

Re Rail

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada (IIROC)**

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Stéphane Rail

2011 IIROC 64

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

Hearing held on November 7, 2011
Decision rendered on December 12, 2011
(72 paragraphs)

Hearing Panel:

Me Robert Monette (Retired Lawyer), Elaine Phenix, John Ballard

Appearances:

Me Marie-Claude Sarrazin, Legal Counsel for IIROC

DECISION

Preamble

¶ 1 This disciplinary hearing is held by virtue of Dealer Member Rule 20 of the Investment Industry Regulatory Organization of Canada (IIROC).

¶ 2 At the previous hearing on July 28, 2011, the parties had agreed to the present dates of November 7 and 8, 2011. The Respondent Stéphane Rail (Respondent) had also undertaken to file his response no later than September 2, 2011; the response would be filed on October 31, 2011.

¶ 3 On November 4, 2011, the Hearing Panel was informed that Me Sébastien Caron (Me Caron), Legal Counsel for the Respondent, was no longer representing the latter.¹

¶ 4 On that date, Me Marie-Claude Sarrazin (Me Sarrazin), Legal Counsel for IIROC, took steps to clarify the Respondent's intentions regarding the hearing scheduled for November 7 and 8, 2011.

¶ 5 That same day, the Hearing Panel was informed that the Respondent did not intend to appear at the hearing scheduled for the following Monday.²

¶ 6 On the morning of November 7, 2011, Me Caron was present but the Respondent was absent.

¹ Letter of November 4, 2011, a copy of which was sent to the Hearing Panel coordinator

² November 4, 2011 email exchange between the attorneys on the case

¶ 7 Me Caron confirmed before the Hearing Panel that his mandate was withdrawn on November 3, 2011.

¶ 8 After his letter of November 4 had been sent, and at the request of Me Sarrazin, Me Caron reached the Respondent; the latter informed him that he would not be present at the hearing scheduled for November 7 and 8, 2011.

¶ 9 Me Caron argued that he no longer had the authority to act in this matter and asked the Hearing Panel for leave to withdraw from the proceeding, as stipulated in Rule 3.3 of the Rules of Practice and Procedure (ROP).

¶ 10 For her part, Me Sarrazin declared that she is ready to proceed.

Preliminary questions

¶ 11 In its analysis of the preliminary questions, the Hearing Panel intends to rely on the general principle stipulated in Rule 1 (ROP) :

“1.2 General Principle

These Rules shall be interpreted and applied to secure a fair hearing and a just determination in the interests of justice, with a view to securing such result in a timely and cost effective manner.”

¶ 12 At the time of the hearing, the Hearing Panel had had no communication from the Respondent (phone call, e-mail...) informing it that he intended to exercise his rights; his absence was therefore not justified or explained.

¶ 13 It is apparent that Me Caron cannot remain on the case without a mandate, nor explain the Respondent's absence.

¶ 14 In view of the circumstances surrounding the withdrawal of the mandate, and the Respondent's absence even though he was duly informed of the hearing date, the Hearing Panel considers that it would not be useful for Me Caron to proceed by written motion and, by the same token, gives the latter leave to withdraw from the proceeding.

¶ 15 Also, considering that the Notice of Hearing in this matter adequately notified the Respondent of the consequences of his absence from the hearing, the Hearing Panel consequently gives IIROC leave to proceed *ex parte*, the whole in accordance with Rule 13.5 (ROP);

13.5 Where Respondent Fails to Attend Disciplinary Hearing

Where a Respondent, having been served with a Notice of Hearing, fails to attend a disciplinary hearing, the Hearing Panel may proceed in the absence of the Respondent and may accept as proven the facts and violations alleged by the Organization in the Notice of Hearing.

Notice of Hearing

¶ 16 The Notice of Hearing details the counts against the Respondent;

- a) **On December 8, 2005 and July 13, 2006, during examinations by Staff of IIROC, the Respondent, Stéphane Rail, impeded the IDA (IIROC)'s investigation when he lied about the existence and/or the involvement of A concerning the account of B, thereby violating IDA By-law 29.1. (now IIROC Rule 29);**
- b) **Between September 1995 and April 2001, Stéphane Rail violated IDA Regulation 1300.1(a) (now IIROC Rule 1300) when he failed to use due diligence to learn and remain informed of the essential facts relative to his client B and to every order or account accepted, considering the fact that A, the president and secretary of B and the person identified as the Authorized Individual on the**

account, had been deceased since December 1994;

- c) **Between September 1995 and March 2001, Stéphane Rail violated Association Regulation 200.1(i)(3) (now IIROC Rule 200.1(i)(3)) relative to instructions concerning approximately 124 trades executed in the account of B, which were from an unauthorized person;**

¶ 17 In support of the Summary of Facts appended to its Notice of Hearing, IIROC called Investigator Nicolas d'Astous to testify and filed exhibits P-1 to P-22.

