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 36
(File No.: 0263/Mar/05)

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

Heard: March 12, 2009
Decision: August 12, 2009
(21 paragraphs)

Hearing Panel:
Claire Richer, Jean Élie, Danielle Le May
Appearances:
Me Diane Bouchard, for IIROC
Me Sébastien Caron, for Stéphane Rail

PENALTY DECISION

Unofficial English Translation

I. Preamble

¶ 1 By majority decision dated June 25, 2008, rendered after six (6) days of hearing held pursuant to the August 23, 2007 Notice of Hearing issued by the Investment Industry Regulatory Organization of Canada ("IIROC"), this hearing panel (the "Panel")

- found the Respondent guilty on Counts 1(a), 2 and 3 of the Notice of Hearing;
- found the Respondent not guilty on Counts 1(b) and 7 of the Notice of Hearing; and
- took note of the Respondent's guilty plea as to Counts 4, 5 and 6 of the Notice of Hearing.

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

II. Penalty Hearing

¶ 3 Consequently, the penalty hearing held on March 12, 2009 pertained solely to Counts 1(a), 3, 4, 5 and 6 detailed below:

Count 1

During the year 2000, while employed as a Registered Representative at TD Securities Inc. ("TD"), the Respondent engaged in conduct unbecoming and detrimental to the public interest when he engaged in outside business activities without the consent and without the knowledge of his firm, as follows:

(a) by introducing one of his clients, HC, to another of his clients, PV (Panel's note: this typo was corrected and changed to LV at the hearing), with the aim of facilitating the obtaining of a loan for PV, knowing that his firm had already determined that this loan was too risky and that such behaviour was not consistent with his responsibilities as a Registered Representative, contrary to Association By-law 29.1.

Count 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.

Count 4

In June and July 2000, the Respondent, while employed with TD as a Registered Representative, failed to use due diligence and engaged in conduct unbecoming and detrimental to the public interest, by creating an investors group, to which he belonged, for the purpose of investing over $150,000, when he knew or should have known, as a Registered Representative, that this stratagem constituted a means of illegally taking advantage of the provisions concerning the prospectus exemption stipulated in section 51 of the Quebec *Securities Act*, contrary to Association By-law 29.1.

Count 5

On or about June 22, 2000, while employed with TD as a Registered Representative, the Respondent engaged in conduct unbecoming and detrimental to the public interest, by depositing in a personal capacity an amount of $48,112 in the account of his client RS, for the purpose of making an investment in a private placement, contrary to Association By-law 29.1.

Count 6

On or about July 18, 2000, the Respondent, while employed with TD as a Registered Representative, engaged in conduct unbecoming and detrimental to the public interest, by depositing in a personal capacity an amount of $35,000 in the account of his client RS, contrary to Association By-law 29.1.

¶ 4 The Respondent testified at the penalty hearing and Counsel for the two parties presented their arguments. Counsel also highlighted certain passages from the authorities and from judgements submitted in support of their respective arguments, particularly with respect to applicable guidelines regarding sanctions.

¶ 5 Finally, Counsel for both parties expressed their respective recommendations regarding the penalties to be imposed against the Respondent in the light of aggravating or mitigating factors, as the case may be.

¶ 6 Counsel for IIROC suggested that the following penalties would be appropriate in the circumstances:

(a) a fine in the amount of $35,000 for Count 1(a);

(b) a fine in the amount of $50,000 for Count 3;

(c) a fine in the amount of $35,000 for Count 4; and

(d) a fine in the amount of $20,000 for each of Counts 5 and 6;

all such fines to be payable from the date of the Panel's penalty decision;

(e) reimbursement of the costs incurred by IIROC in connection with the present case, up to $94,000;

(f) suspension of the Respondent's approval as a Registered Representative for a period of six months, including the revocation of his rights and privileges as a branch manager; and

(g) the requirement to re-write and pass the examination based on IIROC Conduct and Practices Handbook Course.

