Unofficial English Translation

Re Beaudoin et St-Amant

In the matter of:

the Rules of the Investment Industry Regulatory Organization of Canada

and

Jean-Luc Beaudoin

and

Nathalie St-Amant

2010 IIROC 36

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

Hearing: June 1, 2010 and July 22, 2010
Decision: August 24, 2010
(23 paragraphs)

Hearing Panel:
ME Jean-Pierre Lussier, President
Mr. Daniel Houle
Mr. Marcel Paquette

Appearances :
Me Diane Bouchard, for IIROC
Me Julie-Martine Loranger, for the Respondents

Interlocutory Decision

¶ 1 On July 22, 2010, IIROC presented a motion for a joint hearing in the matters regarding the two Respondents. The Respondents, through their lawyer, announced their agreement with such motion given the duplication of the evidence and the probability that the hearing will be very long. Our Hearing Panel thus allowed the motion for a joint hearing.

¶ 2 On the same date, the two Respondents presented a motion to strike out allegations. Since the grounds for their respective motions are the same, our Hearing Panel has reached the same conclusions for both Respondents.

¶ 3 For a better understanding of our decision, however, we shall set out our considerations based on one of the matters, the matter regarding the Respondent Beaudoin.

¶ 4 The motion presented by the Respondent Beaudoin is to strike out many allegations from the Notice of

Hearing. The Respondent first asks that seven allegations referring to the "Respondent's testimony or alleged admissions or confirmations" [translation] be stricken out. The Respondent sets out the following grounds: (1) the "context and the testimony" [translation] were not communicated to him; (2) "The references to alleged admissions not introduced in evidence in an examination by an IIROC investigator" [translation] are made illegally, since the Respondent did not have the opportunity to cross-examine; and (3) it is up to the Panel to determine whether the alleged admissions are in fact admissions and to weigh the evidence.

¶ 5 The Notice of Hearing starts by setting out the Respondent's four alleged violations in connection with his supervision of the transactions of three representatives under his supervision, designated A, B and C. The Notice of Hearing then sets out under the heading "Détails" a summary of the facts that IIROC has the intention of relying upon at the hearing. It then lists in 135 paragraphs allegations of facts supporting the violations he is charged with.

¶ 6 All of the seven allegations in the first part of the motion refer to admissions supposedly made by the Respondent during IIROC's investigation. One example is sufficient:

> "20. The Respondent admitted during his interview with IIROC's investigator that he did not document in writing any intervention on his part as team supervisor during the period from December 2004 to August 2006." [Translation]

¶ 7 By making this allegation, IIROC is letting the Respondent know that it intends, during the hearing, among other things, to rely upon this admission that the Respondent is alleged to have made to its investigator.

¶ 8 Let us first point out that this allegation does not as such amount to evidence. At this stage in the proceedings, IIROC is only providing the Respondent with information in order to enable him to understand the nature of the four violations he is charged with in the Notice of Hearing and the facts underlying them. An allegation of admission shall only become evidence if the Panel receives it as an extrajudicial admission at the hearing. The Panel shall make its decision after hearing the parties' respective representations, if any, during the hearing on the merits. It shall examine the receivability of such evidence based on doctrine and case law, in particular on the principles set out by the Professions Tribunal in the matter Ordre professionnel des psychologues c. Fernandez De Sierra[1], at pages 10 and following. In this matter, the Professions Tribunal stated that an extrajudicial admission must be proven and that it is desirable that a respondent be previously informed that such an admission will be used against him, preferably in writing and sufficiently in advance to allow for an efficient defense.

¶ 9 This is exactly what IIROC does in its Notice of Hearing. Allegation no. 20, reproduced above, informs the Respondent of IIROC's intention to demonstrate this extrajudicial admission during the hearing before the Panel.

¶ 10 The Respondent's lawyer submitted that an admission made before an IIROC investigator does not equate with an admission made before a trustee, since the former does not have the legal status of the trustee, who, as prosecutor, is party to the proceeding.

¶ 11 Although our Panel finds it difficult to imagine that the validity of an extrajudicial admission rests essentially on the quality or legal status of the person to whom it is made, we point out that such representations must be made at the hearing, where the receivability of the admission as evidence shall be determined. At the point at which the Notice of Hearing and the facts on which it is based are issued, it is in the Respondent's interest to know as many details as possible about the facts on which the prosecutor intends to rely upon. We also add that the Notice of Hearing does not put an end to the disclosure of evidence, which is a process that has no time limit and can continue until the end of the hearing. One thing is certain however: the sooner the Respondent is informed of the evidence that is intended to be submitted against him, the better his right to a full defense shall be protected.

¶ 12 The Respondent argues that at the time of the investigation by IIROC'S investigator, he did not have the

[1] Reproduced in 2005 QCTP 134

opportunity to cross-examine (to the extent that one can cross-examine oneself) nor to provide explanations regarding his alleged admission. In this respect, it is obviously not in the phase prior to the hearing that matters of cross-examination or the "due process of law" are to be addressed. Tribunals must respect the principles of natural justice. Of course, if the investigator's examination infringes a respondent's rights, for example if admissions are obtained through threats, the Panel shall have the obligation to refuse the admissions as evidence. But again, the point, at the time of the Notice of Hearing, is only to present to the Respondent the facts relied upon by the prosecutor in charging him with the violations.