¶ 18 Before proceeding with the analysis of the counts, the Hearing Panel deems it necessary to present a summary of the case.

History

¶ 19 In 2005, Investigator D'Astous proceeded with a first investigation concerning the Respondent. This investigation was pursuant to complaints filed by H.C. and P.I. and covered a period of time in 2000-2001.

¶ 20 In the course of this investigation, the Respondent met with representatives of IIROC on two occasions, namely December 8, 2005 (P-12) and July 13, 2006 (P-13).

¶ 21 The results of this first investigation led to the deposit of notices of violations for which penalties were imposed on the Respondent, as appears from exhibits P-1 to P4.

¶ 22 It is important to note that these same actions taken by the Respondent with respect to plaintiffs H.C. and P.I. were also the subject of civil proceedings.

¶ 23 Investigator D'Astous obtained a copy of the aforesaid civil proceedings and followed the progress of the trial, including the Respondent's testimony in May 2009 (P-14).

¶ 24 Upon receiving this new information, IIROC proceeded with a second investigation of the Respondent.

¶ 25 Notices of investigation (P-5 to P-8) dated November 4, 2009 were sent; the allegations concerned the Respondent's actions relative to the account of G.R.S. (account B) and to the individual J.P.B (A).

¶ 26 In the context of this second investigation, the Respondent met with Investigator D'Astous on August 18, 2010.

¶ 27 The result of this second investigation is the subject of the present hearing.

¶ 28 Essentially, the contraventions alleged by IIROC pertain to the fact that the Respondent provided either false information, or new incriminating information, proof of which is in the statements made by the Respondent on different occasions.

¶ 29 There is therefore reason to proceed with an analysis of each contravention in order to assess its merits.

Contravention A

¶ 30 The first contravention concerns IIROC Dealer Member Rule 29.1 which reads as follows;

29.1. Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

¶ 31 The question is to determine whether IIROC has met its burden of proof; namely to demonstrate that the Respondent lied during the examinations conducted in 2005 and 2006 and thus impeded the investigation, the whole contrary to the rules respecting the conduct of activities.

¶ 32 Keep in mind that account B was opened on September 14, 1995 and was closed in 2001; throughout this period, the authorized individual listed in account B is A.

¶ 33 During the examination on December 8, 2005, the Respondent described the role of A with respect to account B.

¶ 34 According to the Respondent, A is the person with whom he communicated. A looked after the transactions in account B and was responsible for the account³.

¶ 35 During the examination on July 13, 2006, the Respondent again confirmed A's responsibilities vis-à-vis account B.⁴

¶ 36 There is no denying that the Respondent maintained before the representative of IIROC the proposition by which A was the sole person responsible for the transactions in account B, and had been since the account was opened in 1995.

¶ 37 This assertion by the Respondent cannot survive in the face of the information obtained during the civil proceeding in 2009.

¶ 38 During his examination of May 5, 2009 before the civil court, the Respondent initially confirmed A's accountability vis-à-vis account B.

¶ 39 The Respondent declared under oath having communicated on several occasions with A regarding instructions in account B and he affirmed that account B was opened through A.⁵

¶ 40 However, during this same examination, the Respondent was confronted with the fact that A was deceased on December 2, 1994.⁶

¶ 41 Armed with new information that surfaced at the civil proceedings, Investigator D'Astous met with the Respondent on August 18, 2010; the meeting took place in the context of the second investigation.

¶ 42 During the 2010 meeting, the Respondent stated several points that were in contradiction to the earlier meetings in 2005 and 2006, more particularly the following.

¶ 43 The Respondent was alone when account B was opened; the Respondent was not present for the signatures which appear on the new account application form for account B (P-9); the opening instructions came from P and C.⁷

¶ 44 The Respondent acknowledged that A could not have signed as an authorized person, given that he was deceased prior to the signature and, consequently, there was no interaction with A after the opening of account B.⁸

¶ 45 The Respondent learned of A's death at some point in 2001-2002.⁹

¶ 46 We note that documents P-16 to P-18 confirm the death of A in 1994 and contradict the information provided by the Respondent during the initial investigation.

¶ 47 This, in essence, is the evidence supplied by IIROC.

³ P-12, pages 41, 43, 46

⁴ P-13, pages 3, 11, 18

⁵ P-14, pages 34, 38 (line 1 to 6), 39 to 41 (line 1 to 16)

⁶ P-14, pages 48 to 52

⁷ P-19, pages 8 to 14, 25 to 28

⁸ P-19, page 19, pages 32-33

⁹ P-19, page 59

¶ 48 In the face of all this evidence and the Respondent's admissions, there is no denying, as far as the Hearing Panel is concerned, that the Respondent lied regarding A's involvement in the management of account B and thus impeded the progress of the investigation conducted by IIROC.

¶ 49 By acting in this manner, the Respondent failed to observe high standards of ethics and conduct in the transaction of his business.