¶ 7 In support of her suggestion, Counsel for IIROC pointed to the following as **aggravating factors:**

- as regards Count 1(a)
  - (a) gross negligence on the part of the Respondent for having played a decisive role in facilitating the loan between two of his clients, including the drafting of several documents, without the requisite prior authorization of his employer,
  - (b) the fact that one of the two clients incurred losses in connection with this transaction, as evidenced by the civil suit commenced against the Respondent,
  - (c) the fact that the Respondent did not, before the penalty hearing, express any remorse for his actions, which he described as technical violations;
- as regards Count 3, the fact that the Respondent engaged in conduct unbecoming and detrimental to the public interest under By-law 29.1 for failing (1) to enquire into the reasons why the cheque from P. inc. was being deposited into an account other than that of COC; and (2) to ensure that the procedure required to effect such an unusual deposit was being followed, thereby exposing his employer to the risk of being sued (which did in fact occur subsequently);
- as regards Counts 4, 5 and 6, the Respondent's ignorance, negligence and carelessness in respect of his undertakings as a Registered Representative when he effected a private placement, contrary to s. 51 of the Quebec *Securities Act,* and his personal participation therein.

¶ 8 Respondent's Counsel, for his part, suggested that the following sanctions would be fitting in the circumstances:

(a) a fine in the amount of $10,000 for Count 1(a);

(b) a fine in the amount of $5,000 for Count 3;

(c) a fine in the amount of $10,000 for each of Counts 4, 5 and 6;

(d) reimbursement of part of the costs incurred by IIROC in connection with this matter, being an amount between $10,000 and $20,000; and

(e) the requirement to re-write and pass the examination based on IIROC Conduct and Practices Handbook Course.

¶ 9 As **mitigating factors**, Respondent's Counsel pointed in general to the fact that the Respondent had, since the 2005 Notice of Hearing, borne the weight of "sanctions which have already been imposed" as a result of his dismissal by his then employer, the anxiety stemming from the civil suit commenced against him, and the negative publicity caused by reports published particularly in the business press. Respondent's Counsel further alleges that the penalties proposed by Counsel for IIROC do not take into account the Respondent's unblemished record from 1987 (date of his approval) to 2000, and since he was hired in 2001 by Canaccord, his current employer, as evidenced by the reports of close supervision filed with IIROC since 2005 at IIROC's request.

¶ 10 More particularly, regarding the counts themselves, Counsel for the Respondent insists on the following points:

- As regards Count 1(a): the Respondent received authorization from his former employer, admittedly belatedly, but the Respondent did nevertheless seek it, which in his opinion greatly mitigates the gravity of the offence;

- As regards Count 3: although a violation did occur, no complaint was made by the client in whose account the cheque should have been deposited; and
- As regards Counts 4, 5 and 6: Counsel for the Respondent points to the two aspects of this block of violations, being the violation of a provision of the *Securities Act,* particularly under the rules governing prospectus exemptions and, secondly, the Respondent's involvement with his clients in an investment; he concludes by stating that for both violations, a suspension is not generally applied for this type of offence, except in extreme cases, which is not the case in the present file.

III. Analysis and Penalties

¶ 11 The Panel's discretion to impose a penalty under IIROC By-law 20.30 is exercised "in accordance with the circumstances of each case". To assist hearing panels in the performance of this function, IIROC has compiled a list of guidelines regarding the imposition of sanctions. The Panel has consulted these guidelines and has also reread the stenographic notes of the hearing of March 12, 2009, as well as the authorities and jurisprudence submitted by Counsel for the two parties.

¶ 12 Before we express our thinking which led to the imposition of the sanctions in this matter, the Panel wishes to point out that it concurs with the observations of the Ontario District Council in Re Mills (I.D.A. No 7, April 17, 2001), quoted in the General Principles to the IIROC Disciplinary Sanction Guidelines:

> *"Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its Members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention rather than punishment."*

¶ 13 A number of judgements and decisions have developed factors to be taken into consideration when imposing a penalty against an offender, including protection of the public, number of years of experience of a Registered Representative, the absence or presence of a disciplinary record, the gravity of the offence and the deterrent effect of the penalty for the representative and members of the industry.

¶ 14 We add a quotation from the Honourable Benjamin J. Greenberg in *R. v. Maruska,* cited by the hearing panel in the penalty decision in Re SRM and Luc St-Pierre, rendered on August 18, 2008:

> " *(…) a fit and proper sentence is the result of a "wise blending" (the "savant dosage") of those considerations (deterrence, rehabilitation and protection of society).*
>
> *In imposing the sentence herein, I have considered the objective gravity of the offences, the subjective gravity of those crimes in relation to each of the four accused, their respective ages and backgrounds, the absence or presence of any mitigating or aggravating circumstances, the salutary or exemplary effects of the sentence on each accused specifically and on others generally and, lastly the possible rehabilitation of each accused.*"

¶ 15 The Panel would like to make the following comments with respect to the various Counts:

Count 1(a)

The facilitation of a loan between two clients constitutes an outside business activity, as was confirmed by the Appeal Panel in its January 7, 2009 decision. Furthermore, unawareness of its investment advisers' outside business activities on the part of an employer causes such employer to run a risk: in such a situation, the employer is unable to assess the consequences of such an activity and,

consequently, its impact on the firm, the investment adviser and the client.

