

## **Re Castonguay**

**IN THE MATTER OF:**

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

**and**

**Réal Castonguay**

2012 IIROC 73

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

Hearing: November 6, 7, 8, 9 and 14, 2012

Decision: January 14, 2013

### **Hearing Panel**

Me Jean-Pierre Lussier, Chair, Mr. François Gervais, Mr. Michel Duchesne

### **Appearances**

Me Myriam G. Del Zotto, Counsel for IIROC

Me Paul-André Mathieu, Counsel for Respondent

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## **DECISIONS**

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¶ 1 On February 3, 2012, IIROC published a Notice of Hearing in the matter of the Respondent, for the purpose of determining whether the latter committed the following contraventions:

- (i) Between October 2003 and June 2007, the Respondent showed a lack of diligence toward one of his clients by neglecting to inform the latter of the existence of an essential fact in connection with the Cierra and Prospector offerings, even though he was aware of this essential fact at the time his client invested in these two offerings, thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to By-law 29.1 of the IDA;
- (ii) Between January 2003 and June 2007, the Respondent facilitated investments for two (2) individuals, one a client and the other a non-client, in the Cierra and Prospector offerings, without the knowledge and consent of his employer, an IDA Member firm, thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to By-law 29.1 of the IDA.

¶ 2 On the very first hearing day, Counsel for the Respondent filed a motion to dismiss the proceedings that comprised two aspects. The first aspect concerned our Hearing Panel's lack of jurisdiction over what the Notice of Hearing terms as "offerings" given that, according to the Respondent, the business activities involving Cierra and Prospector are, rather, subscriptions for software distribution licenses, and therefore activities that do not

fall under IROC jurisdiction. The second aspect concerns the deadlines which, again in the Respondent's opinion, were unreasonable and prejudicial to him.

¶ 3 Our Hearing Panel deemed it appropriate to dispose of the first aspect of the motion at the same time as the merits of the case. As for the second aspect, we dismissed Respondent's claims in a decision handed down on July 24, 2012 (reported in 2012 IROC 42).

¶ 4 The evidence regarding the merits of the case (including the first aspect of the motion to dismiss) was heard from November 6 to 9, 2012, and the parties presented their pleadings on November 14, 2012.

¶ 5 Before we present our assessment of the evidence and the reasons for our decision, we think it appropriate, for a better understanding of the decision, to briefly summarize the evidence as a whole.

## **1. THE EVIDENCE**

¶ 6 Aside from the documentary evidence, seven witnesses were heard. They are: Yannick Béland (IROC investigator), John Sandy Martin (Chief Compliance Officer at Raymond James), Michel Lalonde (client of the Respondent), Isabelle Côté (investigator at the Autorité des marchés financiers), Réal Castonguay (the Respondent), Martin Boucher (at the material time, branch manager at Raymond James) and André D'Orsonnens (attorney who, at the material time, was the legal counsel for Internat Securities and for Claude Duhamel). Their testimony revealed the following.

¶ 7 In 1995, the Respondent was a registered representative in the employ of MCA Securities, an IDA Member firm. That year, he attended a presentation that Claude Duhamel gave at MCA to promote Société en commandite D.P.I. The Respondent reckoned that an investment in D.P.I. would be attractive and he eventually subscribed to shares in the limited partnership for himself. He was to do the same thing a few years later in Cierra and Prospector.

¶ 8 In 1998, the Respondent was a close neighbour of Michel Lalonde, a physician he knew from having sought his professional services for both himself and his son. What's more, Michel Lalonde's spouse was also a physician and worked in a clinic where a childhood friend of the Respondent also worked as a physician.

¶ 9 During casual conversations, Michel Lalonde and the Respondent discussed investments that might offer tax deductions and the Respondent mentioned D.P.I. to him. Dr. Lalonde then decided to invest in this company and the Respondent facilitated the transaction by having him sign the relevant documents. Mr. Lalonde did not have an account with MCA Securities at the time. In fact, in the course of time and his conversations with the Respondent, Dr. Lalonde decided to open an account at MCA Securities in March 2000.

¶ 10 Prior to this, Dr. Lalonde invested privately in D.P.I., through the Respondent in 1998, and through Claude Duhamel in 1999. At the time, Mr. Duhamel was working for Valeurs mobilières Internat D & B Inc.

