Unofficial English Translation

Re Bélisle

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Philippe Bélisle

2021 IIROC 09

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

Hearing: April 27, 2021 by videoconference
Decision: May 17, 2021

Hearing Panel:
Robert Monette, Chair, François Breton and François Demers
Appearances:
Fanie Dubuc, Senior Enforcement Counsel
Gérald Soulière, Legal Counsel for Philippe Bélisle
Philippe Bélisle, Respondent (absent)

DECISION ON MOTION TO STAY PROCEEDINGS

THE INTRODUCTION

¶ 1 A hearing was held before the hearing panel (Hearing Panel) on April 27, 2021, pursuant to a motion filed by the Respondent to stay the proceedings (the Motion); to which IIROC responded in accordance with the Rules of Practice.

¶ 2 Counsel for both parties presented their arguments, supported by the relevant case law. No witnesses were heard.

¶ 3 The motion is founded on two main arguments. The Respondent is applying for a stay of the proceedings, alleging an excessive delay in the conduct of the proceedings and the existence of substantial prejudice caused by this delay.

¶ 4 The Hearing Panel intends to proceed first with a chronology of the alleged events. In the second phase, it will establish the legal principles in the matter of staying proceedings in the administrative and disciplinary field. Finally, it will analyze the conformity of the motion's arguments with the principles retained.

THE CHRONOLOGY

¶ 5 Referring to the written submissions of both legal counsels, the Hearing Panel retains the following facts.

¶ 6 On November 15, 2016, IIROC was informed by National Bank Financial (NBF), the regulated firm, that the latter was investigating inappropriate actions by the Respondent in the course of performing his duties.

¶ 7 On December 13, 2016, the Respondent was dismissed by his employer NBF.

¶ 8 On December 15, 2016, IIROC conducted an initial review to determine whether there was a violation of the rules of conduct by the Respondent.

¶ 9 During the month of December 2016, NBF refused to reimburse the Respondent for a claimed bonus; the reason cited was the dismissal. The Respondent invoked to NBF the psychological stress that existed prior to his dismissal. Between December 2016 and February 2017, NBF communicated with the Respondent's former clients.

¶ 10 During the months of January, February and March 2017, there were numerous exchanges between IIROC, NBF and the Respondent in order to complete the information required for the case analysis.

¶ 11 On April 6, 2017, IIROC informed the Respondent that a formal investigation had been opened.

¶ 12 During the months of April, July and September 2017, IIROC communicated with NBF to obtain additional information.

¶ 13 During the months of October and November 2017, IIROC communicated with the Respondent.

¶ 14 On December 11, 2017, the Respondent was questioned at length by Enforcement Counsel Fanie Dubuc as well as by IIROC's investigator.

¶ 15 Between the months of December 2017 and June 2018, numerous exchanges took place between IIROC and NBF to enable the investigator to carry out his mandate.

¶ 16 The Investigation by IIROC's Enforcement Department therefore ran from April 6, 2017 to August 15, 2018. We emphasize that the parties always cooperated with each other.

¶ 17 **On August 15, 2018**, Enforcement Counsel Fanie Dubuc wrote to the Respondent to advise him that the case was transferred to IIROC Prosecutions for review.

¶ 18 On December 14, 2018, the Respondent made an assignment of his assets; he was discharged from bankruptcy on September 15, 2020.

¶ 19 **On September 21, 2020**, Enforcement Counsel Dubuc submitted a draft statement of allegations to the Respondent's legal counsel; talks ensued between the counsels until December 2020.

¶ 20 On December 14, 2020, IIROC formally served the Statement of Allegations, which related to three contraventions:

a) the Respondent appropriated a client's funds for his personal use;

b) the Respondent executed unauthorized trades in a client's account;

c) the Respondent executed trades in a client's account that were not within the bounds of good business practice.

¶ 21 On January 18, 2021, IIROC published a notice of hearing for the purpose of setting a hearing date.

¶ 22 At a pre-hearing conference held on February 23, 2021, the parties agreed on a timeframe established according to IIROC's Rules of Procedure. The motion was therefore set for April 27, 2021, and the hearing on the merits is planned for June 28 and 29, 2021.

