Unofficial English Translation

Re Chher

In the Matter of:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada

and

The By-Laws of the Investment Dealers Association of Canada

and

Thi Sen Chher

[2011] IIROC No. 50

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

Heard: November 24 and 25, 2010, March 16, April 4, 5, 13 and 14, 2011
Decision: August 12, 2011
(213 paras)

Hearing Panel:
Jean Martel Ad. E. (Chair), Gilles Archambault, Lise Casgrain

Appearances:
Sébastien Tisserand, Enforcement Counsel, Counsel for IIROC
André Gingras, Lawyer – Gatineau, Counsel for the Respondent

Decision on the Merits

I. THE PROCEDURE

¶ 1 This decision pertains to a disciplinary hearing held pursuant to Part 10 of Dealer Member Rule 20 of the Investment Industry Regulatory Organization of Canada (**IIROC**).[1]

¶ 2 In the Notice of Hearing served upon the Respondent on October 8, 2010, IIROC Staff alleged that

[1] Following its merger with Market Regulation Services Inc., IIROC assumed the self-regulatory activities of the Investment Dealers Association of Canada (**IDA**) effective June 1, 2008. To facilitate the consolidation of the disciplinary schemes of the two merging entities, an interim system for the management of these schemes was set up by *Transition Rule No. 1 Made Pursuant to By-Law 13.1 of the Corporation*. This system allows IIROC *inter alia* to initiate enforcement proceedings on behalf of the IDA after June 1, 2008 in connection with events that occurred prior to this date, when the Respondent in these proceedings was governed by IDA rules. In this case, according to *Schedule C.1 to Transition Rule No. 1, Hearing Committees and Hearing Panels Rule* (subsection 1.9(2)), IDA rules in force at the relevant time shall apply, to the extent they are consistent with IIROC practices and procedures at the time the enforcement proceedings are commenced. This is what we shall do in this decision, if need be by making the necessary distinctions to refer to former IDA rules, where such rules have been amended or renamed in relation to the rules currently applied by IIROC.

while he was a representative and an employee of National Bank Direct Brokerage Inc. (hereinafter referred to as **"NBDB"**, the **"Dealer"** or the **"Firm"**, as the case may be) Mr. Thi Sen Chher (the **Respondent**) violated the provisions of IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) in respect of a client:

> *"(i) Between February 28, 2006 and May 17, 2007 inclusive, the Respondent misappropriated funds belonging to a client for his own benefit* [...]*;*
>
> *(ii) On August 2, 2005, the Respondent modified the personal address of a client, without approval, in order to receive the client's monthly statements directly* [...]*;*
>
> *(iii) On November 3, 2006, the Respondent modified a client's investor profile, without approval, in order to have greater latitude with the client's accounts* [...]*."*[2]

¶ 3 The client in question (**Mrs. C**) is the Respondent's mother.

¶ 4 By-law 29.1 requires dealer members and others, including their representatives and employees, to observe high standards of ethics and conduct in the transaction of their business, and prohibits them from engaging in any business conduct or practice which is unbecoming or detrimental to the public interest. It also requires them to be of such character and business repute, and have such experience and training, as is consistent with these standards of good business conduct.

¶ 5 In his Response dated October 29, 2010, the Respondent raised several defences and basically alleged that:

- the disciplinary charges against him are prescribed;
- the delay with which the Notice of Hearing was served interferes with his right to make full answer and defence under the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*;
- his statements made to persons in authority in this case are illegal and in breach of his constitutional rights and his right to counsel;
- he was duly authorized to manage Mrs. C's securities and operate her accounts and it is in this capacity that he carried out the actions alleged against him;
- the transfers of funds were effected by him for the purpose of this management and were not intended to misappropriate any monies belonging to Mrs. C; and
- his actions were carried out in good faith, in the belief that they were consistent with his employer's rules and procedures, and if they were not, it is because he was improperly supervised by his employer.

II. OBJECTIONS TO THE EVIDENCE

¶ 6 Very early in the hearing, IIROC referred our Hearing Panel to IIROC Notice 10-265 of October 7, 2010 and produced a copy of the Settlement Agreement referred to therein, marked Exhibit P-88 (the **Settlement Agreement**), which was entered into with NBDB shortly before the start of this hearing. IIROC thus intended to prove that there were deficiencies in the control and compliance policies and procedures applied by the Dealer (the **Policies and Procedures**) at the relevant times. According to IIROC, the Respondent sought to take advantage of such deficiencies to commit the violations alleged against him.

¶ 7 In its initial disclosure, IIROC remitted to the Respondent a total of 86 Exhibits that could potentially help in his defence, and stated that it intended to rely on only some of them to establish the merits of its claims.[3] Among the evidence disclosed were documents concerning matters of which it could be claimed at times that they were protected by the lawyer-client privilege and at times that they related to negotiations

[2] Notice of Hearing, at p. 2.
[3] List of IIROC exhibits and witnesses, November 15, 2010; trans., November 24, 2010, p. 17.

preceding the conclusion of the Settlement Agreement.

¶ 8 On this last point, we know that all documents pertaining to the negotiation of a Settlement Agreement are covered by the confidentiality and non-reference provisions of Dealer Member Rule 20.35(4), which states that:

> *"All negotiations of a Settlement Agreement are conducted on a without prejudice basis to the Corporation and all other persons involved in the negotiations and cannot be used as evidence or referred to in any proceedings."*

¶ 9 After the examination in chief of Yannick Béland, the IIROC investigator responsible for the case at bar and for the Settlement Agreement, Counsel for the Respondent wished to cross examine him about the account of a meeting between IIROC representatives (including Mr. Béland) and NBDB representatives (Exhibit P-72/D-1). Mr. Tisserand objected to the introduction of this exhibit and to the related questions, on the basis that they were privileged or related to the aforementioned negotiations.

¶ 10 At the time, the Settlement Agreement was still under consideration by the IIROC Hearing Panel to which it had been referred. As a result, the content had to remain confidential until such time as the Settlement Agreement was accepted.

¶ 11 Mr. Gingras then indicated that, in addition to Exhibit D-1, he intended to produce two other documents which might also similarly be described as privileged or related to the negotiation of settlement agreements, being Exhibit P-73/D-2, a letter from an outside counsel of NBDB, and Exhibit P-69/D-3, a letter from IIROC to the Executive Vice-President, Legal Affairs of NBDB. He also announced his intention to request the production of the signed, but as yet unaccepted, Agreement.

¶ 12 Documents D-1, D-2 and D-3 are all derived from the evidence which IIROC disclosed to the Respondent under the "*fruits of the investigation*" disclosure test, in the words of Sopinka J. in *R.* v. *Stinchcombe* [1991] 3 S.C.R. 326.

¶ 13 At this point, one of the outside counsel of NBDB involved in these documents began to attend this hearing as an observer.

¶ 14 Subsequently, on March 14, 2011, a motion by NBDB to intervene in the proceedings was served upon the parties to require our Hearing Panel to order the removal of Exhibits D-1, D-2 and D-3 from the record on the ground that they had been erroneously disclosed to the Respondent by IIROC or, if the Panel failed so to conclude, then to order that they be sealed. This motion was subsequently withdrawn. Therefore, the issue of the NBDB lawyer-client privilege is no longer before us.

¶ 15 While we were proceeding with this hearing, the Hearing Panel to which the Settlement Agreement had been referred rendered its decision. In *Re National Bank Direct Brokerage Inc.*, [4] it accepted the terms and conditions of the Settlement Agreement and imposed the recommended disciplinary sanctions on the Dealer, being a fine in the amount of $75,000 and the payment of costs equal to $25,000.

¶ 16 The hearing resumed on April 4, 2011. In the course of the cross-examination of witnesses called by it, IIROC once again raised objections to questions posed by Counsel for the Respondent regarding facts which governed the negotiations of the Settlement Agreement and the acceptance thereof. More specifically, these objections (hereinafter collectively referred to as the **"Objections"**) concerned:

- Objection No. 1: The notes taken by the investigator, Yannick Béland, following a conversation with lawyer Marie-Emmanuèle Cardinal about answer (d) to question 9 mentioned in Exhibit P-13/D-6 and the criteria for the approval of transfers of securities or funds by accounts managers for the VIP Service (trans., April 4, 2011 at pp. 83 ff);
- Objection No. 2: Mr. Béland's testimony regarding fund transfer approval practices followed by these accounts managers in breach of the Firm's Policies and Procedures (trans., April 4, 2011 at

[4] *Re National Bank Direct Brokerage Inc.* [2011] IIROC No. 2, dated January 11, 2011, marked P-88.

pp. 180-181);

- Objection No. 3: Lawyer Marie-Emmanuèle Cardinal's testimony concerning the control sub-procedures applied at the VIP Service (trans., April 5, 2011 at pp. 115-116);
- Objection No. 4: Marie-Emmanuèle Cardinal's testimony concerning procedures for the periodical oversight of PRO accounts by an officer of the Dealer (trans. April 5, 2011 at pp. 262- 265).

¶ 17 For the sake of efficiency and promptness in these proceedings over which we have control, and to promote the accessibility of disciplinary justice for the parties (which objectives must guide this Hearing Panel in the exercise of its jurisdiction: s. 1 of *An Act respecting administrative justice* (R.S.Q., c J-3, s. 1); *St-Amant and Beaudoin* v. *IIROC* [2011] QCBDR 011-001, March 4, 2011; *Scott* v. *Bourse de Montréal*, Court of Quebec at Montreal, No. 500-02-004432-881, August 15, 1990), we have in every case admitted the relevant evidence, subject to the Objections.

¶ 18 On behalf of IIROC, Mr. Tisserand now submits that the Settlement Agreement was accepted by a Hearing Panel on the basis of facts derived in part from documents D-1, D-2 and D-3, the content of which the Respondent now seeks to challenge.

¶ 19 Mr. Tisserand alleges that the facts that were established subject to the Objections must not be admitted into evidence before our Hearing Panel if the effect is to reverse the presumption of *res judicata* born of the decision ratifying the Settlement Agreement. He contends that this presumption is opposable to the Respondent and thus that no evidence aiming to contradict the facts on which such decision is based can be admitted in the case at bar. Otherwise, he asserts, if we came to a decision based on facts that differ from those underlying the decision ratifying the Agreement, this would be tantamount to a review of such decision, for which we have no jurisdiction.

¶ 20 The admissibility of the evidence referred to in the Objections and, to some extent, of the evidence introduced incidentally with Exhibits D-1, D-2 and D-3, must now be decided before the merits of the case can be addressed. For this purpose, the question we must ask ourselves is this: are the determination and appreciation of certain facts by the Hearing Panel who ratified the Settlement Agreement opposable, in whole or in part, to the Respondent in the administration of the evidence to be presented to us at this hearing, where the self-same facts are now being contested?