¶ 11 In September 2000, Dr. Lalonde privately invested another sum of money in D.P.I.

¶ 12 In August 2002, Dr. Lalonde decided to invest a substantial amount in Cierra. The investment concerned licensing contracts to operate a debit card in given territories; the debit card would be issued to individuals who do not have bank accounts, but who could charge to this debit card via MasterCard. The investment would be of the same nature as the D.P.I. investments, in the sense that it would offer tax deductions. The Respondent supplied Dr. Lalonde with information to that effect. The doctor purchased licensing contracts in August 2002 and February 2003. Dr. Lalonde's wife, through her husband, also purchased a license in December 2002. The Respondent also purchased some for himself.

¶ 13 During the same period, more specifically in December 2002, the Respondent left MCA Securities for Raymond James Ltd. (RJL), as an agent of the Gatineau Branch. Dr. Lalonde, for his part, opened a brokerage account at RJL in June 2003.

¶ 14 On October 17, 2003, the Québec Securities Commission approved a settlement agreement involving Valeurs mobilières Internat D & B Inc., Claude Duhamel and Daniel Boivin. The agreement revoked the registration of Valeurs mobilières Internat D & B Inc., Claude Duhamel and Daniel Boivin, for a period of 10 years each.

¶ 15 Respondent Castonguay learned of the existence of the revocations during a phone call from Claude Duhamel in spring 2004. The latter explained that he no longer worked in securities, but that his record at the Securities Commission had not resulted in a conviction or financial penalty. Mr. Duhamel added that he was the contact for Prospector and that Daniel Boivin played the same role for Cierra. Prospector was an enterprise promoting certain software products, including "Mail it safe". During the call, Claude Duhamel referred the Respondent to his attorney, Me Paul-André Mathieu, if he wanted more details. The Respondent immediately called Me Mathieu and the latter confirmed that the licensing contracts were not securities, but permits to buy and sell software. A license for securities was therefore unnecessary to sell these products.

¶ 16 The Respondent added that he saw a copy of a letter that the head of the investigations department at the Autorité des marchés financiers (AMF) sent to Me Paul-André Mathieu on May 10, 2004 about an investigation concerning Services Financiers Internat SFI inc. (the company acting as the licensing agent for Cierra Inc.). The letter mentions that this type of activities does not warrant the launch of an investigation. Reading the letter, he says, calmed the Respondent's concerns.

¶ 17 The Respondent added that he had discussed what he had learned at the office (at the time he was working with Martin Boucher, the Gatineau branch manager, and Marc Courtemanche, an insurer who had looked after some financial planning for Dr. Lalonde) – namely that Daniel Boivin and Claude Duhamel were no longer working in securities, and that one was handling Cierra and the other, Prospector.

¶ 18 The Respondent mentioned that he did not bother to mention the revocation to his clients who had invested in Cierra, since none of them dealt with Internat Valeurs mobilières.

¶ 19 In late 2004, and in 2005, 2006 and 2007, Dr. Lalonde invested substantial sums in Prospector, once again on the premise that these investments would generate tax deductions. Dr. Lalonde remembers one meeting in 2006, attended by about twenty clients and by Claude Duhamel, Réal Castonguay and attorney Jacques Matte. Claude Duhamel was dangling the fact that Prospector's profits were going to double. At the time, the provincial and federal tax authorities had rejected the tax deductions relative to Cierra. It was implied that the notices of assessment were being contested, but that it was better to pay them until the contestation could be settled.

¶ 20 The Cierra company was dissolved in 2006. Prospector is still an active company, but in its case as well, the tax deductions were rejected. A contestation is still pending.

¶ 21 In October 2008, Dr. Lalonde filed a complaint against Réal Castonguay, Martin Boucher and RJL, concerning the management of his accounts and his investments. The complaint refers to certain securities which Mr. Lalonde maintains did not correspond to his investment objectives. It also references the investments in Cierra and Prospector, for which the governments had rejected the tax deductions. Dr. Lalonde only learned of the existence of the Québec Securities Commission decision against Valeurs mobilières Internat D & B Inc., Claude Duhamel and Daniel Boivin in December 2010. He estimates his losses in Cierra and Prospector at more than \$460,000.