¶ 13 The Respondent bases his last argument on his right to privacy. This concept should not be overworked. It refers to a fundamental right that does not imply that an individual is entitled to behave as he or she wishes in all circumstances. For example, a patrol police officer may dress as he or she wishes in his or her private life, but must wear a uniform to work. A branch manager who is contractually bound to comply with IIROC regulations must respect the regulation stipulating that the manager must answer an IIROC designated investigator's questions whose purpose is to determine whether IIROC regulations have been violated. Such an investigation does not encroach upon the Respondent's fundamental right to privacy. It is part of the standards that the representative or, in this case, the branch manager, has agreed to comply with.

¶ 14 The second part of the motion pertains to striking out nineteen allegations referring to the testimony of representatives or ex-representatives or a third party, made without the Respondent being present. For illustrative purposes, we reproduce below one of these allegations:

> "39. A admitted to IIROC's investigator having directly remunerated the J without informing the firm's Compliance Department." [Translation]
>
> Note: A refers to one of the representatives under the supervision of the Respondent, and J refers to that representative's clients.

¶ 15 The Respondent requests that this allegation (as well as the 18 other allegations) be stricken out on the grounds that it refers to testimony made without him being present, he was not informed of the circumstances, he was not able to cross-examine and it is up to the Panel to weigh the evidence.

¶ 16 It is true that it is up to the Panel only to weigh the evidence, but the Respondent's grounds are not admissible. Firstly, it is not yet a question of "testimony". The statements made by third parties to the investigator are facts which may or may not be admitted as evidence by our Panel at the hearing on the merits. If IIROC does not intend to summon representative A but does intend to prove such representative's statements to the investigator, the Panel could deem the statements inadmissible on the grounds that they amount to hearsay evidence and that the Respondent's right to cross-examine is not respected. Unless there is a reason authorizing the Panel not to observe the general rule excluding hearsay evidence, a statement made by a third party to the IIROC investigator will not be admissible if the third party does not testify.

¶ 17 That being said, our Panel reiterates that at this stage, it is not a question of evidence or testimony. The Notice of Hearing simply lets the Respondent know what IIROC is relying upon to explain the four violations the Respondent is charged with.

¶ 18 This is not a Civil Law matter, where a proceeding to institute a suit must comply with the rules of the Code of Civil Procedure, including section 168, which provides for the striking out of allegations which are immaterial, redundant or libelous. The purpose of the Notice of Hearing is to inform the Respondent, to provide the Respondent with additional details about the facts we intend to give in evidence. The Notice of Hearing is essentially an asset to the Respondent; as for the wording of the disciplinary complaint, it is at the entire discretion of the prosecutor.

¶ 19 We point out that these allegations are not immaterial, redundant or libelous. Essentially, the Respondent is contesting allegations based on hearsay. He mentions that he was not able to cross-examine, clarify the context, etc. Even supposing he is right, the most that his motion could result in would be the striking out of the words "to IIROC's investigator". For example, if allegation no. 39 read as follows: "A admitted

having directly remunerated the J without informing the firm's compliance department", the Respondent could certainly not request that it be stricken out.

¶ 20 The weighing of the relevance and admissibility of evidence is at the discretion of the Hearing Panel; therefore, great prudence is advisable at the preliminary argument stage. It is often preferable to wait until the hearing on the merits before passing upon the admissibility of an allegation[2].

¶ 21 The Respondent also raised the question of the confidentiality of the investigation. This question of confidentiality does not mean that the remarks made in front of an investigator may not be raised before the Hearing Panel. IIROC may hold one hearing involving many representatives and a branch manager. This does not mean that remarks made by one of them cannot be relevant to the investigation as a whole. The concept of confidentiality, as regards the investigation, implies that the content of the investigation may not be disclosed other than before the Hearing Panel entrusted with deciding whether the alleged violations are substantiated or not and in connection with the procedures. But this certainly does not mean that the investigation must be compartmentalized and that each of the persons concerned must be isolated.

¶ 22 The motion presented in the name of the Respondent St-Amant is of the same nature as that of the Respondent Beaudoin. *Mutatis mutandis*, the same reasons in support of the motion are raised and are dealt with by the Panel in the same manner as the motion presented in the name of the Respondent Beaudoin.

FOR THESE REASONS, THE HEARING PANEL:

¶ 23 ***DISMISSES*** the Respondents' motions to strike out allegations.

August 24, 2010

Mr. Daniel Houle, member of the Hearing Panel

Mr. Marcel Paquette, member of the Hearing Panel

Me Jean-Pierre Lussier, President of the Hearing Panel.

[2] See for example :

- Lagacé c. Déry (Superior Court) A.E./P.C. 2002-1732
- Ruest c. Boily (Superior Court) J.E. 95-1303