. 440).

¶ 75 For this argument to succeed, the party raising it must show - as with *res judicata*, except at a preliminary stage of the proceedings - that the various actions brought against such party combine three identities: identity of the parties, of the objects and of the causes of action (*Cargill Grain Co. v. Foundation Co. of Canada Ltd.* [1965] S.C.R. 594, 596-597).

¶ 76 Absent any of these conditions, the preliminary exception based on lis pendens must be dismissed.

¶ 77 None of these conditions are fulfilled in the case at bar.

¶ 78 The plaintiff's are patently different in the three proceedings against the Respondent (see *Matte v. Gélinas* (2005) CanLII 29898, at para. 5 (Court of Québec) for an application of the principle of the identity of parties between civil proceedings and criminal proceedings based on the same cause of action).

¶ 79 Nor is the object of these various proceedings identical. Object, in this context, “ [TRANSLATION] [...] is the right which the plaintiff is exercising; it is the immediate legal benefit he seeks to have recognized by the court.” (Nadeau et Ducharme, *Traité de droit civil du Québec*, vol. 9, 1965, cited in *Rocois Construction*, supra.).

¶ 80 This Panel notes that the various Plaintiffs are all seeking different findings in the aforementioned proceedings: in one case, a finding of guilt and a penal sentence; in another, a disciplinary penalty for violations of the code of ethics enforced by the CSF under the *Distribution Act*; and in a third case, a disciplinary penalty for alleged violations of the Rules of the Association.

¶ 81 One therefore cannot come to the conclusion, set down by the authorities as regards the condition of identity of objects, that the claim before one court is identical to the claim before the other courts.

¶ 82 As regards the identity of causes required to prove the exception of *lis pendens*, it presumes that there is a similarity of facts engendering the same legal consequences upon application of the relevant legal rules. To illustrate this concept, Lamer J. states that “ [...] *The same body of facts may well be characterized in a number of ways and give rise to completely separate causes. For example, the same act may be characterized as murder in one case and as civil fault in another. [...]* ” (*Rocois Construction*, supra; see also *Deeb v. Lajoie* (1991) CanLII 3813 (CAM) for another illustration of the same principle).

¶ 83 In the case before us, we note that the facts alleged against the Respondent before the CSF Disciplinary Committee occurred between February 1998 and June 2004, when the Respondent was a certified group savings plan representative whose conduct was subject to the disciplinary jurisdiction of such SRO, whereas the violations which IIROC alleges today against the Respondent are based on facts spread over a period from March 8, 2004 to December 1, 2005, while the Respondent was under the jurisdiction of the Association.

¶ 84 As regards the penal action commenced by the AMF, assuming that it stems from the same conduct (which has not been proved) which earned the Respondent the disciplinary proceedings he now faces, brought either by the syndic of the CSF or today by IIROC, it would nevertheless not stem from the same cause within the meaning of art. 2848 CCQ.

¶ 85 Case-law, moreover, has recognized that a professional can at the same time be the subject of criminal, civil and disciplinary proceedings for violations which are based on the same facts (*Feldman v. Lenetsky* (2004) QPT 071, applied in *Chambre de l'assurance de dommages v. Gingras* (2009) CanLII 13204).

¶ 86 Accordingly, we find that we are not in the presence of a *lis pendens* situation which would justify an action for dismissal of the proceedings initiated by the Association.

## VI. DECISION

¶ 87 The Respondent has not shown a *prima facie* right to the dismissal of the judicial proceedings or justifying the Hearing Panel's declining jurisdiction.

¶ 88 ***NOW THEREFORE, the Panel:***

***DISMISSES the motion;***

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

**CONFIRMS** that IIROC has the requisite jurisdiction to take up the matter and continue these proceedings and the Panel has the jurisdiction to continue to hear the same and rule thereon;

**REQUEST** the National Hearing Coordinator to convene a Set Date Hearing for proof and hearing as soon as counsel can be heard.

Montreal, July 7, 2009.

Jean Martel, Chair

Guy L. Jolicoeur, Member

Gilles Archambault, Member

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