¶ 21 There are two angles from which we can approach this question. The first is the interconnectedness of the two disciplinary matters arising from the same facts:

- one disciplinary matter, involving an investment dealer's duty to supervise - and prevent certain misconduct on the part of - its representative, which was settled by the Settlement Agreement ratified pursuant to IIROC Dealer Member Rule 20;
- the other, independent of the first and directed against such representative for the same misconduct, but where the representative contests the merits of IIROC's claims before another Hearing Panel, namely ours.

The second angle from which the question can be viewed is the impact of this situation on the administration of the evidence for the purposes of this hearing.

¶ 22 Ideally, our answer should be able to make a determination – and, to the extent required, establish a balance - between the Respondent's right to defend himself before this Hearing Panel and the rights granted to his ex-employer by the Settlement Agreement, as ratified.

¶ 23 A Hearing Panel seized of a settlement agreement under IIROC Dealer Member Rule 20 has the jurisdiction to check the legality and the appropriateness of determinations and conclusions arrived at within the framework of this consensual variant of the disciplinary process. But this jurisdiction is limited as a Hearing Panel cannot but accept or reject the agreement.

¶ 24 To accept the agreement, the Hearing Panel must first be satisfied that it was entered into freely and

voluntarily; that it is not based on a factual error; that the facts described therein clearly demonstrate the commission of the offences referred to; and, finally, that the proposed sanctions are appropriate in the circumstances.

¶ 25 As a rule, facts not contained in the settlement agreement cannot be disclosed to the Hearing Panel and underpin its decision, unless the parties consent or the Hearing Panel so requests where the respondent is not present at the settlement hearing. (*Rule of Practice and Procedure* 15.3, *Facts not to be Disclosed*).

¶ 26 The Settlement Agreement between IIROC Staff and NBDB includes elements of the evidence which IIROC intends to adduce to shed light on the Respondent's conduct and help establish the merits of its complaint against him. They include *inter alia* the Dealer's violation of IDA rules and its failure to supervise the Respondent and put into place control mechanisms which could have prevented certain deeds now alleged against him. Proof of the acknowledgement of these violations by the Firm (P-88 and P-89), if not contradicted, can actually help to corroborate some of the facts on which IIROC intends to rely to establish the culpability of the Respondent. Conversely, the Settlement Agreement concerns evidence which the Respondent intends to refute.

¶ 27 In its description of such evidence, the Settlement Agreement clearly indicates that some of the disciplinary offences acknowledged by the Dealer were committed "*because it permitted its representative Thi Sen Chher*", the Respondent in the case at bar:

> [TRANSLATION]
>
> "[…]
>
> *(a) during the period from November 20, 2002 to March 15, 2006 inclusive, to obtain a power of attorney in the brokerage accounts of* [Mrs. C]*, a member of his family, without registering or causing such accounts to be registered as PRO accounts,*
>
> *(b) to make additions, without supervision or verification, to the mailing address and investor profile of* [Mrs. C], *without her authorization, and*
>
> *(c) during the period from February 28, 2006 to May 17, 2007 inclusive, to self-approve, without supervision or verification, transfers of funds between his personal accounts and those of* [Mrs. C], *without her consent or approval* […];"[5]
>
> *(Emphasis added)*

¶ 28 As regards the decision to ratify the Settlement Agreement, it rests, as it should, on facts that have been admitted or have not been refuted by the Dealer, but which are contested before this Hearing Panel by its ex-representative. We note in particular that the decision states that "[t]h*e representative* [the Respondent] *concealed his activities from NBDB*" (para. 35(A)(a) of the decision).[6]

¶ 29 The Dealer's contractual acknowledgement of its deviation from the rules, the way in which this was done by the Settlement Agreement with IIROC, and even the Hearing Panel's decision approving the Settlement Agreement, all concern the Respondent specifically. Indirectly, acts are ascribed to him which he denies having committed, or accusations presented as actual facts are made against him without his having as of yet had the opportunity to contest them.

¶ 30 There is no doubt that the finding that the Respondent acted without the authorization of Mrs. C, who is a client of the Dealer, or that he sought to conceal the activities involved in these proceedings from NBDB, are at the heart of this case and he would do well to rebut them if he wishes to prove his innocence.

¶ 31 Similarly, the Firm's failure to properly supervise the Respondent's conduct over a long period of time (from November 20, 2002 to March 15, 2006), or its failure to adopt and deploy internal control mechanisms

[5] *Re National Bank Direct Brokerage Inc., supra,* note 4 at 2.

[6] Ibid, p. 5. We are referring to the activities alleged against the Respondent at this hearing.

capable of preventing the misconduct alleged against the Respondent, both of which were admitted by NBDB in the Settlement Agreement, may also be relevant to the ex-representative's defence, as demonstrated by his Response.

¶ 32 Article 2848 of the *Civil Code of Québec* (**C.C.Q.**) provides that:

> "*Art. 2848. The authority of a final judgment* (res judicata) *is an absolute presumption; it applies only to the object of the judgment when the demand is based on the same cause and is between the same parties acting in the same qualities and the thing applied for is the same."*

¶ 33 The doctrine of *res judicata* is indeed relevant here from the point of view of the parties to the Settlement Agreement. In fact, it seems clear to us that the ratified Settlement Agreement is permanently binding on them and that our decision in these proceedings cannot affect the stability of the ratifying decision. Thus we could not provide the Dealer with the opportunity to deny the admissions made to IIROC or escape the sanctions it accepted to bear, no more than we could challenge the rights conferred upon the Dealer by the settlement as a result of facts it agreed to admit to as a way of settling a disciplinary dispute. This is a question of public policy, but it is also a question of the protection of the private interests of IIROC and NBDB.[7]

¶ 34 On this point, this Hearing Panel consulted the decision of a Hearing Panel of the Ontario District Council of the IDA in *Re Derivative Services Inc. and Kyle.*[8]

¶ 35 In that particular case, the Hearing Panel was seized of a disciplinary complaint against two respondents who, as in the case at bar, were alleged to have engaged in conduct unbecoming or detrimental to the public interest. The contested hearing resulted in a finding of guilt against the respondents. At the penalty hearing, Counsel for the Association introduced in evidence notices published three years before by the *Toronto Futures Exchange* (TFE) for the purpose of establishing the disciplinary history of the respondents, including Mr. Kyle. These notices referred to a settlement agreement to which he was a party and which had subsequently been approved by the TFE. As is usual in these situations, the agreement contained a description of the facts establishing the violations acknowledged by Mr. Kyle and in respect of which the disciplinary measures recommended had been imposed and accepted.

¶ 36 The respondents wanted to examine Mr. Kyle before the Hearing Panel to attempt to contradict the factual basis of the agreement he had entered into. Upon the objections of the Association, the Hearing Panel expressed the opinion that the Respondents were not entitled to adduce evidence to contradict facts which they had formally acknowledged before the disciplinary body of the TFE. It held that the acceptance of the settlement agreement by the TFE invested it with the force of *res judicata*, and its terms were proof positive against the respondents. The Hearing Panel gave the following reasons for its decision (pp. 7 and 8):

> *"The settlement process in the securities industry is not as unlike the criminal process as Ms. Biggar submitted. A respondent agrees to the accuracy of the facts contained in a settlement agreement by signing it. <u>This is equivalent to an oral affirmation of a factual summary presented in court</u>. A settlement agreement must be accepted by an independent arbiter, in the Association's case a District Council pursuant to the procedures in paragraphs 20.25 to 20.27 of the By-laws. The settlement agreement is part of and usually constitutes the "record" in such a proceeding. A District Council considering whether to accept a settlement agreement relies on the accuracy of the facts agreed to by the parties to it. It does not customarily ask a respondent whether the facts are accurate, as the signing of the agreement constitutes such an admission. In the respondent's case, the Settlement Agreement was accepted by a panel of the TFE Hearing Committee, which performed an analogous function (and reduced the fine agreed to by Mr. Kyle).*
>
> *After hearing the submissions of counsel, the District Council ruled that it would not*

[7] Royer, *La prevue civile*, 4th ed. No. 790 at p. 635.
[8] *Re Derivative Services Inc. and Kyle* [2000] IDA Ont. District Council, June 7, 2000.

permit Mr. Kyle to be called to give evidence on the accuracy of the facts contained in the Settlement Agreement. To do so would, as Mr. Awad submitted, permit a collateral attack on facts accepted by a hearing panel in a disciplinary proceeding to which the respondents previously agreed. In the District Council's view, a respondent is not entitled to adduce evidence to contradict the facts contained in such a settlement agreement. Doing so is inconsistent with the purpose of settlement agreements, as it would permit re-litigation of matters previously resolved, where the District Council may not have a means of obtaining evidence on the prior matter from any person other than the respondent. While the District Council would be prepared to hear an explanation of extenuating circumstances relating to a previous disciplinary matter, allowing evidence on the accuracy of the facts found or agreed to in it would amount to a new hearing of the prior matter. The District Council concluded for these reasons that Mr. Kyle's evidence on these matters should not be permitted. "

(Emphasis added)

¶ 37 Under Quebec law, the same interpretation must apply to the parties to the Settlement Agreement with the Dealer. The facts and disciplinary charges acknowledged by the parties to such an agreement, as well as the sanctions agreed to therein, are the fruit of negotiations between IIROC Staff and the relevant firm.[9] Once the accuracy thereof has been attested to as between the parties by their signature to the agreement, the facts acknowledged by the firm have the value of judicial admissions made at a hearing before a hearing panel called upon to accept the agreement, and they are proof against the dealer (art. 2852 C.C.Q.).

¶ 38 If the agreement is accepted, it acquires the force of *res judicata* and becomes effective as between the signatories, who are bound by the provisions thereof. The signatories cannot, in other disciplinary proceedings involving IIROC, be entitled to adduce contrary evidence to challenge facts that have been acknowledged. Otherwise, as noted by the IDA Hearing Panel in *Kyle*, this "*would permit re-litigation of matters previously resolved"*.

¶ 39 However, we do not believe that the decision ratifying the Settlement Agreement has the legal effect of *res judicata* in this proceeding and, in our opinion, this presumption is not opposable to the Respondent.