¶ 23 That, in essence, is the factual background on which the Hearing Panel will rely for purposes of its assessment.

THE LEGAL FRAMEWORK

¶ 24 Keep in mind that IIROC is a recognized self-regulatory organization.[1] Organizations like IIROC have as their goal the regulation of the securities market and the protection of the investing public; this special character must be recognized when assessing the way in which their functions are carried out.[2]

¶ 25 Nevertheless, these organizations must abide by the principles of natural justice and, to this end, they routinely endow themselves with rules of procedure and explicit administrative directions.

¶ 26 At the hearing, the legal counsels clearly defined the appropriate legal framework for the matter at hand, citing *Blencoe*[3] as their main source of applicable legal principles.

¶ 27 In *Blencoe*, Justice Bastarache recognizes that the obligation to abide by the rules of natural justice applies to administrative and disciplinary proceedings.

¶ 28 Moreover, the rules of natural justice concern not only the right to a fair and unbiased hearing, but also the obligation to act expeditiously when administering the process.

¶ 29 Consequently, Justice Bastarache recognizes an unreasonable delay as an abuse of process, but only in very limited circumstances:

> […] I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an "unacceptable delay" that amounts to an abuse of process.[4]

¶ 30 The point to bear in mind is whether the prejudice is of such magnitude as to be contrary to the interests of justice.[5]

¶ 31 The Respondent acknowledges that the procedural fairness of the hearing is not in jeopardy. His claim is that an undue delay in the administrative process caused him irreparable prejudice.

¶ 32 The Hearing Panel must therefore determine whether the Respondent has proven both allegations, and moreover, that he is entitled to the remedy that is being demanded, namely a stay of the proceedings.

¶ 33 The principal factors for evaluating the reasonable nature of an administrative delay are: the delay inherent in the matter at hand, the reasons for the delay and the prejudicial effects of the delay.

THE DELAY

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[1] E-6.1 *Act respecting the regulation of financial sector*, s. 59 and ss

[2] *Pezim v. British Columbia (Superintendent of Brokers),* [1994] 2 SCR 592

[3] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307

[4] *Ibid.* note 3, par. 115

[5] *Diaz-Rodriguez v. British Columbia (Police Complaint Commissionner),* 2020 BCCA 221, par. 37

¶ 34 The Respondent's burden of proof is to establish the existence of an excessive delay as alleged against IIROC.

¶ 35 The Hearing Panel considers that the fairness of the delay can be analyzed at different stages of the process.

¶ 36 To evaluate the reasonable character of the delay, it seems to us useful to subdivide the chronology into two specific periods, namely the pre-inculpatory period prior to December 14, 2020, and the post-inculpatory period between December 14, 2020 and June 28, 2021.

¶ 37 The Respondent has not invoked the six-month post-inculpatory period. The Hearing Panel is satisfied with this position, since the six-month delay described in the joint timetable is completely appropriate.

¶ 38 In *Re Castonguay*[6], the hearing panel retained from the evidence given that, subject to the complexity of a matter, IIROC allows for an investigation timeframe of 12 to 24 months and an enforcement timeframe of 10 to 12 months following the end of the investigation. The pre-inculpatory period was therefore approximately three years in a matter of little complexity.

¶ 39 What about in the present matter?

¶ 40 According to IIROC, the formal investigation was conducted between April 6, 2017 and August 15, 2018. However, the Hearing Panel was prepared to start on December 15, 2016, when IIROC conducted an initial review of the matter. The investigation delay is therefore approximately 20 months.

¶ 41 This delay seems reasonable to us and intrinsic to the matter. Various exchanges of information are documented between the parties during this interval. It is evident that the investigation had to cover not only a review of the actions taken by the Respondent, but also a review of the employer's policies.

¶ 42 Once the investigation was completed, there was a two-year delay between the investigation's transfer to Enforcement in August 2018 and the filing of the complaints before IIROC in December 2020. The pre-inculpatory delay was therefore approximately four years.

¶ 43 Without formally deciding on an acceptable inherent delay of ten months for Enforcement, it seems to us that the additional delay of about 14 months is non-standard for this matter.