¶ 22 On the second count, the evidence reveals that the Compliance Department at RJL had not been informed that clients of the Respondent had invested in Cierra and Prospector until Michel Lalonde filed a formal complaint in October 2008.

¶ 23 In 2004, RJL sent the Respondent, as well as the other employees of the firm, a form entitled "*Annual Employee Disclosure Statement 2004*". None of the questions dealt specifically with outside business activities. From 2005 on, the form was computerized. Question number 7 read as follows:

*"Are you currently engaged in or do you intend to engage in any outside business activities (i.e. will you receive compensation from any source other than RJL, or will your outside activity prevent you for[sic] devoting your full-time[sic] to RJL business)?"*

¶ 24 The Respondent answered this question in the negative. He says he talked to his branch manager, Martin Boucher, about his involvement with Cierra. He explained that he had a management contract with Cierra, but that it was Cierra that managed the software and the business related to the software. Mr. Boucher told him that

if he had no income sources other than RJL and if he was not working elsewhere, he could answer in the negative. In other words, the question on “outside business activities” did not involve his relationship with Cierra.

¶ 25 In his testimony, Martin Boucher explained for his part that the discussion on “*outside business activities*” took place in 2004, not in 2005. He had, he says, just been named branch manager and, in the normal course of the branch’s business, he had heard of Cierra and Prospector. He says he organized a conference call which he participated in with the Respondent and two people from RJL in Toronto, namely John White (“*advisor*”) – whose job was to supervise all of the branches and subbranches – and Georges Karkoulas, the sales supervisor. The conference call specifically addressed the Respondent’s participation in Cierra. Since this participation did not require any work, nor did it involve any compensation, it was agreed that it was not necessary to disclose it.

¶ 26 In his testimony, John Sandy Martin estimated that the firm should have been informed. He did not know whether the Respondent’s disclosure regarding Cierra should have been as a personal investment or as an outside business activity, but he expressed the opinion that it should have been done in one form or another. He adds that Cierra was purchased from a securities issuer and should have, in Michel Lalonde’s case, been considered an “on book” purchase, which implies opening an account.

¶ 27 After this brief review of the evidence, our Hearing Panel intends, first, to dispose of the aspect of the motion to dismiss the proceedings that attacked our Hearing Panel’s jurisdiction, given that the counts in the Notice of Hearing refer to “offerings”, whereas the business activities in question in the Notice of Hearing, according to the Respondent, have no connection with securities and, consequently, are outside IIROC jurisdiction.

## **2. THE JURISDICTION OF THE HEARING PANEL**

¶ 28 The jurisdiction of our Hearing Panel, like that of any other tribunal, must cover three aspects: *ratione loci* jurisdiction (the territory covered by the court), *ratione personae* jurisdiction (the personal reach of the court’s jurisdiction), and *ratione materiae* jurisdiction (subject-matter jurisdiction). The Respondent’s motion does not question either the territory covered by IIROC, or the personal reach of its jurisdiction. It only concerns its subject-matter jurisdiction.

¶ 29 First of all, it is important to keep in mind the contractual nature that binds the Respondent and IIROC. Citations are unnecessary as the case law of the higher courts has clearly recognized the contractual nature arising from the voluntary membership of firms and registered representatives in IIROC, as a self-regulatory organization<sup>1</sup>, and their subjection to the rules, including its disciplinary rules.

¶ 30 Thus, the IIROC Dealer Member Rules state the following, in By-law 29.1:

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.
2. For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.

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<sup>1</sup> It is worthwhile reading Judge Rochon's notes, in paragraphs 25 to 35, as well as his references to case law, in OCRCVM c. Beaudoin et Autorité des marchés financiers, 2011 QCCA 2247.

¶ 31 When, in the first paragraph, reference is made to *business conduct or practice which is unbecoming or detrimental to the public interest* – the provision referenced by IIROC in both allegations in its complaint against the Respondent – it is far from certain that the misconduct or business practice is limited solely to securities. A registered representative's relations with his clients, like his relations with the firm that employs him, often extend beyond the strict framework of buying or selling securities. For instance, one may consider unbecoming the practice of a representative of not disclosing his spouse's business activities to his firm. In this scenario, regardless of whether or not the representative has negotiated the purchase or sale of securities, the allegations have to do with an omission or with misconduct that a hearing panel may or may not consider unbecoming.

