

Re Rail

IN THE MATTER OF:

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

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

STÉPHANE RAIL

2009 IIROC 35
(File No.: 0263/Mar/05)

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

Heard: June 29, 2009
Decision: August 12, 2009
(22 paragraphs)

Hearing Panel:

Claire Richer, Jean Élie, Danielle Le May

Appearances:

Me Diane Bouchard, for IIROC

Me Sébastien Caron, for Stéphane Rail

DECISION ON A MOTION TO REVOKE A GUILTY VERDICT AND RE-OPEN THE INVESTIGATION

I. Preamble

¶ 1 On June 25, 2008, the Hearing Panel presiding over the above-referenced matter rendered a majority decision in which Panel Member Jean Élie and Panel Chair Claire Richer concurred, with third Panel Member Danielle Le May dissenting.

¶ 2 On July 24, 2008, the Respondent appealed such majority decision and the appeal on the merits was heard by an Appeal Panel on November 26, 2008. In its decision dated January 7, 2009, the Appeal Panel allowed the Respondent's appeal in part by acquitting the Respondent on Count 2.

¶ 3 On March 12, 2009, a penalty hearing was held before this Hearing Panel with respect to Counts 1(a), 3, 4, 5 and 6.

¶ 4 On March 20, 2009, IIROC was served by the Respondent with a Motion to revoke a guilty verdict (with respect to Count 3) and to re-open the investigation (the "Respondent's Motion").

¶ 5 On April 6, 2009, IIROC filed a Motion for dismissal of the Respondent’s Motion and, on June 9, 2009, following an examination out of court of the Respondent, IIROC filed an Amended Motion for Dismissal and its Answer (the “IIROC Motion”).

II. Hearing on the IIROC Motion and on Respondent’s Motion

¶ 6 The hearing held before the Hearing Panel on June 29, 2009 was, by mutual agreement, conducted in two parts:

- (i) IIROC’s Motion for Dismissal was heard first and, after deliberation, was dismissed by the Hearing Panel. That decision reads as follows:

“The Motion for Dismissal is denied. The Hearing Panel is of the opinion that it is still seized of this matter and shall remain so until such time as a decision on the penalties has been rendered. Our decision is based *inter alia* on the 1976 Lessard case and on many decisions handed down since, including the Supreme Court judgement in Chandler.

The Hearing Panel agrees with the Respondent and the Association that the absence of a specific provision in By-law 20 is not an obstacle to its jurisdiction and further believes that the decision of the Appeal Panel does not prevent it from hearing the Respondent’s Motion concerning its own decision of June 25, 2008.

Allow us to quote Mayrand J. of the Quebec Court of Appeal in *Nationwide Advertising Service inc. v. Lafrance*, a decision that was rendered in March 1980: “We must strike the right balance between two competing principles: the stability of judgements rendered and the right to a complete defence.” End of quote.

We shall therefore hear the parties on the Respondent’s Motion today.”

- (ii) The Respondent’s Motion was heard immediately after the decision referred to in sub-paragraph 6(i) above was delivered. As previously mentioned, this motion pertained to Count 3 of the Notice of Hearing, which reads as follows:

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

¶ 7 In its motion, the Respondent moved the Hearing Panel for permission to file a letter from the President of C.O.C. authorizing the cheque from P. inc. dated September 14, 2000 to be deposited into an account other than C.O.C.’s account., which letter was found by the Respondent on March 20, 2009.

¶ 8 Two witnesses were heard at the hearing: the Respondent and, for IIROC, a graphology and writing expert. Furthermore, Counsel for both parties presented their arguments, bolstered by various authorities and judgements.

¶ 9 In support of the Respondent’s Motion, Counsel for the Respondent invoked art. 483(7) of the Quebec *Code of Civil Procedure*, reproduced below:

“483. Likewise, where there is no other useful recourse against a judgment, the court which rendered it may revoke it at the request of one of the parties, in the following cases:

1° [...];

2° [...];

3° [...];

4° [...];

5° [...];

6° [...];

7° When, since the judgment, new evidence has been discovered and it appears that:

(a) if it had been brought forward in time, the decision would probably have been different;

(b) it was known neither to the party nor to his attorney or agent and

(c) it could not, with **all** (emphasis added) reasonable diligence, have been discovered in time.”

¶ 10 More specifically, Counsel for the Respondent argues that:

- (i) the Respondent acted with all due diligence to find the letter, although it could not be found in time;
- (ii) the courts do not insist on such a stringent application of the condition of due diligence in disciplinary matters; and
- (iii) the document which has been found is reliable as it is consistent with the continuum of the evidence and, had it been submitted into evidence during the disciplinary hearing, it would have had an impact on the decision handed down by the Hearing Panel on June 25, 2008.

¶ 11 For its part, Counsel for IIROC argues that:

- (i) the document is not reliable for a number of reasons, including the testimony given by the expert witness, who testified unequivocally that the document was the result of a photomontage, which testimony was not contested by the Respondent;
- (ii) the document did not constitute new admissible proof as the Respondent always claimed at the disciplinary hearing that it existed, although he had never seen it and had not enquired whether it had been delivered to his employer; Counsel for IIROC pointed out that there is a distinction between what really constitutes new evidence and the fact that a document has been located;
- (iii) the Respondent did not use all possible diligence to find the document at the time of the disciplinary hearing; in fact, the Respondent had had the document in question in his possession since 2001, in his office in the basement of his residence.