¶ 44 The Enforcement Department cannot use the complexity of the matter to justify the delay, since it already had obtained plenty of information, for example while questioning the Respondent during the investigation. The Hearing Panel has heard no other explanation other than that of an administrative order.

¶ 45 IIROC has raised the question of the six-year limitation period provided in Rule 8206 of the Enforcement Proceedings, arguing that proceedings could therefore commence by November 2022 at the latest.

¶ 46 The Hearing Panel considers this argument confusing in the context of a motion to stay proceedings for excessive delay.

¶ 47 The limitation period normally is invoked as a means of acquisition or extinction of a right; it would be surprising if it was used in support of a lack of administrative celerity.[7] The Hearing Panel does not uphold this argument.

¶ 48 In this matter, the Hearing Panel considers that the delay of 14 additional months does not align with the specifics of the matter.

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[6] *Re Castonguay,* 2012 IIROC 42, par. 10

[7] *CSF c. Cauchi*, 2017 QCCDCSF 82, par. 40

THE PREJUDICE

¶ 49 Excessive delays are unacceptable in any jurisdiction, whether criminal, civil or administrative in nature, but the effects will not be identical.

¶ 50 Even a long delay is not in and of itself sufficient to permit a stay of proceedings. The applicant must prove that the delay resulted in harm to his right to a full and complete defense or in substantial psychological prejudice.

¶ 51 As mentioned previously, the Respondent has invoked substantial prejudice of a psychological, professional and economic nature linked directly to the delay.

¶ 52 However, the Hearing Panel finds that well before IIROC's formal decision to investigate in April 2017, the facts in evidence mostly show exchanges between the Respondent and his former employer NBF.

¶ 53 Keep in mind that initially, in December 2016, the Respondent was the object of a dismissal. Yet in the wake of this dismissal, the Respondent had several disagreements with NBF, one of which concerned an un-refunded bonus, and another, a loss of clientele due to interference by NBF.

¶ 54 The majority of the allegations that are sources of professional and psychological prejudice, are directed principally at NBF and predate IIROC's formal investigation. There is no real direct link between the alleged prejudice and the incurred delay.

¶ 55 The complaints lodged by IIROC were made public in January 2021, namely at the start of the post-inculpatory period, which is not in dispute. Other than the stress of a disciplinary proceeding, which is to be expected, the evidence is not convincing that IIROC created a climate of harassment vis-à-vis the Respondent.

¶ 56 The Respondent insists that there is financial prejudice due to the fact that he cannot benefit from the advantages of his discharge from bankruptcy. Thus, were the Respondent to be ordered to pay financial penalties, these penalties could have been subject to his declaration of bankruptcy.

¶ 57 The Hearing Panel cannot uphold this argument. First of all, the Respondent is the sole instigator of the action in bankruptcy, with no interference from IIROC; and secondly, the alleged prejudice can only be hypothetical in the absence of a finding of guilt against the Respondent or the imposition of fines, if applicable.

¶ 58 The Respondent argues moreover that the absence of complaints or reimbursements of complainants should serve as contextual factors in the evaluation of the prejudicial delay. This argument is not valid; the Québec Court of Appeal has already ruled, stating that the victim reimbursement or the absence of complaints are not relevant to evaluating the excessive nature of proceedings:

> [*TRANSLATION*]
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> […] Even though the financial institutions that were direct victims of the cheque kiting have all been reimbursed and those who were losers in the venture are, rather, victims of the financial setbacks of the appellant's companies, it is clear that this fact is in no way relevant to the question of the excessive nature of the proceedings and the jurisdiction of the disciplinary committee.[8]

¶ 59 Still, the Appeal Court adds that these facts may be taken into consideration when determining an appropriate penalty.

¶ 60 The Respondent bases his argument on *Abrametz*[9] which concerns an investigation of a member of the

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[8] *Huot c. Pigeon*, 2006 QCCA 8, par. 67-69

[9] *Peter V. Abrametz v. Law Society of Saskatchewan*, 2020 SKCA 81, par. 198 and ss

Saskatchewan Bar. While the legal principles are clearly identified, and the concepts expressed in *Blencoe* recognized, some major distinctions are noted.