¶ 50 The Hearing Panel concludes that the first contravention is proved and, consequently, finds the Respondent guilty.

Contravention B

¶ 51 The second contravention concerns the application of IIROC Rule 1300.1 which states:

1. Identity and Creditworthiness

Each Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted.

¶ 52 The Hearing Panel finds that the Respondent failed in this duty of due diligence on numerous occasions when he had the opportunity to verify the essential facts relative to account B, notably: when the account was opened in 1995 (P-9), when the agreement update form was filled out in 1998 (P-11), or again when the fund transfer authorizations were received in 2000 (P-22).

¶ 53 On these occasions, the Respondent had the opportunity to contact the responsible person, A; this was not done.

¶ 54 The Respondent also acknowledges that the forms pertaining to account B are incomplete and that they were not reviewed or corrected.¹⁰

¶ 55 What's more, pursuant to the factual analysis performed above, it is established that A, the authorized individual on account B, was deceased at the time said account was opened in 1994.

¶ 56 However, the Respondent learned of A's death in 2001-2002, namely more than six (6) years after the opening of account B.

¶ 57 The evidence is convincing that the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to account B, particularly the death of the authorized individual, A.

¶ 58 The Hearing Panel concludes that the second contravention is proved and finds the Respondent guilty.

Contravention C

¶ 59 The third contravention concerns the application of IIROC Rule 200.1(i)(3);

(i) A record in respect of each cash and margin account:

(1) The name and address of the beneficial owner (and guarantor, if any) of such account,

(2) In the case of a margin account a properly executed margin agreement containing the signature of such owner (and guarantor, if any), and

(3) Where trading instructions are accepted from a person or corporation other than the customer, written authorization or ratification from the customer naming the person or company,

But, in the case of a joint account or an account of a corporation, such records are required only in respect of the person or persons authorized to transact business for such account;

¶ 60 Exhibit P-21 attests that more than 124 transactions were effected in account B.

¹⁰ P-19, pages 26 and 27

¶ 61 Given the death of A, none of these transactions could have been authorized by the person mandated.

¶ 62 Considering that no other authorization appears in the register of account B, the Respondent did commit the alleged contravention by accepting instructions from an unauthorized individual.

¶ 63 The evidence on file allows us to conclude that the third contravention is proved and the Respondent is therefore found guilty.

Conclusion

¶ 64 Before proceeding with its conclusion, the Hearing Panel wishes to comment briefly on the response filed by the Respondent.

¶ 65 Given his absence, the Respondent cannot, obviously, respond to the burden of proof that is his, which is to demonstrate the soundness of his legal argument.¹¹

¶ 66 Although the theory of procedural abuse or of multiplicity of counts for one same action may have a place in disciplinary matters, they nevertheless are subject to strict application criteria, which are not found here.¹²

¶ 67 The Hearing Panel nevertheless has two observations to make.

¶ 68 First, if there has been any delay incurred in this matter, it is entirely the doing of the Respondent who has failed to cooperate from the very first investigation.

¶ 69 Secondly, the counts which are the subject of this hearing stem from actions that are entirely distinct from those for which the Respondent was disciplined previously.

¶ 70 Finally, the Hearing Panel notes that the alternative arguments in the Respondent's response are lacking and insufficient in that the allegations of *non est factum* are without grounds.

¶ 71 Consequently, the Hearing Panel, having weighed all of the evidence in the matter, concludes that IIROC has demonstrated the validity of the alleged contraventions.

¶ 72 **FOR THESE REASONS**, the Hearing Panel:

FINDS the Respondent guilty of having, on December 8, 2005 and July 13, 2006, during examinations by Staff of IIROC, contravened IDA By-law 29.1. (now IIROC Rule 29) by impeding the IDA (IIROC)'s investigation when he lied about the existence and/or the involvement of A concerning account B;

FINDS the Respondent guilty of having, between September 1995 and April 2001, violated IDA Regulation 1300.1(a) (now IIROC Rule 1300) when he failed to use due diligence to learn and remain informed of the essential facts relative to his client B and to every order or account accepted, considering the fact that A, the president and secretary of B and the person identified as the authorized individual on the account, had been deceased since December 1994;

FINDS the Respondent guilty of having, between September 1995 and March 2001, violated Association Regulation 200.1(i)(3) (now IIROC Rule 200.1(i)(3)) relative to instructions concerning approximately 124 trades executed in the account of B, which were from an unauthorized person;

ASKS IIROC, through the National Hearing Coordinator, to convene the parties and to set a date to hear their representations in respect of the penalties to be imposed.

Signed at Montréal, this December 12, 2011

¹¹ Blencoe v BCHRC (2000) 2 SCR 307

¹² See preceding note.

R v Prince (1986) 2 SCR 480

Me Robert Monette (Retired Lawyer)

Élaine Phénix

John Ballard

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