Counsel for IIROC referred the Hearing Panel to the Respondent’s testimony at the time:

TRANSLATION

“Q. (33) And why didn’t you search through all your personal things, in fact, which came from TD before the disciplinary hearing or during the disciplinary hearing before the hearing panel?”

R. I searched the whole box to see if there were any client documents inside. I didn’t see any. This folder is a closed folder. (...) I didn’t open this one before March 20, 2009.

Q. (34) What prevented you from opening it before that?

R. It never occurred to me. I never thought there could be documentation, there could be a client document there”;

- (iv) the timely submission of a copy of the authorization letter would not have exculpated the Respondent because, as alleged in the offence notice and noted by the Hearing Panel in its majority decision, the Respondent did not at the time of the events act with all due diligence to ensure that the cheque in question was deposited in the right account.

III. Analysis and Decision

¶ 12 In a Superior Court judgement rendered on November 16, 2005 (SOQUIJ AZ-50345658), Mr Justice Pierre Isabelle holds that:

TRANSLATION

“32. The principle of the irrevocability of judgements is an important element of our legal system. Settled jurisprudence confirms that the stability of judicial decisions is essential to the sound administration of justice. (*Michel Lavallée et al. v. Banque Nationale du Canada* REJB 1998-07791 (CA)) (...)

33. The exception to the principle of the irrevocability of judgements is found in arts. 482 *ff.* of the *Code of Civil Procedure*. This is the procedure in revocation of judgements.”

¶ 13 Professor Léo Ducharme writes in *L’administration de la preuve* [The Administration of Evidence], 3rd edition, Wilson & Lafleur p. 150 as follows: TRANSLATION “As we can see, for the discovery of new evidence to give rise to the revocation of a judgement, very strict conditions must be met. First, it must be shown that, if such evidence had been submitted in a timely manner, the judgement would probably have been different.”

¶ 14 We recall the third of the four principles stated by the Supreme Court of Canada in *Palmer v. The Queen*, (1980) 1 S.C.R. 759 with respect to applications for revocation of judgement: “Applications of this nature have been frequent and courts of appeal in various provinces have pronounced upon them [...] the following principles have emerged: [...] (3) The evidence must be credible in the sense that it is reasonably capable of belief [...].

¶ 15 The evidence submitted by IIROC at the June 29 hearing before this Hearing Panel in the person of its graphology and writing expert witness has shown unequivocally that the authorization letter which had been adduced was the result of a photomontage, which as a document renders it unreliable and implausible, and thus inadmissible as evidence for the Respondent.

¶ 16 The Hearing Panel believes that, even if the letter in question had been admissible, Counsel for the Respondent has not demonstrated that the majority decision would have been different had this letter been submitted at the disciplinary hearing. As stated by the October 1997 Court of Appeal decision in *Les ressources Informatiques Quantum Ltée v. Hôpital Royal Victoria*, (1997) No. AZ-97011876 (C.A.), “TRANSLATION ... It is not sufficient, as in the case at bar, to make an assertion without providing the elements of proof thereof.”

¶ 17 Furthermore, we would like to add the following comments with respect to art. 483(7) of the Quebec *Code of Civil Procedure*, to which we have referred in our analysis.

¶ 18 Sub-paragraph 483(7)(a) provides in respect of new evidence that “*if it had been brought forward in time, the decision would probably have been different*”. We repeat that the majority decision, which found the Respondent guilty on Count 3, is not based on the submission or non-submission of the letter which the Respondent wishes to submit into evidence, but rather on a lack of due diligence on the part of the Respondent.

¶ 19 As for sub-paragraph 483(7)(b), which requires of the evidence that it be “*known neither to the party nor to his attorney or agent*”, the Hearing Panel cannot accept the argument of Respondent’s Counsel that the evidence was merely presumed and not known. In fact, the Respondent’s testimony on this point has been consistent throughout the disciplinary hearing and since then to the effect that an authorization letter did exist because, in the absence thereof, the deposit in an account other than that of C.O.C. would never have occurred.

Moreover, the Respondent now wishes to submit this ‘presumed’ authorization letter into evidence. We find it difficult to accept the notion of presumption in this context.

We agree that a distinction must be made between new evidence and a document that has been located; we believe that the authorization letter is clearly a document that has been located.

¶ 20 As regards sub-paragraph 483(7)(c), which requires that the evidence “*could not, with all reasonable diligence [emphasis added] have been discovered in time*”, the Hearing Panel cannot accept this argument. There is no doubt that the Respondent did to a certain extent search and investigate, either personally or through Respondent’s Counsel, but considering the number and gravity of the contraventions alleged against him by IIROC in its Notice of Hearing of August 23, 2007, we believe that the Respondent could have found the letter by systematically examining his files, thus using all reasonable due diligence in the circumstances.

¶ 21 For all these reasons, the Hearing Panel dismisses the Respondent’s Motion.

¶ 22 The Hearing Panel’s penalty decision in this matter is contained in a separate decision, also handed down on the date hereof.

Signed at Montreal by the members of the Hearing panel on the 12th day of August 2009.

Claire Richer, Chair of the Hearing Panel
Danielle Le May, Panel Member
Jean Élie, Panel Member

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