¶ 61 A first distinction concerns the inordinate delay; in *Abrametz*, the delay was calculated to be 32 ½ months, whereas here it is approximately 14 months.[10]

¶ 62 Another distinction is the prejudicial publicity alleged by Abrametz during the inordinate delay[11]; in this matter, any publicity, minimal though it is, occurred after the contested delay.

¶ 63 Finally, a last distinction is the Saskatchewan Bar's harassment of its member. The association is reproached for having severely restricted Abrametz' law practice with intrusive conditions on his professional activities.[12] No such oppressive behaviour has been observed on IIROC's part.

¶ 64 Unlike *Abrametz*, the Respondent has not proved the existence of real, grave prejudice, beyond that of an individual facing a disciplinary proceeding and enduring negative effects on a psychological and financial level.[13]

¶ 65 The Hearing Panel concludes therefore that the Respondent has not demonstrated the existence of significant prejudice caused by the delay. Consequently, this delay, even if excessive, cannot constitute an abuse of process. The Hearing Panel also confirms that the Respondent's right to a fair hearing was not compromised.

THE REMEDY

¶ 66 Even though the Respondent has not proven his allegations, the Hearing Panel believes it is useful to analyze the conclusions sought, namely a stay of the proceedings.

¶ 67 Once again, the Hearing Panel relies on *Blencoe* for the motion for a stay of proceedings, noting that the Supreme Court had rejected the aforesaid application at the time:

> In order to find an abuse of process, the court must be satisfied that, "the damage to the public interest in the fairness of the administrative process should the proceeding go ahead would exceed the harm to the public interest in the enforcement of the legislation if the proceedings were halted" (Brown and Evans, supra, at p. 9-68). According to L'Heureux-Dubé J. in *Power*, supra, at p. 616, "abuse of process" has been characterized in the jurisprudence as a process tainted to such a degree that it amounts to one of the clearest of cases. In my opinion, this would apply equally to abuse of process in administrative proceedings. For there to be abuse of process, the proceedings must, in the words of L'Heureux-Dubé J., be "unfair to the point that they are contrary to the interests of justice" (p. 616). "Cases of this nature will be extremely rare" (*Power*, supra, at p. 616). In the administrative context, there may be abuse of process where conduct is equally oppressive.[14]

¶ 68 The courts have unanimously confirmed the principle that the stay of proceedings on grounds of abuse of process is only ordered in exceptional circumstances,[15] when irreparable prejudice to the integrity of the

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[10] *Ibid.* note 9, par. 197

[11] *Ibid.* note 9, par. 200

[12] *Ibid.* note 9, par. 202

[13] *Ibid.* note 7, par. 73

[14] *Ibid.* note 3, par. 120

[15] *Ibid.* note 6, jurisprudence cited by Justice Doyon at par. 46 and ss, *ibid.* note 7 par. 40 and ss

justice system has been demonstrated. It is a draconian measure granted in rare cases where no other remedy is conceivable:

> [TRANSLATION]
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> The stay of proceedings on grounds of abuse of process is therefore only ordered if exceptional circumstances justify it, and when, as Justice Forget mentions in *Procureur général du Québec c. Bouliane*, [2004] R.J.Q. 1185, "there is no other possible remedy".

¶ 69 In this matter, the Hearing Panel is not convinced that continuing the proceedings would be contrary to the public interest to safeguard the administrative process.

¶ 70 On the contrary, the Hearing Panel finds that the allegations against the Respondent are serious. Considering IIROC's responsibility to protect the investing public and safeguard the integrity of the securities market, the balance of interests clearly falls on the side of holding a hearing.

¶ 71 That said, the Hearing Panel recognizes that a lack of diligence by an administrative organization may be sanctionable. Among other remedies proposed are orders for an expedited hearing and costs.[16]

THE CONCLUSION

¶ 72 The Respondent had the primordial burden of proving, in the context of IIROC's disciplinary process, the existence of an excessive delay that was the direct and real source of substantial prejudice. The Hearing Panel, having weighed all of the evidence in this matter, concludes that the Respondent has not met his burden of proof.

¶ 73 For these reasons, the Hearing Panel dismisses the Respondent's motion.

Dated at Montréal, this 17th day of May, 2021.

Robert Monette

François Breton

François Demers

[16] *Ibid.* note 3, par. 136, 178 and ss