The Respondent already had several years of experience in the securities industry and he showed gross negligence in failing to seek the prior authorization of his employer. Such negligence on the part of an investment adviser with several years of experience constitutes an aggravating factor.

Count 3

When the Respondent received LV's verbal request to deposit the $333,000 cheque payable to COC into HC's account, he did not use the due diligence required of a Registered Representative to ensure that the prescribed procedure was followed, thereby demonstrating gross negligence. Furthermore, a Registered Representative is not at liberty to rely on third parties when carrying out his of her duties. This would be tantamount to transferring one's responsibilities to others, including subordinates; a Registered Representative's responsibilities are personal and non-transferable (Emphasis added).

Count 4

IIROC rules are based *inter alia* on the Quebec *Securities Act* and the *Securities Regulation* thereunder (the "Act"). When a person becomes a Registered Representative, he or she agrees contractually to comply with the Act. He or she must, therefore, not only be familiar with this Act, but must also take the necessary means to know it.

Given that the Respondent had been a Registered Representative since 1987, we find it difficult to understand how he could claim to be unfamiliar with s. 51 of the Act and the workings thereof, particularly since the $150,000 limit for investing in an offering without a prospectus was a constraint for many investment advisers in the industry and it seems highly implausible that the Respondent would never have heard of it.

Counts 5 and 6

Counts 5 and 6 are the same violation which the Respondent has acknowledged having committed twice.

¶ 16 Furthermore, when the offences committed by the Respondent are examined in the light of the key consideration suggested by the *Disciplinary Sanction Guidelines*, we believe that:

(a) the Respondent's conduct, although tainted by gross negligence, was neither fraudulent nor dishonest;

(b) the Respondent alone is liable for his actions; furthermore, he did not profit monetarily therefrom;

(c) the Respondent has no prior disciplinary record and his conduct since his employment with Canaccord, although he is under close supervision, has proved to be proper;

(d) since the Respondent has been in the employ of Canaccord, he has taken various securities courses; and

(e) the Panel need not consider the impact of media interest in the Respondent's tribulations; this is a consequence of the kind of society we live in.

¶ 17 Our decision concerning the determination of the fines takes into account these various aggravating and mitigating circumstances.

¶ 18 As regards the costs incurred by the Plaintiff, we have decided upon an amount which we deem reasonable, based on the number of days of the hearing and the charges upheld against him.

¶ 19 As regards a suspension of approval as a Registered Representative for a period of six months, including the revocation of rights and privileges as a branch manager, we believe that a suspension would not be appropriate in the circumstances for the following reasons:

(a) the Respondent has been in the employ of Canaccord, an IIROC-registered firm in good standing, since 2001;

(b) the Respondent has been under close supervision by his employer since 2005 and his employer has not observed any violations in that time;

(c) the Respondent appears to have retained the confidence of his clients since the Notice of Hearing was served;

(d) the Respondent retains his position as branch manager, which means he retains his employer's confidence; and

(e) the Respondent has not committed any dishonest or fraudulent act.

¶ 20 Counsel for the two parties recommend that the Panel require the Respondent to re-write and pass the examination based on the CSI Conduct and Practices Handbook Course, which recommendation we accept conditionally.

IV. Conclusion and Decision

¶ 21 For all the above reasons, the Panel

(a) orders the Respondent to pay IIROC the following fines:

Count 1(a):	$35,000
Count 3:	$40,000
Count 4:	$35,000
Count 5:	$10,000
Count 6:	$10,000

(b) orders the Respondent to pay IIROC the amount of $25,000 in partial payment of the costs incurred in connection herewith;

(c) imposes against the Respondent the requirement to re-write and pass the examination based on IIROC Conduct and Practices Handbook Course within three months following this decision; and

(d) maintains the requirement that the Respondent must be closely supervised by his employer until he passes the examination referred to in 21(c) above.

Signed at Montreal by the members of the Hearing Panel, on this 12th day of August 2009.

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