¶ 32 While it is evident that the conduct or business practices of a registered representative in respect of securities transactions may give rise to allegations, the reverse is far from true. Indeed, in order to conclude that a representative's conduct or business practices in respect of investments and products other than securities is outside the jurisdiction of the disciplinary power of a self-regulatory organization, one must examine the disciplinary rules very carefully and be able to conclude that only securities transactions are relevant in determining whether a conduct is unbecoming.

¶ 33 However, the only forum competent to determine if the business conduct of a representative registered with a self-regulatory organization contravenes the disciplinary rules of the organization is the hearing panel empowered to enforce the disciplinary rules. It is therefore inappropriate to grant a motion for a stay of proceedings before examining the evidence of the alleged misconduct and analyzing these facts in light of the rules that are purported to have been violated. Our Hearing Panel therefore estimates that this aspect of the motion to stay proceedings is intimately tied with the merits of the case. Since the merits of the case, namely the adequacy of the alleged facts to the rules that were allegedly violated, fall under the jurisdiction of the Hearing Panel, there is absolutely no reason to grant a preliminary motion for a stay of the proceedings on this ground.

### **3. THE BURDEN OF PROOF**

¶ 34 That said, it seems to us useful now to review some of the rules in regard to the burden of proof that must be met by the prosecutor in disciplinary law, particularly respecting general provisions that create offences, such as By-law 29.1, the provision at issue in the case before us. Our Hearing Panel reiterates what another hearing panel wrote in a recent matter<sup>2</sup>:

"[28] In short, it is frequent in disciplinary law to encounter general provisions that create offences to enable peers to appreciate the conduct of a professional brought up on disciplinary charges. By-law 29.1 is of this nature. The high standards of ethics and conduct are left to the discretion of the peers, based on the accepted standards of the securities industry. The business conduct or practice which is unbecoming or detrimental to the public interest is also evaluated in accordance with the standards in force within the industry.

[29] In short, disciplinary law is not penal law. It possesses certain of its attributes, notably for anything that concerns the prior disclosure of evidence, but it does not have all of the characteristics of penal law. This is the case with the burden of proof, for instance. The prosecution is not required to demonstrate beyond a reasonable doubt that an offence has been committed, as in criminal law. The standard is that of the preponderance of probability, although because of the nature of the allegations, one often talks about particularly convincing evidence. In this respect, we think it useful to cite the comments of Chief Justice Dickson of the Supreme Court of Canada who invokes degrees of probability depending on the nature of the dispute. He expresses himself as follows:

"The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil

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<sup>2</sup> Re St-Amant, (2011) IIROC 30, par. 28 to 30.

court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion."

[30] Therefore, for the prosecution to meet its burden, it must convince the Hearing Panel, with particularly convincing evidence, that the allegations against the Respondent occurred and that these facts contravene a standard of conduct within the industry, or constitute conduct or practice unbecoming. "

¶ 35 Frequently, the standards of conduct that are alleged to have been violated are contained in writings, notably the "Conduct and Practices Handbook" that was in force when the alleged misconduct occurred. It is then sufficient for the prosecutor to enter the Handbook into evidence and to prove the facts which, according to its allegations, are contrary to a standard specified in the Handbook. If the Hearing Panel is convinced that the facts occurred and contravene one of the standards in the Handbook, it will find the Respondent guilty.

¶ 36 Furthermore, as was emphasized by another hearing panel<sup>3</sup>, the prosecutor is bound by the wording of the allegations and the Respondent is compelled to adapt his defense to the tenor of the counts as worded in the Notice of Hearing. Finally, a word on the standard or standards of conduct that have allegedly been violated.

¶ 37 If a standard of conduct is not entered into evidence, the hearing panel may not decide on its own if a given behaviour violates the standard. The following excerpt from an article published by the Barreau du Québec Education Department<sup>4</sup> succinctly expresses the necessary requirements in regard to proving a standard before a disciplinary tribunal. The article states:

[TRANSLATION]

The hearing panel may not rely on its members' expertise to bridge a gap in the syndic's evidence. The members may not establish the standard, their role is limited to appraising the standard presented and determining whether the facts demonstrate that the standard was followed or not. Here is what the Tribunal stated in *Malo*:

"[translation] It should be emphasized that as soon as a discussion can be had on the question of whether the behaviour is contrary to the practices of the profession, all three members of the Committee must rule on the debate and, in the absence of evidence, the ruling cannot be made in light of the specific knowledge of two of the members. Their specific expertise can be helpful in understanding the evidence, but cannot constitute the evidence."...

