Re Deutsche Bank Securities

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

Deutsche Bank Securities Ltd

2010 IIROC 45

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

Heard: September 27 and October 7, 2010
Decision: October 13, 2010
(13 paras.)

Hearing Panel:
Hon. Patrick T. Galligan Q.C. (Chair), F. Michael Walsh, Donald H. Page

Appearances:
Elsa Renzella and Tamara Brooks, IIROC Enforcement Counsel
Nigel Campbell and Ryan A. Morris, for Deutsche Bank Securities Ltd.

REASONS FOR DECISION

¶ 1 At the conclusion of the argument of the motion, the Panel, orally, dismissed the request for a stay and stated that brief reasons would follow. These are those reasons.

¶ 2 Deutsche Bank Securities Ltd. ("Deutsche Bank") moved for an order:

a. dismissing or staying the notice of hearing;

b. for further and better disclosure;

c. for an adjournment.

¶ 3 We will deal with the issues briefly and in that order.

a. Dismissal or Stay

¶ 4 IIROC participated with the Ontario Securities Commission and L'Autorité des marchés financiers in an investigation into the freezing of the third party Asset-Backed Commercial Paper market in the summer of 2007. That investigation identified a number of specific persons who, Deutsche Bank states, could give material support to its defence to the contraventions alleged against it. Those persons are neither members of

the IDA nor employed by members. Deutsche Bank wants to have those persons testify on its behalf at the hearing.

¶ 5 It is common ground that IIROC has no power to compel persons, who are neither members of the IDA nor employed by a member, to testify at a disciplinary hearing. Deutsche Bank contends, therefore, that it is deprived of its right to make full answer and defence because it cannot force those persons, or any of them, to testify.

¶ 6 The law with respect to granting a stay at this stage of a proceeding has been enunciated by the Court of Appeal on more than one occasion. We refer specifically to *R. v. R.C.*, [1995] O.J. No. 210 (Ont. C.A.). While the circumstances giving rise to the application for a stay in that case were different from these, we are satisfied that there is no difference in principle. We quote from the decision of the Court which was delivered by Griffiths J.A.:

> 6 Mr. Justice Jenkins then found on the evidence before him that the accused had met this burden.
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> 7 In our respectful view the evidence must clearly establish prejudice to the defence of a significant degree before a stay should be granted by reason of pre-charge delay. In *Regina v. François*, (1993), 15 O.R. (3d) 627 this court quoted with approval from an earlier decision in *Blake* as follows:
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> > In our view, the showing of some prejudice is not a sufficient basis for a decision that an accused person's *Charter* rights under ss.7 and 11(d) would be infringed if the accused were required to stand trial. What must be demonstrated on the balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence. The measurement of the extent of the prejudice in the circumstances of this case could not be done without hearing all of the relevant evidence, the nature of which would make it clear whether the prejudice was real or minimal. The Crown's submission was, in our view, right. The motion was premature and the stay should not have been granted when it was.
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> 8 In our view the above reasoning applies equally to this case. It would be more appropriate for this matter to proceed to trial and for the trial judge to determine whether a stay is appropriate at that stage of the trial, when he or she has had the benefit of hearing sufficient evidence to assess whether prejudice has been demonstrated of such magnitude as to justify a stay.

¶ 7 We have no hesitation in concluding that, in this case, the appropriate course is to allow the case to proceed to a hearing at which time the hearing panel will be able to assess whether prejudice has been demonstrated of such magnitude as to justify a stay. The request for a stay is, accordingly, dismissed.

b. Disclosure

¶ 8 As a result of commendable cooperation between counsel, the problems of disclosure have largely been resolved and, therefore, no general order is required at this time. Staff is under a continuing obligation to make disclosure and if any problems develop the Hearing Panel may be spoken to.

¶ 9 Because of the complexity of the case, and because of the voluminous disclosure which has been made, we do make the following order:

¶ 10 Staff shall comply with Rules 10 and 11 on or before January 15, 2011.

¶ 11 Deutsche Bank Securities Limited shall comply with Rules 10 and 11 on or before January 31, 2011.

c. Adjournment

¶ 12 An adjournment is obviously required. Because of the complexity of the case, and the voluminous disclosure which has been made, we think that the adjournment should be for a substantial period. We order

that the hearing be adjourned to a date to be fixed as soon as practicable after April 4, 2011.

¶ 13 Costs in the cause.

Reasons dated this 13th day of October 2010.

P. T. Galligan, Chair

F. Michael Walsh

Donald H. Page