¶ 40 The case at bar does not satisfy the criteria of article 2848 C.C.Q. in terms of the proceedings where the Settlement Agreement was accepted. As noted by LeBel J. in *Canada Post Corp.* v. *Lépine* [2009] SCC 16, 1 S.C.R. 549 at para. 51, the conditions for *lis pendens* are well established in the domestic context in Quebec civil law. He writes that "*Like res judicata, lis pendens depends on identity of the parties, identity of the cause of action and identity of the object (J.-C. Royer, La preuve civile (4th ed. 2008), Nos. 788-89, at p. 635; Rocois Construction Inc.* v. *Québec Ready Mix Inc., [1990] 2 S.C.R. 440).*"

¶ 41 In this case, the criterion of identity of the parties is clearly not met, for the Respondent was never a party to the proceedings which led to the judgement accepting the Settlement Agreement, and he never intended to admit the facts which the Dealer chose to acknowledge in the Agreement. On the contrary, he contests them before this Hearing Panel. Consequently, this judgement, and the essential reasons on which it is based, cannot be binding upon him (*Roberge* v. *Bolduc* [1991] 1 S.C.R. 374; *Contrôle technique appliqué ltée* v. *Québec (Procureur général)* [1994] R.J.Q. 939 (C.A.); *Doyon* v. *Régie des marchés agricoles et alimentaires du Québec* [2007] QCCA 542 at para. 388).

¶ 42 The Respondent is not a party to the Settlement Agreement and has never been involved therein. We can therefore not invoke against him what his ex-employer has decided to admit to in this Agreement, for its own purposes, based on its own judgement and interests and, especially, in circumstances where the effect of such admission is to incriminate the Respondent on a disciplinary level, without giving the latter the opportunity to be heard. The fact that a Hearing Panel has accepted this Agreement in the exercise of its very specific jurisdiction, taking these admissions as proved, obviously makes no difference to the situation.

[9] Dealer Member Rule 20, *Corporation Hearing Processes*, s. 1 *"Settlement Agreement"* and ss. 35 ff.

¶ 43 Furthermore, for the following reasons, we are of the opinion that the Respondent is entitled to submit otherwise admissible evidence to this Hearing Panel to support, distinguish or contradict the facts underlying the decision to ratify the Settlement Agreement, provided that he is able to demonstrate that it is material to his ability to make full answer and defence. This is a question of procedural fairness which, moreover, does not in any way call into question the presumption of *res judicata* as between the parties to this Settlement Agreement.

¶ 44 We know that we must act equitably when exercising this Hearing Panel's disciplinary jurisdiction, particularly given the disciplinary nature of the decision expected of us, given the process to be followed to arrive at such decision, given the nature of the regulatory scheme under which we act, and the importance of the decision for the Respondent (*Baker* v. *Canada (Minister of Citizenship and Immigration)* [1999] 2 S.C.R. 817, 838-841*; Pezim* v. *British Columbia Securities Commission* (1994) 2 S.C.R. 551; *Re YBM Magnex International Inc.* (2000) 23 O.S.C.B. 623; *Re O'Neill* (1999) 31 BCSC Weekly Summary 20).

¶ 45 In *Bourdon* v. *Commissaire à la déontologie policière* [2000] RJQ 2239 (a judgement cited with approval by Judge Bouchard in *Simard* v. *Shallow* [2010] QCCA 1019 at para. 53), Deschamps J. states that "[TRANSLATION] *There is a stigma attached to the mere fact of being the subject of a complaint or an investigation.* […] *In* Baker *v.* Canada*, 1999 CanLII 699 (SCC), [1999] 2 S.C.R. 817, Madam Justice L'Heureux-Dubé states (at p. 837) that the concept of procedural fairness is "eminently variable" and its content is to be decided in the specific context of each case.*"

¶ 46 As a rule, fairness requires that any information in IIROC's possession which appears to be relevant and useful to the Respondent's ability to raise a defence should be disclosed to the Respondent, irrespective of any claim of privilege or privacy that may arise (*R.* v. *O'Connor* [1995] 4 S.C.R. 411, Lamer C.J. and Sopinka J.).

¶ 47 In *Stinchcombe*, the Supreme Court of Canada, at p. 333, defined as follows the duty of the prosecution to disclose evidence:

> "*…information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege ... (p. 340)* [...] *With respect to what should be disclosed, the general principle to which I have referred is that all relevant information must be disclosed subject to the reviewable discretion of the Crown. The material must include not only that which the Crown intends to introduce into evidence but also that which it does not. No distinction should be made between inculpatory and exculpatory evidence…*". (p. 343)
>
> (Emphasis added)

¶ 48 In the case at bar, the prosecution had a particular duty to disclose documents D-1, D-2 and D-3 to the Respondent if, after exercising its discretion to determine whether or not they contained sufficiently relevant evidence likely to be of use to his defence, it came to the conclusion that the Respondent could reasonably use the information disclosed to refute the evidence and the arguments of the prosecution, to mount a defence or otherwise to make a decision that is likely to affect the conduct of the defence (*R.* v. *Egger* [1993] 2 S.C.R. 451, 467; *R.* v. *Chaplin* [1995] 1 S.C.R. 727, 742; *R.* v. *Dixon* [1998] 122 C.C.C. (3d) 1, 11).

¶ 49 We note, incidentally, that among the information to be disclosed, the courts have included notes prepared by investigators to record witnesses' statements (*Stinchcombe*, supra, at p. 344; *Markandey* v. *Board of Ophthalmic Dispensers (Ontario)* (1994) O.C.J. 484 (Ont. Gen. Div.)), which perfectly matches the account of the meeting with his former Firm, marked D-1, which IIROC disclosed to the Respondent, which he actually produced and about which he may want to cross-examine witnesses called by IIROC.

¶ 50 These principles, all of which are derived from *Stinchcombe*, allow us to define the duties of procedural fairness that weigh upon administrative or domestic courts which, like our Hearing Panel, exercise a disciplinary jurisdiction (*Howe* v. *Institute of Chartered Accountants* (1994) 118 D.L.R. (4th) 129, Laskin, J.A. in dissent, at pp.142-143 (Ont. C.A.); *Hammani* v. *College of Physicians and Surgeons of British Columbia* (1997) 9 W.W.R. 301).

¶ 51 Any decision we make about whether or not to refuse evidence based on a written instrument which the prosecution has deemed potentially relevant to the Respondent's defence and has therefore disclosed to him, must be taken in accordance with these principles, for this decision may so impact the fairness of the disciplinary process as to be tantamount to a breach of the rules of natural justice governing the exercise of our jurisdiction *(Université du Québec à Trois-Rivières* v. *Larocque* [1993] 1 S.C.R. 471, per Lamer C.J., at p. 491).

¶ 52 If IIROC had not disclosed these written instruments, it could have impaired the Respondent's right to full answer and defence and given rise to the additional risk of his being found guilty, even if he was innocent of the charges against him. In *R.* v. *Mills* [1999] 3 S.C.R. 668, the Supreme Court of Canada stated (at para. 69) that:

> *" […] the ability of the accused to make full answer and defence is a principle of fundamental justice protected by s. 7:* Dersch *v.* Canada (Attorney General)*, [1990] 2 S.C.R. 1505. Full answer and defence is also linked to other principles of fundamental justice "such as the presumption of innocence, the right to a fair trial, and the principle against self-incrimination":* R. *v.* Rose*, [1998] 3 S.C.R. 262,* per *Cory, Iacobucci and Bastarache JJ., at para. 98. Many of these principles of fundamental justice are informed by the legal rights outlined in ss. 8 to 14 of the* Charter*:* Re B.C. Motor Vehicle Act, supra*;* R. *v.* CIP *Inc., [1992] 1 S.C.R. 843. Indeed, in* R. *v.* Seaboyer*, [1991] 2 S.C.R. 577, at p. 603, the majority of this Court recognized that both s. 7 and the guarantee of a right to a fair trial enshrined in s. 11(d) are "inextricably intertwined" and protect a right to full answer and defence."*

¶ 53 IIROC therefore rightfully exercised its discretion to disclose evidence to the Respondent, possession of which evidence had been obtained as a result of an investigation and which IIROC deemed relevant and useful to the Respondent's defence. This disclosure, even though it may have pertained to confidential information concerning the activities of one of its dealer members, was appropriate and consistent with the terms and conditions of IIROC's recognition in Quebec (Decision 2008-PDG-0126 of May 2, 2008, Schedule A, para. 8(g)).

¶ 54 Furthermore, IIROC could validly make the disclosure, even though this evidence could possibly serve as the basis for a defence, despite the privilege of confidentiality set forth, under Dealer Member Rule 20.35(4), in favour of the Dealer who had signed the Settlement Agreement.

¶ 55 Considering that the terms of the Settlement Agreement, from which he was kept well away, have - incidentally, perhaps, but nonetheless publicly and by name – ascribed to him a conduct that is reprehensible in a securities professional, we believe that this special case of the Respondent certainly deserves that we now offer him the possibility of asserting his point of view, of establishing that he is not guilty in the way and to the extent it has been claimed, and of thus avoiding a disciplinary stigma that will stay with him throughout his career.

¶ 56 The documentary evidence introduced by Exhibits D-1, D-2 and D-3, and the facts that have been established subject to the Objections, also appear to satisfy the criteria of *likely relevance* and *necessity in the interests of justice* that were set out in *Mills* as a condition to the exercise of a court's discretionary power to allow evidence that would otherwise be privileged. Even if they were laid down in the context of criminal proceedings, these principles may be taken into account by analogy in disciplinary matters as a guide to the exercise of our Hearing Panel's discretionary power (*College of Physicians and Surgeons of Ontario* v. *Shiu-Yuen* [2005] CanLII 2037 (Ont. SCDC)).

¶ 57 This is why, in the name of the Respondent's right to full answer and defence and to fairness, a right which must guide our proceedings, he must be entitled to introduce before this Hearing Panel, "*in spite of the law of privilege*" (*O'Connor*, p. 30) which the parties to the Settlement Agreement enjoy as between themselves pursuant to Rule 20, evidence to support, distinguish or even contradict some of the facts which, in the settlement hearing, were agreed upon by IIROC and NBDB or were acknowledged or accepted by another Hearing Panel.

¶ 58 Furthermore, we add that, in the context of a disciplinary process such as that of IIROC, we must always seek to establish a proper balance between the exercise of a respondent's right to full answer and defence and NBDB's right to confidentiality and equal treatment in the face of disciplinary proceedings (*Dagenais* v. *Canadian Broadcasting Corp.* [1994] 3 S.C.R. 835, 877).

¶ 59 Consequently, situations may undoubtedly arise where, as in *St-Amant* v. *IIROC* [2011] BDR 2011-011, AMF Bulletin of May 4, 2011, a Hearing Panel will be called upon to weigh contradictory claims made in this regard, and hold that the information is not admissible in evidence or even that it should not be disclosed to a respondent on the basis of a *"reasonable limit"* to a respondent's constitutional right to make full answer and defence (*O'Connor* (para. 16), *Stinchcombe,* p. 340; *Mills* at pp. 78-79). In other situations, a Hearing Panel might simply decide that the evidence sought to be introduced, in spite of some privilege protecting it, is quite simply not relevant, and might therefore refuse to allow it or might otherwise allow it to be introduced under seal. In the case at bar, given the nature of the evidence at issue and the Objections, such an exercise is not required.