In another matter, the Tribunal clearly defines the role and utility of the expert witness: "[translation] The expert duly summoned before a tribunal remains the person or the witness who is most competent, most able to inform it of the existence of the standard, of the generally accepted scientific rule that would be applicable to the specific facts under consideration. The witness will help it evaluate to what extent the professional who is the object of the proceedings derogated or not from the standard given the evidence provided."

[our emphasis]

¶ 38 We wish to point out from the outset that, in the matter before us, the "Conduct and Practices Handbook" is not part of the documentary evidence provided to the Hearing Panel. Neither was any expert witness heard. The Handbook, in its 2003 and 2007 versions, was provided to us during IIROC's arguments, but is not part of the evidence. And even if it had been, we will explain in the pages that follow why, given the

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<sup>3</sup> Re Myatovic and Lowe, 2012 IIROC 47, par. 127 to 130.

<sup>4</sup> DOWNS, Éric and Magdalini VASSILIKOS. La preuve en droit disciplinaire, Développements récents en déontologie, droit professionnel et disciplinaire (2009), Service de la formation du Barreau du Québec, p. 21.

wording of the counts and the facts in evidence, it is impossible for our Hearing Panel to infer a contravention of any of the standards in the Handbook, based on the evidence. We will begin with the first count.

#### **4. ASSESSMENT OF THE EVIDENCE**

¶ 39 The allegation is that the Respondent showed a lack of diligence toward one of his clients (Michel Lalonde) by neglecting to inform the latter of the existence of an essential fact in connection with the Cierra and Prospector offerings, even though he was aware of this essential fact at the time his client invested in these two offerings. The essential fact is allegedly that he knew that the person representing Cierra and Prospector had been barred from practicing in the securities industry for a period of 10 years.

¶ 40 The evidence has revealed that said “offerings” were subscriptions to software distribution licenses for given territories. Counsel for the Respondent has argued that these are not “offerings” in the proper sense. Our Hearing Panel does not find it necessary to rule on this shrewd argument because, upon examining the evidence in its entirety, it is difficult for us to conclude any misconduct in respect of the standards in force in the industry.

¶ 41 Indeed, the client who is mentioned in the allegations was, for the purpose of the license purchases from Cierra and Prospector, a client of Claude Duhamel, and not a client of the Respondent. He had an account at RJL; the Respondent was the one who served him at RJL; the Respondent, according to the evidence, never received any compensation from anyone pursuant to the contracts signed by Michel Lalonde for the purchase of the licenses from Cierra and Prospector. In short, the question is whether there is conduct unbecoming or contrary to industry standards when a registered representative discusses with his clients the fact that he himself has purchased licensing contracts from a third party, giving rise to tax deductions, and that he considers this a worthwhile investment, which discussion motivated the clients to make the same investment themselves.

¶ 42 Counsel for IIROC, in her argument, ably referred to two standards of the “Conduct and Practices Handbook”, standard B and standard C. We will not revisit the fact that the Handbook is not part of the evidence, but, even if this had been the case, it is far from clear, without the appreciation of an expert witness, that standards B and C were contravened.

¶ 43 Standard B relates to Trustworthiness, Honesty and Fairness. It requires the Approved Person to have first taken reasonable steps to ensure that he is providing his client with all of the information at his disposal and to verify its accuracy. All of the examples contained in the “Conduct and Practices Handbook” concern cases of securities trading in the client’s account. Nowhere is there any mention of the registered representative’s obligations relative to investments made by his clients elsewhere than in his account at the brokerage firm. Nowhere does one read that a registered representative has the same obligations towards his client when he knows that his client is dealing with a third party for investments not involving securities and for which the representative receives no compensation.

¶ 44 Standard C relates to professionalism. In it we read that by reason of his expertise, the professional is required to protect his clients, whose knowledge is not usually as specialized as his own, and he must always put his clients’ interests ahead of his own. Here again, all of the examples contained in the Handbook concern relations between the representative and his client relative to transactions carried out in his securities account. Nowhere is there any indication that this standard might concern suggestions, and even tips on investments that are not in securities, investments that are effected through a third party.

