Re Crandall

IN THE MATTER OF:

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

and

Robert Adrian Crandall

2015 IIROC 30

Investment Industry Regulatory Organization of Canada
Hearing Panel (New Brunswick District)

Heard: July 14, 2015
Decision: September 2, 2015

Hearing Panel:
Robert Monette, Chair, Elaine C. Phénix and Gilles Archambault
Appearances:
Melissa J. MacKewn, Enforcement Counsel for IIROC
Robert Adrian Crandall, appearing for himself

DECISION ON PRELIMINARY MOTIONS

Preamble

¶ 1 On April 23rd, 2015, Staff of the Investment Industry Regulatory Organization of Canada (IIROC) issued a Notice of Hearing (the "Notice"), concerning Robert Adrian Crandall (the "Respondent").

¶ 2 On May 22, 2015, with the consent of both parties, a hearing was held via conference call for the sole purpose of setting a date regarding the disciplinary hearing. After discussion with the Hearing Panel (the "Panel"), the parties agreed that the disciplinary hearing will be held in New Brunswick on the 20,21 and 22 of October 2015.

¶ 3 After the conference call, written communications were exchanged between the parties and different legal and factual issues were raised by both parties.

¶ 4 On June 16, 2015, the Panel notified the parties that Rule 8 of IIROC's Dealer Member Rules of Practice and Procedure ("Rules of Practice and Procedure" or "RPP") stipulates the process by which motions can be addressed to the Panel.

¶ 5 Accordingly, the Panel referred the parties to the National Hearing Coordinator in order to file their formal motions and set a date for a hearing on those motions.

¶ 6 On June 30, 2015, in compliance with Rule 8 of the RPP, IIROC filed a Notice and Record of Motion; the motion was in regards to the disclosure of information (the "Disclosure") provided to the Respondent in this disciplinary hearing.

¶ 7 The Respondent did not file a response to IIROC's motion nor did he file any written motions of his own.

¶ 8 A hearing date was fixed on July 14, 2015 for which the parties requested to proceed by conference call

(the "Hearing").

The Hearing

¶ 9 At the beginning of the Hearing, the Respondent informed the Panel that he would orally present two motions of his own. IIROC's counsel did not have any objection to the Respondent's request to proceed orally.

¶ 10 Pursuant to Rule 1.5 of the RPP, the Panel waived the procedural conditions set out by Rule 8 of the RPP and allowed the Respondent to proceed orally on his motions.

¶ 11 Three preliminary motions were brought before the Panel; two by the Respondent and one by IIROC.

¶ 12 The Respondent raises two jurisdictional issues :

a) The first issue is about whether an argument of apprehension of bias is sustainable against one of the Panel members.

b) The second one is the requisite that the Panel be composed exclusively of members of English-speaking mother tongue.

¶ 13 As for IIROC's motion, the issue is procedural and concerns the merits of different directions submitted to the Panel in regards to Disclosure.

¶ 14 The Panel will analyse the merits of those applications with the objective of enforcing the duty of procedural fairness.[1]

A) Jurisdictional Issues

¶ 15 The Supreme Court of Canada has considered the question of whether administrative tribunals may entertain questions relating to their jurisdiction**.**

¶ 16 In *Matsqui*, it was enunciated that administrative tribunals can examine the boundaries of their jurisdiction although their decisions in this regard lack the force of *res judicata.*

> It is now settled that while the decisions of administrative tribunals lack the force of *res judicata*, nevertheless tribunals may embark upon an examination of the boundaries of their jurisdiction. Of course, they must be correct in any determination they make, and courts will generally afford such determinations little deference.[2]

¶ 17 It is now an established concept, through legislation or authorities, that most adjudicative instances (civil, criminal, statutory…) have and should exercise their authority to rule on jurisdictional matters.[3]

¶ 18 The Panel has such authority from Rule 20 of the Dealer Member Rules of IIROC (Rules), which reads at section 20.2 :

> Exercise Of Authority
>
> (1) A Panel may make any determination, hold any hearing and make any decision**, o**rder, interim order or impose any terms required to implement such order, required or permitted under Rule 20 or under the Corporation Practice and Procedure**.**

¶ 19 Therefore, the Panel will decide on jurisdictional issues first, as conclusions on those issues will determine the opportunity for the Panel to continue the disciplinary proceedings.