¶ 60 In the light of the foregoing considerations, we dismiss the Objections to the introduction of the evidence expressed by IIROC at the hearing.

¶ 61 We therefore declare that documents D-1, D-2 and D-3 are admissible in evidence and validly produced, and that the testimony which is the subject of the Objections may be taken into account, in full, for the purposes of this decision.

¶ 62 Let us now examine the merits of the debate.

THE FACTS

¶ 63 In 1980, at the age of four, the Respondent, Thi Sen Chher, immigrated to Canada from Vietnam with his parents, who are of Chinese origin. He went to school in Quebec, including university, and obtained a degree in business administration.

¶ 64 Shortly after her arrival in Canada, Mrs. C started retail businesses, which subsequently took on many forms: sewing, boutiques, import-export with China, a restaurant, etc. She succeeded in business with the support of members of her family, to whom she regularly turns for advice. In financial, accounting and taxation matters, the Respondent is the person she has leaned on and consulted since the early 1990s. The role he plays for her and her businesses is tantamount to that of a chief financial officer.

¶ 65 In September 2001, the Respondent joined Courtage à Escompte Banque Nationale (which became Courtage Direct Banque Nationale Inc. (National Bank Direct Brokerage Inc.) in 2003) as an investment agent. NBDB is a discount brokerage firm which is registered in Quebec and a member of the IDA, which authorized the Respondent to act as a representative of the Firm. In consideration thereof, the Respondent agreed to observe the rules of the Association.

¶ 66 At NBDB, the Respondent acted for a time as a contact person for a group of financial planners who were employees of the network of individuals and commercial clients of the National Bank group in Quebec. He provided services to them in connection with securities transactions[10]. The planners relayed buy or sell orders from their clients and the Respondent carried out their instructions by conducting all sorts of transactions for them and, where required, he confirmed that the trades had been authorized by the clients.

¶ 67 After four years, the Respondent was promoted. He was assigned the functions of an "accounts manager" within a business unit named "VIP Service". This is an "elite unit" composed of a dozen accounts managers, to which are steered certain valued clients - wealthy individuals, investors seeking autonomy and control[11], day traders generating substantial commissions, etc. — and where the Dealer endeavours to provide a more personalized service.

[10] Job Description, P-13, p. 4, Question 9(b).
[11] Ibid.

¶ 68 The Respondent was described as a dedicated, intellectually gifted and qualified employee who gave his clients good advice. He was proactive, which is what the Dealer was looking for. He was praised on more than one occasion by his employer.

¶ 69 He was responsible for some 30 clients, some of whom maintained several accounts. Even if he was registered as a representative or options representative for retail clients[12], he was not, at NBDB, required to act as a securities advisor or portfolio manager for the account holders assigned to him. More particularly, he was not authorized to give securities advice.

¶ 70 In his usual functions as accounts manager with the VIP Service, the Respondent:

- interacted on the phone with clients, forwarded their orders to the market according to their instructions and confirmed the execution thereof; he provided information on new, available financial products and, from time to time, provided them with information which could have an impact on their portfolio;
- conducted for them various types of transactions on the computer systems made available to him; transactions initiated by him from his workstation - including changes of address and changes to investor profiles - were then implemented by the Dealer's administrative services; and
- conducted these transactions at the clients' request, without verifying the suitability thereof, as efficiently as possible.

In short, he helped clients assume their autonomy as beneficiaries of discount brokerage services and, to this end, made the most of his excellent knowledge of securities rules, of the conditions of application thereof and of the Policies and Procedures laid down by the Firm.

¶ 71 The Respondent was also a client of the Firm. He traded for himself on the securities market from accounts he maintained with his employer:

- a Canadian dollar cash account,[13] which subsequently became a short selling margin account with options; [14]
- a self-directed RSP account;[15] and
- a self-directed locked-in retirement account (LIRA).[16]

In each case, the opening of the account was authorized by an officer of NBDB.

¶ 72 Pursuant to NBDB's Policies and Procedures,[17] all these accounts were marked **"PRO"** in the jargon of the industry, as the Respondent was an employee of the Firm. Identification was made by inserting an "E" — for "Employee" — in the account reference number.

¶ 73 The purpose of this support mechanism in the Firm's internal control and supervisory systems was *inter alia* to prevent the execution of an employee's orders that would conflict with his or her duty of loyalty to the clients, or that would breach a dealer's duty to prioritize client orders.

¶ 74 In his capacity as a registered representative, the Respondent had an excellent knowledge of the supervisory rules governing advisory and brokerage activities, as well as related products and services.

¶ 75 Some of the clients assigned to him had powers of attorney and were thus authorized to act on behalf of account holders and give trading instructions that the Respondent then executed in the name of the Dealer. These were not self-directed accounts, discretionary accounts or professionally managed accounts, according

[12] See Respondent's registration file, Exhibit P-44.
[13] Opened on April 9, 2002: Exhibit P-11-C.
[14] This account was opened on October 5, 2001: Exhibit P-11-A.
[15] Opened on November 8, 2001: Exhibit P-11-B.
[16] Opened on April 9, 2002: Exhibit P-11-D.
[17] Which implement Part II Sections A and C of IDA Policy No. 2.

to industry standards, and the persons giving instructions were generally not registered in this capacity with the securities authorities. They were simply agents acting as *alter ego*s of the account holders.

¶ 76 According to the Respondent (and we agree), there was nothing illegal or irregular in this type of principal-agent relationship. His clients were doing it and he saw no reason not to do the same for his mother. Moreover, this is what he claimed to have done for her in the past when he was operating an account in her name under a power of attorney at Desjardins Securities.

¶ 77 Mr. Chher was therefore acceding to Mrs. C's request to create this type of relationship between them and they agreed that he would help her manage her investments, just as he managed his own. He did what any son would do for his mother, albeit within the contractual and regulatory framework which governed his employer and its representatives and employees. Hence, the application of IDA rules to the professional acts performed by the Respondent under his mandate.

¶ 78 Mrs. C became a client of NBDB on November 20, 2002. In the new client information form for her first discount brokerage account (Exhibit P-4-A), she indicated that her investment knowledge was limited and that she should not be viewed as a securities professional. We note that the account was a Canadian dollar cash account and that her investment objectives were conservative. At that time, there was no question of her engaging in riskier investments.

¶ 79 The brokerage agreement entered into by Mrs. C in the form marked P-4-A (**Brokerage Agreement**) provided that NBDB agreed to act solely as her agent for the purpose of executing buy, sell or other orders and, generally, conduct such transactions in securities as the client would relay.

¶ 80 By signing the new client application form for the Canadian dollar account (and the same undoubtedly applied for her U.S. Dollar account), Mrs. C expressly acknowledged that "[TRANSLATION] [NBDB] *is not authorized to give advice on securities investments other than investments in mutual funds, and shall not be held liable for the relevance of buy, sell or other orders transmitted to* [NBDB], *other than for advice on mutual funds* […]." Furthermore, the Brokerage Agreement expressly authorized the Firm to act on any order which it believed, in good faith, to stem from the account holder.[18]

¶ 81 The opening of a discount brokerage account by Mrs. C., a person who declared herself a neophyte in financial matters, may seem surprising at first blush. We know that the classic holders of this type of account act autonomously. Such holders are called upon to manage their investments themselves and to take their own investment decisions, without the assistance of a professional advisor.[19] Their trading orders are transmitted to the discount broker for the sole purpose of being executed on the market, hence the fact that a discount broker's services are less costly than those of a full-service or integrated services broker.

¶ 82 This situation can obviously be explained by the fact that Mrs. C agreed with her son, a securities professional, that he would watch over her interests. Indeed, on her new client application form, she mentioned that she granted him the authorization to trade in the account, and she granted him power of attorney the same day. This is the power of attorney marked P-5/D-10, conferred on a form entitled "*Authorization to Trade or Power of Attorney*" (**POA**), dated November 20, 2002.

¶ 83 This arrangement allowed the client to assume her independence as a beneficiary of discount brokerage services. The use of a POA provided numerous advantages for her. Her investment knowledge may have been limited, but she could be active in the market. Her son was a securities professional whom she trusted and who already assisted her in these matters. A discount brokerage account was less costly to manage. She had the benefit of the VIP Service at NBDB. Furthermore, in the unanimous opinion of those who dealt with her in the present matter, she didn't speak the language very well, to the point that she needed an interpreter to fully understand questions that went beyond general conversation. It is therefore clear that she wouldn't have risked undertaking direct brokerage transactions alone, without the assistance of her son.

[18] Exhibit P-11-A, s. 6. See also Exhibit P-45-A / D-8, *Manuel de conformité* (Compliance Manual) 2002 Version, May 2005, Chapter 5 at p. 5.

[19] Marie-Emmanuèle Cardinal, trans. April 5, 2011, at pp. 38-39.

¶ 84 The client's *modus operandi* was quite simple: she would from time to time deliver cheques to the Respondent, to be credited to her account (Exhibit P-4-F / D-16), and the Respondent would operate her account under the POA.

¶ 85 Later, Mrs. C opened a second account, the existence of which appears for the first time in the statements marked P-4-D for the period from September 1 to September 30, 2005. This is also a cash account (i.e., no options), but for transactions in U.S. dollars. This account is also not marked PRO and the number does not contain the characteristic "E".

¶ 86 Under NBDB's internal procedures,[20] Mrs. C's Canadian dollar account should have been marked PRO upon the opening thereof, either at the behest of the Respondent or of the officer of the Firm who approved the opening of the account, for two reasons. First, the holder was the mother of an employee of the Firm and, at the time, they lived under the same roof. Secondly, this employee was acting on her behalf, as her attorney under a POA authorizing him to give orders in the account.[21] As the POA was still effective in 2005, the Firm should have done the same for the U.S. dollar account.

¶ 87 Not until March 15, 2006 was this situation rectified at the request of the Respondent's immediate superior, Mario Caron (the officer responsible for periodically verifying trades in the PRO accounts of VIP Service accounts managers).[22]

¶ 88 From this moment at least, according to the evidence, Mr. Caron was expressly aware that, in addition to operating his own accounts, the Respondent operated those of his mother as well under a POA.[23]

¶ 89 Under IDA Regulation 200.1(i)(3) (now IIROC Dealer Member Rule 200.1(i)(3)), the POA should have appeared in the books and records of NBDB as early as November 20, 2002, the date on which it was issued, or shortly thereafter. When the Respondent's POA transactions drew the attention of his superior in the spring of 2006 and Mrs. C's accounts themselves were marked PRO, thus becoming subject to special supervision, only 2 of the 49 transfers of funds alleged by IIROC against the Respondent had already been effected (Table P-86 / D-4).