¶ 45 Our Hearing Panel can find no indication anywhere in the “Conduct and Practices Handbook”, or in the case law, that this standard might also concern investments made by a client outside the framework of his client relationship with the registered representative. And, we repeat, the Hearing Panel has had no expert testimony on the extent, the scope of standards B and C. Even if we consider that it would have been prudent and wise for the Respondent to inform his client of the judgment by the Securities Commission to the effect that the seller of Cierra and Prospector had been barred from dealing in securities for a period of 10 years, we can find no standard of conduct that required him to supply his clients with this information. The Respondent, furthermore, after having learned of the ban, made some inquiries with the seller’s attorney and learned of a letter from the head of the Investigations Department at the AMF, a letter in which the latter confirmed that, Cierra’s business

being outside the jurisdiction of the AMF, he was closing the investigation.

¶ 46 Counsel for IIROC has argued that this letter had no probative value. However, it was entered into evidence by an investigator at the AMF who certified that this document was indeed part of the AMF case file. Granted, our Hearing Panel cannot infer anything more from this document than what it states. But there can be no doubt as to its existence. We are therefore driven to conclude that, for the head of the Investigations Department at the AMF, as of May 14, 2004, the type of activities engaged in by Internat SFI Financial Services Inc. (Claude Duhamel being one of its directors) being limited to acting as an agent for Cierra Inc. for the distribution and awarding of software user licenses and the distribution of electronic boards, did not justify launching an investigation process.

¶ 47 In short, to the head of the Investigations Department at the AMF, the activities of Claude Duhamel relative to Cierra were not incompatible with the ban that had been imposed on him a few months prior.

¶ 48 Was the Respondent ill advised not to mention the ban to his client Michel Lalonde? That is not the question that our Hearing Panel must answer. The question put to it is whether the fact that he did not tell Michel Lalonde about it violated a standard of conduct, or constituted conduct unbecoming for a registered representative in the securities field. Disciplinary law is a quasi-penal law. The consequences of a disciplinary contravention can be very severe for the offender inasmuch as there exists a serious doubt regarding the tenor and especially the scope of a standard of conduct. The Respondent has to benefit.

¶ 49 And it is far from clear that standards B and C referenced by IIROC apply to a client for an investment made by this client through a third party, regardless of whether this third party is a friend of the registered representative, when the latter derives no direct benefit from this investment.

¶ 50 And it is far from evident that the ban on engaging in securities trading imposed on this third party is an essential fact that must be disclosed to a client when the investment this client is planning to make has nothing to do with securities trading.

¶ 51 Moving on now to the second count. The Respondent is charged with having facilitated the participation of a client (Michel Lalonde) and a non-client (Michel Lalonde's wife at the time) in investments, without the knowledge and without the consent of his employer, thereby engaging in conduct unbecoming or detrimental to the public interest.

¶ 52 Here again, the evidence gives rise to a number of obstacles, leading our Hearing Panel to drop this count against the Respondent.

¶ 53 No need to repeat the preceding regarding the burden of proof which lies with the prosecutor in a disciplinary proceeding. As for the facts revealed by the evidence, one may retain that during casual conversations between the Respondent and Michel Lalonde, there was some question about investments that offered tax deductions. These conversations took place from 1998 on. The Respondent indicated to Dr. Lalonde that he had himself invested in Société en commandite DPI via Claude Duhamel. Dr. Lalonde decided to do the same and the Respondent put him in touch with Claude Duhamel who, at the time, worked at Valeurs mobilières Internat D & B Inc.

¶ 54 In August 2002, Dr. Lalonde – who was a client of the Respondent at RJL at the time – decided to invest in Cierra, again with the goal of benefiting from tax deductions. The Respondent had also personally purchased licensing contracts from Cierra, again through Claude Duhamel, who was acting as Cierra's agent for the sale of licensing contracts. Dr. Lalonde accordingly invested substantial sums in Cierra. He did so in his own name, and in that of his then wife, in 2002, 2003 and 2004.

¶ 55 Later, in 2004 and 2005, Dr. Lalonde also invested substantial sums in another company similar to Cierra, Prospector Network Inc. Here again, the investment involved software distribution licensing contracts and an investment in this company was to afford tax deductions. Here again, these investments went through Claude Duhamel and a company he operated, Services Financiers Internat SFI inc.