1) Apprehension of bias

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[1] Deeb v IIROC, 2012 ONSC 1014

[2] Canadian Pacific Ltd. v Matsqui Indian Band (1995) 1 SCR 3 at para. 23

[3] Re TSX, Market Regulation Services Inc., Northern Securities Inc., Vic Alboini and Chris Shaule, OSC, October 23, 2007, Arbitration Act R.S.N.B.2014 c.100 section 17.1

¶ 20 IIROC is a recognized self-regulatory organization (SRO) pursuant to a recognition order made under section 35(1) (b) of the *Securities Act*, S,N,B, c. S-5.5 as amended (the Act).[4]

¶ 21 Section 38.1 of the Act provides that a SRO shall regulate the operations, the standards of practice and the business conduct of its members or participants and their representatives in accordance with its by-laws and other regulatory instruments and its practices and policies.

¶ 22 As an SRO, it is expected that IIROC provide a disciplinary process that is fair and transparent. Such a process implies that members of the Panel will be impartial as required by its rules.[5]

¶ 23 This is imperative as impartiality is a fundamental principal of justice. In *Wewaykum Indian Band*, the Supreme Court wrote that:

> The motions brought by the parties require that we examine the circumstances of this case in light of the well-settled, foundational principle of impartiality of courts of justice. There is no need to reaffirm here the importance of this principle, which has been a matter of renewed attention across the common law world over the past decade. Simply put, public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so.(par.57)[6]

¶ 24 The Supreme Court has adopted a standard by which an argument of disqualification must be appraised, this criterion is expressed by de Grandpré J. in *Committee for Justice and Liberty v. National Energy Board*, at p. 394; [7]

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

¶ 25 Consequently, a motion based on an argument of an apprehension of bias must be presented at the earliest convenience and the merits of such motion must be evaluated at first instance.[8]

a) Allegations

¶ 26 The grounds for the apprehension of bias relate to Panel Member Gilles Archambault (G.A.).

¶ 27 Both the Respondent and G.A. worked for the same organization, Scotia McLeod at a certain point in time from 1984 to 1999.

¶ 28 The Respondent was a branch manager and vice president in New Brunswick while G.A. was a branch manager and vice president in Montreal, Quebec

¶ 29 The Respondent relates that he and G.A. had dealings together directly or indirectly.

¶ 30 He states that they may have crossed paths at the occasion of branch managers' meetings, conferences at hotels, or by telephone.

¶ 31 The Respondent and G.A. never had any exchanges regarding the facts described in the Notice which occurred in a period of time from 2006 to 2012.

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[4] Ontario made the recognition order under section 21.1 of the Securities Act

[5] Schedule C.1 of Transition Rule no.1, Section 1.6, subsection 3),b

[6] Wewaykum Indian Band v. Canada, 2003 SCC 45

[7] Committee for Justice and Liberty et al. v. National Energy Board et al., [1978] 1 S.C.R. 369

[8] Re Northern Securities 2012 IIROC 33;

¶ 32 For the relevant period mentioned in the Notice, the Respondent was employed by another firm; moreover, the allegations pertain solely to the relationship between Dealer Member and customer.

¶ 33 The Respondent contends that he and GA have crossed paths with a previous employer and that this does compromise the Panel.

¶ 34 Clearly, from the events mentioned above, it is the apprehension of bias rather than direct bias that is at stake here.

b) Discussion

¶ 35 To succeed in his application, the Respondent has to firstly submit his motion of apprehension of bias at the earliest convenience and secondly demonstrate that there is a *reasonable* ground for apprehension of bias.

¶ 36 The Panel is satisfied that the Respondent did submit his motion at the earliest convenience.

¶ 37 As to the second aspect, the Panel must determine if the Respondent has established substantial grounds for a reasonable apprehension of bias.[9]

¶ 38 For the following reasons, the Panel decides that the Respondent has not answered his onus of proof; he did not establish circumstances that would justify the disqualification of a member of the Panel.

¶ 39 As a whole, the Panel considers that there is a lack of specificity in the Respondent's proposition.

¶ 40 The Respondent does not have any recollection of any particular encounter. It is worthwhile to stress that the Respondent and G.A worked at different offices in different provinces and they only crossed paths at the occasion of branch managers' meetings or conferences.

¶ 41 No particular ground of conflict or dispute with G.A. is mentioned by the Respondent, while they had the same employer.

¶ 42 We draw attention to the fact that the events asserted by the Respondent have occurred around 7 years before the ones alleged in the Notice of Hearing.

¶ 43 At the time of the events mentioned in the Notice, the Respondent was with a different employer; those events concern the relation between Dealer Member and customer and not the one between employee and employer.

¶ 44 It is obvious that the Respondent and G.A never have, at any occasion, discussed the allegations described in the Notice.

¶ 45 Finally, the present proceedings are taking place more than 15 years after the facts alleged by the Respondent; the authorities have concluded that such a long passage of time diminishes the strength of the argument for disqualification.[10]

c) Conclusion

¶ 46 The foregoing is sufficient for the Panel to conclude that the criterion of Grandpré J. has not been met.