¶ 90 On June 15, 2007, after verifications by the Dealer's compliance department[24] and an internal investigation by Mr. Gilles Lavergne of the National Bank revealed possible misconduct on the part of the Respondent, Mr. Caron temporarily relieved him of his duties with pay, while awaiting the results of additional verifications (letter P-4-G). As part of the internal investigation, Mr. Lavergne, who is an expert in this type of mission, obtained a "*statutory statement*" (Exhibit P-4-I) from the Respondent.

¶ 91 On June 19, 2007, the Firm terminated the Respondent's employment and produced a *ComSet* report (*Event Report Form*, Exhibit P-1) to notify IIROC. The dismissal was justified on the basis that the Respondent had made numerous transfers of funds, without prior authorization, from his mother's account to his own brokerage account.

¶ 92 Having analysed the report marked P-4-I that Mr. Lavergne prepared about the events surrounding the Respondent's dismissal, IIROC initiated a formal investigation, which commenced in June 2007 and ended in September 2008.

¶ 93 When investigator Yannick Béland contacted Mrs. C in this matter on November 7, 2007, she didn't understand what he wanted from her.[25] Mr. Paul Chher was the one designated to call him back and he, in fact, is the one Mr. Béland spoke to subsequently. It was also Paul Chher who informed the investigator, in a telephone conversation conducted on December 5, 2007, that his mother had no interest in suffering the stress

[20] Which on this point referred to Part II Sections A.3 and C.4 of IDA Policy No. 2.
[21] Yannick Béland, trans. Nov. 24, 2010 at pp. 80-82, and P-13-B, *NBDB Compliance Manual, November 2006, Account Openings and Documentation*, p. 10, Section 5.1, produced as Exhibit P-13-B.
[22] Yannick Béland, ibid, p. 82; Exhibit P-4-E.
[23] Yannick Béland, trans. April 4, 2011 at pp. 48 ff.
[24] These verifications were undertaken as of May 2007: Marie-Emmanuèle Cardinal, trans. April 5, 2011 at pp. 97 ff. and at p. 130.
[25] The account of the telephone conversation marked P-27 prepared by the investigator is clear on this point.

of a recorded interrogation in connection with an investigation into the conduct of her son, Thi Sen (P-31). It was also Paul Chher who, in the fall of 2007, met with representatives of the Dealer (Frédéric Simard and lawyer David Desjardins), along with Mrs. C, to discuss what happened in her accounts and who, on October 30, 2007, wrote to lawyer Marie Emmanuèle Cardinal and to Mr. Simard to formally demand that NBDB indemnify his mother for losses incurred (letter P-87).

¶ 94 In this demand notice, Paul Chher referred to a recent exchange of correspondence with the Dealer concerning his brother's transactions in Mrs. C's two accounts, and spoke on her behalf. Challenging the fact that the POA marked P-5/D-10 could have allowed the Respondent to effect transactions that resulted in an aggregate loss of $64,500 in these accounts, he stated that his mother held NBDB liable for this loss and demanded that an offer of settlement be made to her, failing which he (she) would consult a lawyer.

¶ 95 The Respondent never disputed the validity of this letter and the intentions ascribed to his mother therein, and the evidence provides no explanation as to how it was relayed to the Dealer. Ms. Cardinal, however, reported (trans. April 5, 2011 at pp.139-140) that, upon receipt of the demand letter signed by Paul Chher, NBDB delivered its own preventive demand letter to the Respondent to inform him that it would hold him liable for any damages the Firm might be required to pay to his mother, if ever she acted upon her threat of prosecution. Speaking to the Respondent's lawyer, Ms. Cardinal was very clear that, if the Firm was not required to make any payments to the mother, there would be no claim against the son, which might explain why, to this day, Mrs. C has not followed through on her demand letter marked P-87.

¶ 96 Apart from his laborious telephone conversation of November 2007, IIROC's investigator has never actually been able to discuss the subject of this case with Mrs. C., who at one time was willing to meet him with her son Paul, but finally desisted.

THE ANALYSIS

¶ 97 IIROC has charged the Respondent with three disciplinary offences in his capacity as registered representative and employee of NBDB based on misconduct which allegedly contravened the provisions of IDA By-law 29, *Business Conduct*, which prescribed in the first paragraph of section 29.1 that:

> *"Members and each partner, director, officer, sales manager, branch manager, assistant or co-branch manager, registered representative, investment representative and employee of a 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 of Directors."*

¶ 98 Before turning to an analysis of the issues surrounding each of these offences, it is necessary to focus briefly on three of the arguments of the defence raised in the Respondent's Response, to which Counsel for the Respondent did not return in his arguments:

1° the offences described in the Notice of Hearing are prescribed;

2° the delay with which the Notice of Hearing was served interferes with the Respondent's right to full answer and defence under the *Canadian Charter of Rights and Freedoms* and the Quebec *Charter of Human Rights and Freedoms*; and

3° the statements obtained from the Respondent by authorities in this case are illegal and in breach of his constitutional rights, as well as of his right to counsel.

¶ 99 Furthermore, as a fourth point, we shall preliminarily examine the issue of the authorization to act on behalf of his mother, which the Respondent claims as his authority to seek the dismissal of the charges against him. For this purpose, we shall discuss the provisions of Mrs. C's POA to the Respondent.

1° The Issue of Prescription

¶ 100 Since October 1, 2004, rules governing the continuing jurisdiction of the IDA, which are codified in section 7 of By-law 20 – *Association Hearing Processes*, provide that in his capacity as a former Approved Person of the Association, the Respondent remains subject to the investigative and disciplinary jurisdiction of the Association for a period of five years from the date on which he ceased to be an Approved Person of the Association. This is the only extinctive prescription of IIROC's current power to initiate disciplinary measures which is contractually opposable to the IDA by the Respondent. Otherwise, there is, under ordinary law, no prescription in disciplinary matters (*Scotia McLeod* v. *Bourse de Montréal* [1992] R.J.Q. 1040).

¶ 101 NBDB terminated the Respondent's employment on June 19, 2007, on which date he lost his status as an IDA Approved Person. The Notice of Hearing was served upon him on October 8, 2010, i.e., well under the aforementioned 5-year time period.

¶ 102 Under the rules of the Association, these procedures were duly initiated within the prescribed time.

¶ 103 The defence whereby the disciplinary breaches alleged against the Respondent are prescribed is therefore unfounded.

2° <u>Excessive Delay</u>

¶ 104 We are very far in this case from the type of unreasonable or excessive delay that could impair our duty to act fairly and could count as an abuse of process under administrative law, according to the criteria established in *Blencoe* v. *British Columbia (Human Rights Commission)* [2000] 2 S.C.R. 307, as interpreted in *Huot* v. *Pigeon* [2006] QCCA 164 and the case-law cited in paras. 41 ff. of that decision.

¶ 105 Moreover, no evidence of special circumstances nor any specific argument that would permit us to relate the time period in which these proceedings were commenced to the provisions of the Charters have been presented to us.

¶ 106 That is why, like the Hearing Panel in *Re Eisen* [1991] I.D.A.C.D. No. 22, we do not allow this defence.

3° <u>Respondent's Illegally-Obtained Statements</u>

¶ 107 This argument seems to be directed against the statutory statement (Exhibit P-4-I) made to Mr. Gilles Lavergne, an investigator in the employ of the National Bank who was seconded to NBDB to shed light on allegations contained in Exhibit D-16, a document prepared by lawyer Marie-Emmanuèle Cardinal entitled *Internal Review of the Allegations of Inappropriate Practices Against Thi Sen Chher*. This statement was recorded in writing, reread and personally corrected and signed by the Respondent in the presence of Mr. Lavergne on June 15, 2009.

¶ 108 The Panel notes that Counsel for the Respondent has not seen fit, given the circumstances revealed by the evidence and, more particularly, the testimony of the Bank's investigator regarding the events surrounding the receipt of the Respondent's statement, to object to the production of this statement or demand that it be struck from the record. We are not required to stand in his stead in this regard nor examine and determine *proprio motu* whether this statement was freely and voluntarily made and, therefore, admissible in evidence before this Hearing Panel.

¶ 109 However, without really deciding whether, on this point, it is justified to go beyond the Quebec Court of Appeal's warning on this issue in *Québec (Procureur général)* v. *Bouliane* [2004] CanLII 25806 (C.A.) and draw a very close parallel between IIROC Rules of Practice and Procedure, disciplinary law in general and penal law, we have nevertheless examined the rules formulated in *R.* v. *S.G.T.* [2010] 1 S.C.R. 688 and have simulated the application thereof to the facts relating to the statutory statement signed by the Respondent. We find that these rules would not be applicable in this case, even if the Respondent had sought, other than by simple allegation in his Response, to invoke them before this Hearing Panel. We are also of the opinion that such statement was obtained under conditions which demonstrate the legality thereof.

¶ 110 Therefore, we confirm the admissibility in evidence and the production of the statutory statement marked P-4-I.

4° POA

¶ 111 Under IIROC Dealer Member rules, a dealer member is required to keep a record of all cash and margin accounts wherein appears, when trading instructions are accepted from a person or corporation other than the client, a written authorization or ratification from the client naming the person or corporation (IDA By-law 17.2 and Regulation 200.1(i)(3)).

¶ 112 The POA marked P-5/D-10 constitutes such an authorization from Mrs. C. However, because of a lack of specific indication, it covers all her accounts with NBDB, with no particular identification.

¶ 113 Even if the issuance of the POA is set forth on a form prepared in advance by the Dealer for the convenience of its clients (i.e. Form 13768, as indicated on the first side), this does not mean that this is a regulated contract as such. It is an instrument which has all the characteristics of a civil law contract between Mrs. C and her son, subject to the rules of the *Civil Code of Québec* governing mandates (arts. 2130 ff) and the administration of the property of another (arts. 1299 ff).

¶ 114 The POA completes the Brokerage Agreement and is therefore binding on the Dealer in accordance with its terms. It describes as follows the mandate conferred upon the Respondent and by which NBDB agrees to be bound when providing brokerage services:

[TRANSLATION]

> *" **POWER OF ATTORNEY***
>
> *"To give [NBDB] instructions for the purchase (in cash or on margin), sale (including short sales) or, generally, the trading of securities, to act for administrative purposes, withdraw available credit balances and registered securities for and on behalf of the account holder, and to effect any trade or transaction in the account(s) (hereinafter the "Transactions") for all types of accounts related to the above-stated account number(s) of the account holder.*
>
> *The trading authorization and power of attorney do not authorize the mandatary to:*
>
> – *receive monies and registered securities on behalf of the mandatary or any third party;*
>
> – *sign agreements or endorse securities; or*
>
> – *open, close or change the nature of an account.*
>
> *The account holder hereby authorizes* [NBDB] *to follow the instructions of the mandatary and effect the transactions accordingly, in the same manner and to the same effect as if such instructions had been given by the account holder himself or herself.*
>
> *The trades shall be executed in accordance with the terms and conditions of the agreements governing the accounts and the account holder shall be fully liable therefor.*
>
> *The account holder hereby confirms and ratifies in advance each and every trade effected by* [NBDB] *in accordance with the instructions of the mandatary. The account holder hereby agrees to indemnify, defend and pay* [NBDB] *forthwith upon demand for all losses and amounts due and owing in the holder's account.*
>
> *The rights granted hereunder are in addition to all other rights* [NBDB] *may have under any other agreement entered into between the account holder and* [NBDB], *without any limits or restrictions as to the rights of* [NBDB].
>
> *This agreement shall remain in full force and effect until it is terminated by written notice of the account holder to* [NBDB], *provided that such termination shall not affect the liability of the account holder resulting from any transaction initiated or entered into before the receipt of such written notice by* [NBDB].*"*

¶ 115 By signing this document, Mrs. C showed that, from the very outset, she wanted her son to invest the

amounts she would entrust to NBDB. She expected the Respondent to make such trading decisions and give such trading orders in her accounts on her behalf as he deemed necessary. As far as she was concerned, he was the expert and he should therefore take the initiative.