¶ 56 IIROC alleges that Claude Duhamel and the Respondent were friends. Indeed, the evidence reveals that

the Respondent, in meetings with the IIROC investigator, referred to Mr. Duhamel as such. But in his testimony, he elaborated on the meaning he was giving to this expression. He qualified Claude Duhamel as “a business friend”. He met him in 1995, at a presentation on DPI products, and he saw him frequently on similar occasions, or when he himself invested in products promoted by Mr. Duhamel. According to the evidence, the two men never saw each other outside business. In short, whether or not Claude Duhamel is described as a friend of the Respondent, the fact remains that, getting back to the count, we can retain that the Respondent is the person who put his client and a non-client in touch with Claude Duhamel when they wanted to invest in Cierra and when Dr. Lalonde invested in Prospector later on.

¶ 57 That said, to find the Respondent guilty on this count, two questions must be answered in the affirmative. Was it the Respondent’s obligation to disclose to RJL the fact that Dr. Lalonde and his wife had invested in Cierra, and that Dr. Lalonde had invested in Prospector? And if so, did the Respondent make this disclosure or not?

¶ 58 Let us begin with the second question, since the answer to that affects the first. The evidence in fact shows that in 2004 (according to Martin Boucher) or in 2005 (according to the Respondent), Réal Castonguay and Martin Boucher discussed the question of whether the Respondent should disclose his own investment in Cierra and Prospector.

¶ 59 As for the date when this discussion occurred, our Hearing Panel is more inclined to rely on Mr. Boucher’s testimony for the following reason. Indeed, the latter was appointed manager of the Gatineau branch in 2004 and that is where, he says, the Respondent and he talked about Cierra and Prospector, because he knew the Respondent had invested in these companies. He had wondered about the Respondent’s obligation to disclose these investments to RJL. Mr. Boucher, being a new branch manager, did not want to overlook any of the obligations inherent in his position and it is normal to think that, back in 2004, he would have wanted to be certain.

¶ 60 In any case – whether it was in 2004 or in 2005 – there is no contradicting the evidence that the conference call took place between the Respondent, Martin Boucher, John White and George Karkoulas. These last two worked for RJL in Toronto. Mr. White was an “advisor” and, in this capacity, supervised all of the branches and sub-branches in Eastern Canada. The conversation focused on the necessity or not of disclosing the Respondent’s investments in Cierra and Prospector to RJL Compliance, and everyone concluded that this was unnecessary, on the one hand because these investments did not require any work on the Respondent’s part and, on the other hand, because they did not involve any compensation or remuneration in his favour.

¶ 61 If the Respondent’s own investment in these companies entailed no obligation of disclosure to RJL Compliance, all the more reason to think that there was no obligation of disclosure in respect of an RJL client and a non-client who had also chosen to invest in these offerings, which were neither securities, nor investments transacted directly by an RJL representative. The fact that the Respondent facilitated the contact between his client or clients and Claude Duhamel did not implicate RJL as a result. And even if the investments had implicated RJL (due to the fact that one of its representatives had facilitated the contact with Claude Duhamel), why would there have been an obligation of disclosure when the purchase of licensing contracts by the RJL representative himself entailed no similar obligation of disclosure?

¶ 62 To sum up, in the first place, our Hearing Panel cannot conclude that the Respondent did not disclose his personal participation in investments in Cierra and the Prospector, even though he made this disclosure to John White, whose job was precisely to supervise, at a higher level, the actions of the representatives and the manager of the Gatineau branch. If the disclosure was not made to RJL Compliance, it is because of John White’s decision, and not because of any wish of the Respondent to conceal his participation in these investments. In the face of this, our Hearing Panel would consider it unfair to rule that Respondent’s investments in Cierra and Prospector were made without the knowledge and without the consent of RJL.

¶ 63 In the second place, how can we conclude that the Respondent had to inform his firm that clients were investing in products that were not securities, through a third party from outside the firm?

¶ 64 Our Hearing Party reiterates that the evidence on this question is brief. Only John Sandy Martin

expressed the opinion that the firm should have been informed, both about Respondent's investments in Cierra and Prospector and about the investments made by a client of the firm.