¶ 47 We are of the opinion that no reasonable person could conclude that this Panel, whether consciously or unconsciously, would not decide fairly.

¶ 48 The Respondent's motion for apprehension of bias is dismissed

2) <u>Qualification of Panel Members</u>

¶ 49 The Panel Members were appointed according to Rule 20 of the Rules.

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[9]Committee for Justice and Liberty et al…p 395

[10] Wewaykum Indian Band par.85

¶ 50 Since the Respondent was a member of IIROC's New Brunswick District Council until May 2014, chairs of the respective Hearing Committees consented to the selection of members from the Quebec Hearing Committee to serve on the Panel, the whole in conformity with Section 1.6 Schedule C.1 of Transition Rule no.1, which states :

> 1.6. Selection of Hearing Panel
>
> (1) Any Enforcement Proceeding or Review Proceeding pursuant to Rules of the Corporation shall be heard by a Hearing Panel selected by the National Hearing Co-ordinator comprised of two Industry Members and one Public Member appointed to the hearing committee of the applicable District subject to subsection (2).
>
> (2) Hearing committee members may serve on Hearing Panels in other Districts where both chairs of the respective hearing committees consent….

¶ 51 The Respondent submits that since his mother tongue is English, he has a right to be heard by a Panel constituted of members whose mother tongue is also English.

a) Discussion

¶ 52 The Supreme Court has mentioned that the notion of language is not a static characteristic, and the reference to maternal language may be difficult to apply in certain circumstances.[11]

¶ 53 The constitutional protection is the right for a person to have a hearing in the appropriate language.[12]

¶ 54 The Panel has confirmed and the Respondent recognizes that this hearing and all procedures will be conducted in English.

¶ 55 The Respondent's right to a hearing in his language is thus complied with and this disciplinary hearing will be heard by duly appointed Panel members.

b) Conclusion

¶ 56 The Respondent's requirement to be heard by a Panel constituted of members whose mother tongue is also English is not recognized by law or authorities.

¶ 57 The Panel dismisses the Respondent's motion.

B) Procedural Issue

¶ 58 IIROC requests the following directions from the Panel :

a) a direction that Respondent, shall not :

   i) use the disclosure made to him in this proceeding for any purpose other than the defence of this proceeding; or

   ii) provide copies of the Disclosure to, or share the contents of the Disclosure with anyone other than a lawyer or agent retained by him to defend his proceeding; unless he has been authorized to do so by order of the Panel; and

b) a direction that the Respondent shall return the Disclosure to IIROC and destroy any additional copies of it at the conclusion of this proceeding.

a) Allegations

¶ 59 IIROC submits the necessity of the directions on two grounds:

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[11] R v Beaulac (1999) 1 SCR 768

[12] Ibid.

a) the refusal by the Respondent to undertake an engagement similar to the directions above; and

b) the obligation by IIROC to strike a balance between the protection of the privacy rights of third parties and the requirement of Disclosure towards the Respondent.

¶ 60 While the Respondent confirms that he will not undertake the engagement asked of him by IIROC, he also acknowledges that the information should be mainly used for his defence and in communications with a lawyer to prepare such a defence.

¶ 61 He submits that the hearing being public, the directions are not justified as he contends that all information should be public.

¶ 62 The Panel will proceed to evaluate the grounds for directions requested by IIROC and consider the position of the Respondent.

b) Discussion

Disclosure Obligation

¶ 63 As established previously, IIROC is recognized as an SRO; it is instructed to administer and monitor its rules and policies and enforce compliance with these rules.

¶ 64 In furtherance of its mandate, IIROC may conduct examinations and investigations, in the course of which information of a personal, financial and commercial nature is collected. This information is received from different sources such as respondents, complainants, third parties,[13] who may expect that their right to privacy should be protected.

¶ 65 IIROC admits, rightfully so, that they are bound by the standard for disclosure prescribed by *Stinchcombe*.[14]

¶ 66 In *Stinchcombe*, the Supreme Court decided that full disclosure by the pursuit of relevant information collected during an investigation protects the right for any person to have full answer and defence.[15]

¶ 67 This principle is well recognized in IIROC's Rules of Practice and Procedure[16] and Disclosure Policy[17]; in the latter document, a reference is expressly made to *Stinchcombe* as an applicable disclosure standard.

¶ 68 Thus, the Panel confirms that IIROC has a duty to full Disclosure towards the Respondent.

Deemed Undertaking Rule

¶ 69 The second step of the analysis is to appreciate, if, once IIROC executes its obligation of Disclosure, it has an added obligation to assure the protection of the privacy rights of third parties.