¶ 116 As between Mrs. C and her Dealer, under the Brokerage Agreement and until otherwise proven, it is the written POA that applies. Therefore, it is the terms and conditions of this writing that must first and foremost guide us in our quest to appreciate the nature and the scope of the mandate conferred upon the Respondent, as well as the trustworthiness of the professional acts carried out by him in the performance of such mandate.

¶ 117 As regards NBDB, the Compliance Manuals (or extracts thereof, as the case may be) marked P-45-A or D-8/P-45-B or P-66-E (updated in May 2005) and P-66-F (updated in November 2006) of the Respondent's ex-employer describe, for the relevant periods, the terms on which the Dealer agreed to follow the instructions of a person instructed by an account holder to act on his or her behalf.

¶ 118 As a rule, such a manual codifies and governs, in a manner which must be acceptable to the IDA, the application of the policies and procedures designed to supervise the activities carried out by the Dealer and, more particularly, to facilitate the supervision of its registered representatives, employees and agents and give reasonable assurance that securities legislation and IDA rules (i.e. by-laws, regulations, rules, policies, official interpretations, etc.) are actually being complied with by these persons.[26]

¶ 119 The policies and procedures set forth in these manuals vary from dealer to dealer, depending on the nature, size or complexity of their activities and the risks to which they are exposed, based on what each firm deems appropriate.[27]

¶ 120 The provisions of such policies and procedures do not, in themselves, have the value of rules which this Hearing Panel is required to enforce. But as these provisions aim to facilitate the observance of such rules and of good business conduct by the dealers in the interest of their clients and the general public, the reasonable care a representative shows in complying therewith - to the extent they adequately reflect IDA rules — is a factor to be taken into consideration in the appreciation of his or her conduct within the meaning of By-law 29.1.

¶ 121 Furthermore, the issuance of a power of attorney by the holder of a discount brokerage account is a recognized mechanism deemed acceptable by securities legislation[28] as well as by IDA and IIROC rules.[29] Such an instrument makes it possible to authorize a third party to give orders in the account, which can be accepted and executed by the dealer as if they stemmed from the holder.

¶ 122 At the time Mrs. C's POA was issued to the Respondent and accepted by NBDB, the section in the 2002 Compliance Manual (Exhibit P-45-A / D-8) concerning the amendment of information in the new client application form provided no guidelines to cover this type of act carried out at the initiative of a representative acting under a power of attorney.[30] Considering this silence, it is therefore the general rule of powers of attorney, which states that the [TRANSLATION] […] "*account holder authorizes* [NBDB] *to follow the instructions of the mandatary and effect the trades accordingly, in the same manner and to the same effect as if the account holder had given such instructions himself or herself*", which must apply, with the exceptions provided therein.

¶ 123 In Table 1 below, we see that the compliance policy advocated by NBDB in respect of an *Authorization*

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[26] See *inter alia* Rule 38.1, *Compliance and Supervision*, and Part I, Sections A and B of Rule 2500, *Minimum Standards for Retail Customer Account Supervision*.

[27] Marie-Emmanuèle Cardinal testifies to this effect, trans. April 5, 2011, p. 64.

[28] Website of the *Autorité des marchés financiers*, www.lautorite.qc.ca, *Discount Brokerage*, under *Proxy*.

[29] At IIROC, best regulatory practices concerning powers of attorney and the use thereof are seldom codified, to the point that IIROC is now contemplating regulating the use thereof by means of more specific rules that will extend beyond general principles, such as those formerly set forth in By-law 29*:* See IIROC Notice 10-0155, May 28, 2010, *Proposed Personal Financial Dealing and Outside Business Activities Proposals*, p. 5.

[30] This situation is contemplated as regards the PRO label of an account in which an employee of the firm is acting as an attorney: P-45-A / D-8, p. 6

regarding trading by third parties began to evolve in May 2005. Its manuals began to describe what the Firm recognized as sufficient authorization for an agent as well as the conditions to be met for NBDB to agree to carry out the instructions from such an agent.

¶ 124 In this regard, the 2005 and 2006 versions of NBDB's Compliance Manual are identical, except for the issue of exemptions from the requirement that account holders themselves must intervene to amend personal information (address, investor profile, etc.).

Table 1

May 2005 Manual ***(Exhibit P-45-B/P-66-E/D-9)***	*November 2006 Manual* (Exhibit P-66-F)
Chapter 5 Account Openings and Documentation	Chapter 5 Account Openings and Documentation
3.3.3.1 Regular Accounts	**3.3.3.1 Regular Accounts**
As a rule, in the case of individuals, only the holder of a brokerage account is authorized to act in his or her account, provided that the holder may designate a mandatary to act on the holder's behalf, within the limitations of the powers vested in the mandatary.	As a rule, in the case of individuals, only the holder of a brokerage account is authorized to act in his or her account, provided that the holder may designate a mandatary to act on the holder's behalf, within the limitations of the powers vested in the mandatary.
A mandate applicable to a brokerage account may take various forms and the extent of the powers arising thereunder will vary depending on the form of the mandate. [...] Moreover, regardless of the powers conferred on the mandatary, he or she may not change any personal information concerning the account holder (address, investor profile, etc.), with some exceptions.	A mandate applicable to a brokerage account may take various forms and the extent of the powers arising thereunder will vary depending on the form of the mandate. [...] Moreover, regardless of the powers conferred on the mandatary, he or she may not change any personal information concerning the account holder (address, investor profile, etc.), without a notarized power of attorney.
Therefore, no third party, related or unrelated to the account holder (spouse, parent, friend or any other person), may give instructions respecting a brokerage account with NBDB, unless that party is a mandatary duly appointed under a trading authorization or power of attorney.	Therefore, no third party, related or unrelated to the account holder (spouse, parent, friend or any other person), may give instructions respecting a brokerage account with NBDB, unless that party is a mandatary duly appointed under a trading authorization or power of attorney.
All trading authorizations or powers of attorney granted by a client to a third party, person or corporation shall be recorded in writing and signed by the client, and shall name the person or corporation authorized to trade.	All trading authorizations or powers of attorney granted by a client to a third party, person or corporation shall be recorded in writing and signed by the client, and shall name the person or corporation authorized to trade.

(Emphasis added)

¶ 125 In 2005, the Dealer reserved the discretionary power to accept such exceptions and carry out instructions not personally given by the account holder. In 2007 this discretion disappeared, when the Dealer decided to recognize in future only such instructions as were given by attorneys vested by the account holder with a notarized power of attorney, as defined by the Dealer's Policies and Procedures.

¶ 126 The General Procedure marked P-13-A concerning *Monetary Transfers* (at p. 4; see also the testimony of Marie Emmanuèle Cardinal, trans., April 5, 2011 at pp. 25 ff) draws, for the purposes of the Firm's control Policies and Procedures, the required distinctions between "*trading authorization*", "*power of attorney*" and "*notarized power of attorney*":

> ***" Trading Authorization***
>
> *The trading authorization (form # 13768 – Trading Authorization or Power of Attorney)*[31] *grants the mandatary limited powers in respect of the property (securities and monies) in the NBDB brokerage account, but only within this account. It does not authorize the mandatary to deposit or withdraw funds or transfer securities "in or out" nor does it grant any power whatsoever in respect of a bank account held with the NBC.*
>
> ***Power of Attorney***
>
> *The power of attorney (form # 13768 – Trading Authorization or Power of Attorney) grants the attorney limited powers in respect of the property (securities or monies) in the NBDB brokerage account, provided that the actions taken by the attorney are for the benefit of the account holder. However, the power of attorney does not authorize the attorney to open or close an NBDB brokerage account nor sign anything on behalf of the account holder, nor does it grant any power in respect of an NBC bank account.*
>
> ***Notarized Power of Attorney***
>
> *An individual may grant a mandate by means of a notarized instrument specifying restrictions on the powers conferred. However, to ensure the uniform treatment of NBDB*[32] *brokerage accounts and to avoid any case-by-case interpretation as well as the inherent risk of errors of interpretation, NBDB does not allow an attorney to act in respect of an NBDB brokerage account unless he or she is acting under a notarized power of attorney which is not limited in time. Similarly, to be accepted by NBDB, a notarized power of attorney shall not contain any restrictions on the powers granted to the attorney. Invoking an existent notarized power of attorney to give instructions in respect of an NBC bank account does not authorize an NBDB representative to act, as he or she is not able to validate the veracity or authenticity thereof."*
>
> (Emphasis added)

It is understood that the Respondent never held a notarized power of attorney from Mrs. C. Furthermore, the preponderance of the evidence shows that the POA granted to him was never amended.

¶ 127 Let us turn to an analysis of the issues surrounding each of the disciplinary charges against the Respondent, in conjunction with the other defences which the Respondent has raised regarding the merits of the debate.

¶ 128 The Respondent claims that he was duly authorized to manage Mrs. C's securities and operate her accounts; that the transfers of funds initiated by him were carried out as part of his functions as attorney and were never intended to misappropriate the monies belonging to Mrs. C; that his actions were taken in good

[31] Form No. 13768 – *Trading Authorization or Power of Attorney* corresponds to the form used for the power of attorney marked P-5 / D-10. It offers the signatory the choice, by checking a box, to grant either a trading authorization or a power of attorney.

[32] NBDB: National Bank Discount Brokerage Inc., the predecessor of NBDB (National Bank Direct Brokerage Inc.).

faith, in the belief that they were consistent with his employer's Policies and Procedures and that, if this was not the case, then the deficiencies in his employer's supervisory and control procedures were at fault. We shall examine these issues in relation to each charge, in the following order:

- change of address;
- changes to the investor profile; and
- unauthorized transfers of funds.