¶ 65 Evidently Dr. Lalonde's civil suit against the Respondent, Martin Boucher and RJL in 2008, is certainly a factor that may explain Mr. Martin's opinion. However, the fact remains that our Hearing Panel has not heard any expert testimony on the extent of the obligation of disclosure (particularly when the clients of a representative invest in products that are not securities), nor on the necessity to disclose to Compliance information that neither the branch manager, nor the supervisor of the branch manager had considered necessary to disclose.

¶ 66 What's more, when our Hearing Panel examined Exhibit P-40, namely RJL's "Policies and Procedures Manual" in connection with business activities that are external to the firm, we read the following (we are reprinting section 4.16 as it existed in its 2004-2005 version, followed by its new 2006-2007 version):

***"4.16 Outside Employment & Business Activities***

*All IAs are expected to devote their full-time to the business of RJL. The application for registration specifically asks individuals about other employment or business activities that may conflict with the fiduciary duties of a sales representative and it is imperative that representatives answer this fully. In some cases, exceptions to the full-time rule may be made, but only with the prior approval of the branch manager and prior notice to the regulators. This includes any business relationship maintained outside the firm as well as any directorships held. Senior management must be aware of any possible conflict of interest and reserves the right to disallow any arrangement. Under no circumstances shall an employee engage in an outside business activity that is securities related.*

*In cases where an employee is given permission to engage in an outside business activity, under no circumstances shall the employee suggest or otherwise lead someone to believe that RJL is at all associated with this activity. An employee may not use RJL letterhead, business cards, or issue cheques through RJL facilities in connection with his/her outside business activities."*

***"4.16 Outside Employment & Business Activities***

*Outside activities include, but are not limited to, any part or full time work, business relationship, consultancy, or directorship that is maintained outside the firm. The application for registration specifically asks individuals about other employment or business activities and it is imperative that registrants answer this accurately. With the exception of financial planning activities, registrants are prohibited from engaging in any outside securities-related activity. For registrants engaged in financial planning activities, please refer to section 4.17 below for important conditions.*

*All registrants are expected to devote their full-time to the business of RJL. In most cases, this will preclude any involvement in outside employment or business activities. However, in certain instances, where it is determined that there are no conflicts of interest and no impact to client service, an exception may be made subject to prior approval of the branch manager and prior notice to the regulators. Senior management reserves the right to disallow any arrangements.*

*In cases where a registrant is given permission to engage in an outside business activity, under no circumstances shall the employee suggest or otherwise lead someone to believe that RJL is at all associated with this activity. Registrants may not use RJL letterhead, business cards, or issue cheque through RJL facilities in connection with their outside business activities."*

¶ 67 When the subject of Cierra and Prospector came up during the conference call involving the "advisor" John White, the question was whether the Respondent should declare his investment as an "outside business activity". The conclusion from this telephone discussion was that there was no need to mention it, since it did not involve any work for Mr. Castonguay and he would receive no remuneration. As section 4.16 is written, regardless of which version we consult, it is unclear whether the Respondent had an obligation to mention his

personal investments in Cierra and Prospector. But it is even less clear whether he had an obligation to disclose the fact that he had facilitated similar investments for certain clients, by putting them in touch with a person responsible for promoting Cierra and Prospector.

¶ 68 In short, neither the rules in force at IIROC (By-law 29.1), nor the policies and procedures in force at RJL, nor even the "Conduct and Practices Handbook" allow the Hearing Panel to conclude with any certainty that by not mentioning his personal investments in Cierra and Prospector – nor those of some of his clients – to RJL's Compliance Department, he was committing a contravention for which he may be disciplined.

¶ 69 In view of the foregoing considerations, there is no need to discuss the consequences of having described the investments in Cierra and Prospector as "offerings" in the counts, or to discuss the nature of the Respondent's business relationship with RJL (the count invoking an obligation to the employer; can one even speak of an employer when an agency contract binds an agent to a firm?). We therefore take a leave of both of these questions.

¶ 70 ***FOR ALL THESE REASONS, THE HEARING PANEL:***

¶ 71 ***DISMISSES*** the allegations against the Respondent.

***IN WITNESS WHEREOF WE HAVE SIGNED:***

This 14th day of January 2013.

M<sup>c</sup> Jean-Pierre Lussier, Chair

Mr. François Gervais, Member

Mr. Michel Duchesne, Member

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