¶ 70 As mentioned earlier, IIROC has a duty to full Disclosure, which implies the transmission of private important documents.

¶ 71 At this stage of a disciplinary hearing, the information disclosed would not have been filed as exhibits.

¶ 72 At this stage, that information is not public and is only provided so the Respondent is not taken by surprise and so that he can prepare a full answer and defence.

¶ 73 At the disciplinary hearing, some of the information disclosed could be considered not relevant to the issue and thus not filed in the record. Furthermore, an exception for privileged information could be

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[13] Rules 19.5 and 19.6 of the Rules

[14] Deloitte & Touche LLp v. Ontario (Securities Commission), 2003 SCC 61

[15] R v. Stinchcombe (1991) 3 SCR 326

[16] Rule 10 RPP

[17] Policy adopted in March 2009

requested.[18]

¶ 74 Moreover, IIROC has adopted a policy regarding private information in a disciplinary hearing.[19]

¶ 75 For those reasons, the argument of the Respondent based on the notion of a hearing being public, cannot prevail, and a protection of the privacy rights of third parties stands.

¶ 76 According to IIROC, the deemed undertaking rule should apply.[20] This rule is well established in civil procedure.[21]

¶ 77 In *Doucette*, Mr. Justice Binnie of the Supreme Court (as he then was)described the necessity of such a rule :

> Par.26 There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more complete and candid discovery……
>
> Par. 27 The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.[22]

¶ 78 The Panel considers that Mr. Justice Binnie's reasoning can be applicable to Disclosure in disciplinary hearings; hence, the information obtained by Disclosure should be used for the object of the proceedings in which they are disclosed and not for collateral affairs.[23]

¶ 79 The Panel concludes that the implied undertaking rule should apply to Disclosure and that no onus of superior public interest was proposed that would put aside the rule.[24]

Authority of the Panel to Issue Directions

¶ 80 IIROC submits that the Panel has authority to grant directions in accordance with Dealer Member Rule 20[25] and Rule 1.5(a) of the RPP which provides broad procedural powers:

> Procedural Power of the Panel
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> A Panel may:
>
> (a) make any determination, hold any hearing and make any decision, order, interim order or impose

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[18] Ibid 20.50 (2)

[19] Policy Regarding Use and Disclosure of Personal Information in IIROC Disciplinary Proceedings, effective as of **May 1, 2015**

[20] A Co v. Naster (2001) OJ No 4997 (Div Ct)

[21] Goodman v. Rossi (1995) OJ No 1906 (CA); 506913 NB Ltd (Nautica Motors) v McIntyre, 2012 NBQB 225 (CanLII), Rocca Enterprises Ltd. v. University Press of New Brunswick Ltd. 103 N.B.R. (2nd) 224

[22] Juman v. Doucette 2008 SCC 8

[23] Melnyk Re (2006), 29 OSCB 7875, X (Re) (2007) 30 OSCB 592

[24] Inspektor (Re) (2007), 30 OSCB 11271

[25] See previous par.19

any terms required to implement such order, required or permitted under these Rules;

(b) admit as evidence in a hearing, whether or not given or proven under oath or affirmation, anything that is relevant to the proceedings;

(c) require presentation of evidence or testimony under oath or affirmation; and

(d) waive any procedural requirement set out in these Rules upon the request of one or both parties.

¶ 81 These rules provide a wide range of measures to the Panels to enable them to execute their full jurisdiction.

¶ 82 The directions sought by IIROC permits compliance with two concepts of due process in a disciplinary hearing: the obligation of disclosure and the applicability of the implied undertaking rule.

¶ 83 The Panel concludes that it has authority to issue the directions sought by IIROC.

c) ***Conclusion***

¶ 84 IIROC has the obligation to strike a balance between the requirement of Disclosure and the protection of the privacy rights of third parties.

¶ 85 IIROC will execute its obligation of full Disclosure to Respondent.

¶ 86 Disclosure will be used by the Respondent for the sole preparation of his defence.

¶ 87 The Panel considers the Directions well founded in law and thus issues :

a) a direction that Respondent, shall not :

i) use the Disclosure made to him in this proceeding for any purpose other than the defence of this proceeding; or

ii) provide copies of the Disclosure to, or share the contents of the Disclosure with anyone other than a lawyer or agent retained by him to defend his proceeding;

unless he has been authorized to do so by order of the Panel; and

b) a direction that, unless decided otherwise by the Panel, the Respondent shall return the Disclosure to IIROC and destroy any additional copies of it at the conclusion of this proceeding.

Signed in Montreal on the 2nd day of September, 2015.

Robert Monette

Elaine C. Phénix

Gilles Archambault