5° <u>Change of Address</u>

¶ 129 The Respondent is charged with having made unauthorized changes to his mother's personal address with the Dealer so that her monthly statements of account would be sent directly to him.

¶ 130 When her various accounts were opened from October 2001 to April 2002, he lived with his mother at 9119 Robitaille Street, in Montreal (Exhibits P-11-A to P-11-D). Therefore, this is where he received all NBDB correspondence concerning the trades in his PRO accounts. He subsequently moved to 7621 St-Hubert Street in Montreal, effective July 15, 2002 (Exhibit P-11-E), which is the address of an apartment he occupied one floor above one of his mother's businesses, in a building owned by his parents. The change of address was initiated by him and completed on his instructions (Exhibit P-11-E, Thi Sen Chher, trans., April 13, 2011 at pp. 66 ff).

¶ 131 As for Mrs. C., she opened her Canadian dollar account on November 20, 2002 and thus, from that date onwards, received her mail from NBDB, including her statements of account, on Robitaille Street.

¶ 132 A few weeks after opening his mother's U.S. dollar account on August 1, 2005 - well before any of the transfers of funds referred to herein had been effected beginning on February 28, 2006 - the Respondent initiated an operation to add a mailing address to Mrs. C's file, who was still living on Robitaille Street, so that the documents relating to her account would be forwarded to him directly at 7621 St-Hubert Street (Exhibit P-4-B). This operation also caused all correspondence concerning Mrs. C's U.S. dollar account to be automatically readdressed.

¶ 133 Under the Dealer's procedures, a change of address is not an operation which the Respondent is recognized as authorized to carry out alone. An accounts manager such as he may only give instructions to make the change; it falls to another department (the Accounts Opening Department) to implement the instructions.

¶ 134 In her letter marked P-13 of September 25, 2007, lawyer Marie Emmanuèle Cardinal writes as follows on this subject:

> [TRANSLATION]
>
> *"Question 6. A copy of your internal policies regarding changes to the addresses of client accounts in force since 2005.*
>
> *<u>It is not possible</u> for the representatives themselves to effect a change of address in the accounts management system. They use a Macro B-form system which has been in operation since February 2004 and which generates a change of address request in paper form. <u>The paper request is forwarded to the Accounts Opening Department which effects the change of address</u> and then files the paper document in the client file. See Schedule 4 - 2005 Procedure and Schedule 5 – 2007 update. "*
>
> (Emphasis added)

¶ 135 The Respondent contends that he initiated the change because it was more convenient for him to have access at home to the financial, corporate, tax and other documents relating to transactions for which his mother had formally made him responsible. Had the change not been made, he would have had to continue attending her home to obtain these documents, which she paid no attention to in any event, and which was

neither practical nor efficient.

¶ 136 Even if he did not react very strongly to National Bank investigator Gilles Lavergne's question as to the usefulness of a representative making such a change when he already had real-time access to the data in his mother's accounts, we believe the Respondent's explanations and nothing at this stage permits us to ascribe objectionable motives to him.

¶ 137 The 7621 St-Hubert Street address was not unknown to the Firm (or should not have been) for, as early as July 15, 2002, the Respondent had already availed himself of this procedure of his employer to amend the client profile attached to his own PRO accounts and indicate that this would be his new address (Exhibit P-11-E). Once again, there is no evidence to suggest that he attempted to conceal anything from the Dealer's competent authorities and, more particularly, from the director of the VIP Service or from the Accounts Opening Department, or that the change of personal address he made was anything but totally transparent.

¶ 138 In his statement under oath marked P-28 made to IIROC investigators on November 9, 2007, the Respondent admitted that Mrs. C had not authorized the change of address beforehand, but he made it clear that he had subsequently informed her thereof. This, incidentally, is an admission he reiterated before this Hearing Panel. He contended, moreover, that he had a POA which allowed him to proceed in this way.

¶ 139 IIROC replied that, despite the powers vested in him by the POA, the Respondent could not effect the change of address without prior authorization, based on certain provisions of the Compliance Manual of the time (the P-45-B/P-66-E/D-9 version), pursuant to which only the holder was, in principle, qualified to act in respect of his or her account and change the address.[33]

¶ 140 IIROC added that, under the Manual, where a power of attorney is granted to a third party by the account holder in a case such as this one, the third party does not have the authority required to change personal information concerning the holder, including the holder's address.[34] IIROC concluded that the principle must therefore prevail that only Mrs. C could request a change of address, and that it was inappropriate for the Respondent to disregard this requirement.

¶ 141 We cannot agree with these arguments. The Respondent added a mailing address in the Dealer's data concerning Mrs. C, just as he would have done for any other client of the Firm, taking into account the fact that he had to adapt his application of the Dealer's Policies and Procedures to his status as attorney, which was accepted by the employees of the Firm. Furthermore, the addition was made in the normal course of business, with the use of computer systems normally made available to him to service the accounts assigned to him. The task took only a few minutes and was commonly performed at the request of any authorized person, without any particular verification.

¶ 142 The POA provided to the Respondent allowed him to act on behalf of Mrs. C "*for administrative purposes*". This vested him with the authority required to request the addition of a mailing address, which allowed him to perform his mandate more efficiently. From this point of view, the intention of the parties as expressed in the POA was fulfilled.

¶ 143 The Respondent therefore asked the Firm's administrative services to add this mailing address. He exercised this authority just as he did when he changed his own address for his PRO accounts in July 2002 (Exhibit P-11-E), i.e. in his double capacity as account holder and employee of the Firm. The only difference is that in this case he was authorized to act as attorney for the account holder.

¶ 144 We can wonder why the Respondent chose to act in this double capacity as employee of the Firm and attorney by instructing himself to add an address and, subsequently, by carrying out the change as accounts manager. But we don't see any real misconduct, given that the change of address was completely transparent, made in the Dealer's normal course of business and in accordance with the account holder's intentions as clearly expressed in the POA. We must also remember that, all things considered, this was a trivial operation,

[33] Manual, chapter entitled *Account Openings and Documentation*, p. 6, para. 3.2.3.1.
[34] Manual, *supra*, in Table 1, para. 123.

save for cases of fraud, with which the case at bar cannot be equated.[35]

¶ 145 Initiating this change was not an act which was unbecoming or detrimental to Mrs. C at the time it occurred, and the fact that it occurred without a telephone call from Mrs. C does not in any way justify the construction put thereon by the authorities of the Firm or its legal advisors to the effect that the Respondent "simulated"[36] this call (Exhibit D-2, answer to question 11) or, in other words, that he acted in such a way as to give the false impression that a call had been received. Rather, we believe that the way in which the Respondent acted was undoubtedly preferable to putting in a call to one of his accounts director colleagues as if he were a stranger to the Firm.

¶ 146 The Hearing Panel also notes that in the two NBDB policies referred to by IIROC,[37] it is specifically stated that exceptions to the general rules are always possible, whether they concern updating client information (including changes of address or to the financial profile) or the trading authorization.

¶ 147 The fact that, in its Policies marked P-45-B / D-9, the Dealer wanted to limit the risk of illicit transactions or transactions conducted with insufficient authorization, by requiring, as of May 2005, that the account holder be the one to initiate the request, with some exceptions, shows that NBDB wanted to continue to reserve the discretionary power to adequately manage these risks while accommodating the clients and, in some cases, even the employees.[38] This is precisely what the Firm did as regards the addition of a mailing address by the Respondent.

¶ 148 The Respondent followed the usual procedure, he had a POA, which authorized him to act, and he let the administrative services of the Firm discharge their responsibilities. The fact that these services complied and added the requested mailing address to Mrs. C's file confirms that the Firm agreed to make exceptions and to deviate from its policy to accept only such instructions as the holder himself or herself provided.

¶ 149 Could, or should, the Dealer have acted otherwise, checked the operation and prevented the exception system from applying? It undoubtedly could have, and it admitted in the Settlement Agreement that it was a mistake not to do so. But be that as it may, it is not for the Respondent to suffer the disciplinary consequences thereof.

¶ 150 Without a preponderance of evidence to this effect, we reject any allegation that the Respondent initiated this change in order to indulge himself, secretly and to his heart's desire, in irregular trades as his mother's attorney. Even if, several months later, his misfortunes as a trader were to shake his confidence as an attorney, we presume that he acted in good faith and, at this stage, there is no reason not to grant him the benefit of the doubt.

¶ 151 We therefore reject this count of the complaint and declare him not guilty of having, on August 2, 2005, engaged in conduct unbecoming and detrimental to the public interest, contrary to IDA By-law 29.1 by changing the personal address of a client.

6° Changes to the Investor Profile

¶ 152 IIROC alleges that the Respondent amended Mrs. C's investor profile without authorization in order to gain greater latitude in her accounts.

¶ 153 The amendment was made at the initiative of the Respondent on November 3, 2006 in respect of Mrs. C's Canadian dollar account. He himself generated the request from his workstation (Exhibit P-4-C / D-12) and he relayed the same to the Firm's administrative services for them to implement.

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[35] Marie-Emmanuèle Cardinal, trans. April 5, 2011, at p. 59.

[36] We agree with Ms. Cardinal's semantic reservations on this subject (trans. April 5, 2011, at pp. 198 ff.). This expression necessarily implies that the Respondent pretended, that he deliberately feigned having received a telephone call, which is contrary to the evidence.

[37] See Table 1, *supra*.

[38] Marie-Emmanuèle Cardinal, trans. April 5, 2011, at pp. 165 ff.

¶ 154 With this amendment, he changed his mother's investment objectives from "*50% income and 50 % long term capital gains"* (P-4-A) to "*growth*". This assessment is characterized by a high risk tolerance, long-term capital appreciation, acceptance of short term variations in capital (i.e., temporary losses) to obtain a greater return in the long run, and trading in all classes of fixed income securities and shares (Exhibit P-4-C / D-12). Similarly, he raised the client's level of knowledge from "*limited*" to "*medium*".

¶ 155 Four days later, on November 7, 2006, in accordance with routine procedure in such cases, the Dealer sent the client a letter confirming that it had carried out these changes. As a result of the change in mailing address marked P-4-B, the letter was obviously sent to the Respondent's address on St-Hubert Street, and not to Mrs. C's actual residence on Robitaille Street.

¶ 156 There is no direct evidence to conclude that this change in investor profile was inappropriate. One thing however is clear: at the time the request for a change in profile was generated in NBDB's systems and records by the Respondent, Mrs. C was not aware the request had been made or that the changes entailed had been carried out.

¶ 157 Normally, to amend an investor profile without the authorization of the client is a potentially serious disciplinary offence, especially if the result is to facilitate the conduct of transactions which are not suitable for the client, that expose the client to portfolio risks that are greater than those the client is ready to assume, or that ultimately may cause the client to incur losses in circumstances where the client, on the contrary, wanted to protect his or her capital.

¶ 158 The reason is that the investor profile – which is determined upon the opening of the client's account and updated periodically thereafter - is the benchmark to which the representative and the Dealer must systematically refer to ascertain that they are adequately discharging their duty to evaluate suitability to the client, i.e. *inter alia*, to know the client's general needs and investment objectives and other necessary factors to determine whether a proposed purchase or sale of securities is suitable for the client.[39] To this end, the representative must ensure that the investment objectives and all transactions effected for the client are compatible with the client's investment knowledge, consistent with the client's investment objectives while taking into account the client's tolerance to the risks involved in each transaction, and that they correspond to the client's stated income. Hence the key role played by the client's investor profile and the information it contains.

¶ 159 However, when the client is the holder of a direct brokerage account with a discount broker such as NBDB, the issue of assessing suitability is not raised.

¶ 160 The IDA exempted NBDB from making suitability determinations under former Regulation 1300.1(f) respecting the *Suitability of Transactions* (now IIROC Dealer Member Rule 1300 on the *Supervision of Accounts*) and under former Policy No. 9, *Minimum Requirements for Members Seeking Approval Under Regulation 1300.1(t) for Suitability Relief for Trades not Recommended by the Member* (now IIROC Dealer Member Rule 3200).

¶ 161 In its Bulletin No. 2885 of September 6, 2001, the IDA announced amendments to the rules giving rise to this streamlined business conduct scheme for discount brokers, pointing out the following:

> "*Regulation 1300.1 contains the current suitability provision which requires dealers to consider such factors as a client's age, investment objectives, risk tolerance, investment knowledge, net worth and income in order to assess whether each transaction, recommended or non-recommended is suitable for the client.*
>
> *Under the rule change a dealer's obligation to make a suitability determination will apply only to securities that have been recommended by the dealer. An example of such a situation would occur where a Member accepts an order from a client and is recommending a particular transaction to a client. A suitability determination would not be required where the dealer acts*

[39] Notice of the *Autorité des marchés financiers*, Bulletin No. 2009-09-04, Re: *Suitability Obligation to the Client.*

solely as an order-taker for a client on a particular transaction who, on their own initiative, executes a trade without a recommendation.

The rule change will apply to both discount brokers that offer solely an order execution service and to full service brokers who offer both an advisory service and an order execution only service, provided that the dealer has met the requirements of Policy 9, as described below. A Member is required to collect the required information for the New Client Application Form as set out in Form No.2 of the Association's Rulebook. Such information is required so that it can be reviewed for those transactions where the client is provided with recommendations by the dealer. However, where a Member offers solely an order-execution only service, the rules provide that the Member or separate business unit of the Member will not be required to include such information in the new client application form."

(Emphasis added)

¶ 162 As NBDB's registration and its Brokerage Agreement with Mrs. C gave NBDB the right to offer "*Direct*" services [40] with advice upon request by the client with respect to mutual funds only, the Dealer had no duty to ensure the suitability of its recommendations or of the acceptance of the client's orders, except where it was complying with such a request.

¶ 163 It was undoubtedly to take this situation into account that the Firm included, in Mrs. C's new client application form, information that would allow it, only in the case of mutual funds and, again, only as the result of an express request on her part, to make recommendations or accept orders that would be suitable for her.[41]

¶ 164 In actual fact, Mrs. C's profile was a part of her Brokerage Agreement with NBDB that had no practical use, considering that the client had never been and, based on the evidence, had never even intended to be active in the mutual fund market and that the only thing she sought were the Firm's discount brokerage services without recommendation. The evidence shows that at no time was it ever contemplated that Mrs. C would herself give orders in her account or seek a recommendation in connection with mutual funds, either from her son or from another representative of NBDB.

¶ 165 Furthermore, even if the suitability rule had applied, the value of Mrs. C's investor profile to assess the relevance of transactions effected or orders received in an account that was operated by an attorney was quite negligible as regards the investment knowledge of the account holder, for it was the Respondent's knowledge – and not that of Mrs. C - that had to be considered by the Dealer. As far as the Dealer was concerned, the client of the Firm was the Respondent in his capacity as attorney, and not the client who granted the POA (*Parent et al.* v. *Leach* [2008] CanLII 26688 (ON SC), at para. 25).

¶ 166 The Dealer's Compliance Manual perfectly conveyed the implications of this situation: when the Dealer effected a transaction in Mrs. C's accounts on instructions given in her name, she remained solely liable for her investment decisions and those of her attorney, and "*NBDB shall not, upon acceptance of an order from the attorney, consider her financial situation, her investment knowledge or her risk tolerance*" (Exhibit P-85, Chapter 15, at p. 5). In other words, the information included in Mrs. C's investor profile was to be of no use, except in the case of mutual fund transactions and then only on her express request for advice from the Dealer.

¶ 167 To the extent that the changes to the investor profile were made by the Respondent on behalf of his mother under a valid power of **a**ttorney, she is the one who, as holder of the direct brokerage account, assumed the risks to which her portfolio could be exposed as a consequence of the actions of her attorney, subject to any

[40] According to the definition thereof in the Compliance Manual marked P-66-E, chapter 1, p. 4, "[TRANSLATION] *Direct Brokerage"* is *a "Trade execution service (offered by National Bank Direct Brokerage Inc. and Altamira Securities – a Division of National Bank Direct Brokerage Inc.) without recommendation as to any form of investment, except for fixed-income securities and mutual funds, which service entails a determination of suitability with respect to all trades."* (Emphasis added). As for Mrs. C, however, and contrary to anything indicated here in the Compliance Manual, her Brokerage Agreement gave rise to the possibility of a suitability determination only for mutual funds, to the exclusion of fixed-income securities.

[41] See in this regard Exhibit P-85, *Policies and procedures specific to NBDB's no recommendation division*.

civil remedy she may have against him if ever he exceeded his mandate.

¶ 168 As the AMF would have said to the client: "*If you grant full authority over your account to a proxy* [...] *the broker will not keep you informed of actions taken by the proxy - it's up to you to ensure supervision. You will be fully responsible for the proxy's transactions and actions. You will need to reimburse costs incurred by the proxy* [...]."[42]

¶ 169 In the transcript of his examination marked P-28 (at p. 82 ff), the Respondent mentions that he informed his mother of the changes made to her investor profile in the following days. At p. 131, he indicates that, at one point, and this is not contradicted, he discussed her investment objectives with her and that she finally agreed to change them, even if we don't know exactly when:

> [TRANSLATION]
>
> *"Q. [696]* […] *because at the beginning or whatever I had, she didn't like it, but I said: There's no point in buying investments of three percent (3 %) and four percent (4 %). There are opportunities on the market that I can grow for you. But she didn't want to. She didn't want to. At one point, she wanted to and she said: O.K., go ahead. And then when she saw that it worked, well she trusted me again and all that."*

¶ 170 Therefore, under the authority of the POA, the Respondent asked the Dealer's administrative services to amend his mother's investor profile to make it consistent with the composition of the portfolio that he was mandated to constitute as her attorney under the POA. This is what was commonly done for clients of the VIP Service, just as the Respondent did for his mother. Initiating the change of profile of a client whose trades would never be subject to a suitability determination was a purely administrative act. Consequently, it was fully consistent with the POA entrusted to the Respondent.

¶ 171 As with the change of address, the Respondent was authorized by the POA to initiate the change of profile, and because this change was carried out exceptionally by the Firm's administrative services before the amendment which, at the beginning of 2007, would require attorneys to hold a notarized power of attorney, it did not violate the Dealer's Policies and Procedures.

¶ 172 We conclude therefore that, even if the Respondent amended Mrs. C's investor profile to gain greater latitude in her accounts, he did not do so without authorization or for his own benefit. Thus he did not breach the standards of ethics and conduct that governed him and did not engage in conduct that was unbecoming and detrimental to Mrs. C. He must therefore be found <u>not guilty</u> of having contravened IDA By-law 29.1 on this count.

7° <u>Unauthorized Transfers of Funds</u>

¶ 173 IIROC alleges that the Respondent misappropriated funds belonging to Mrs. C for his own interests, through unauthorized transfers initiated by him from Mrs. C's accounts to his own, during the period from February 28, 2006 to May 17, 2007.

¶ 174 Table P-86/D-4 was drawn up by investigator Yannick Béland, based on statements of transactions for Mrs. C's two accounts (Exhibit P-4-D), on statements of accounts of the Respondent (Exhibit P-11-G) and on other information obtained from the Dealer (Exhibits 13-G and 16-B).

¶ 175 This Table illustrates the transfers of funds belonging to Mrs. C, which transfers were initiated, if not carried out, by the Respondent. We can actually see that 49 transfers of funds were made in the period from February 28, 2006 to May 17, 2007 between the accounts of Mrs. C and those of the Respondent: 39 of which were from Mrs. C's accounts to those of the Respondent, and 10 from the Respondent's accounts to those of Mrs. C.

¶ 176 The net loss incurred in Mrs. C's accounts as a result of all these transfers was in the amount of $64,500 as at May 17, 2007, taking into account the US exchange rate.

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[42] *Supra*, note 28.

¶ 177 In his examination under oath of November 9, 2007 before two IIROC investigators (Exhibit P-28 at pp. 36 to 39), the Respondent described how inter-account transfers are made at the VIP Service and, in particular, how accounts managers check the authorization for these transfers.

¶ 178 Until the end of October 2006, i.e. for 17 of the 49 transfers, two accounts managers who were representatives had to be involved in the conduct of these transactions, pursuant to the Dealer's practices. One accounts manager had to give instruction to initiate the transaction (in 45 cases, this was done by the Respondent) while another had to give instruction to complete the transaction as initiated (which was the case in 20 of the 49 transfers).

¶ 179 The Respondent testified that, after October 17, 2007, this practice was amended for the VIP Service and that accounts managers were authorized to initiate and complete transfers themselves, without having to obtain further approval for the transactions to appear on the Firm's books:

> [TRANSLATION]
>
> "[…] *there was an authorization, we were able to approve it ourselves, to self-approve our own transactions for our accounts, for our clients, for whom we made transfers of money and securities. So it wasn't me who started to do that or conceal that, it was the system that permitted it and this was common knowledge for the accounts managers. So, I could do it as much as my colleagues could do it for their own transactions and the transactions of their clients."* [trans., 13 April 2011, p. 97]
>
> "[…] *for the sake of speed and efficiency, we were able to self-approve our transactions ourselves. Because you have to understand that transactions are done on the spot, then later, the next day, I had to have amounts deposited in the account to cover these transactions. So, if I effect the transaction in the instruction management system, I initiate the request at the time of the transactions, for it to be done at the end of the day or the next day so that the money can be deposited in the account in which the transactions took place, we could self-approve for the sake of efficiency and speed of the transactions we made."* [ibid. p. 99]
>
> […] *The client asked us to do it, we did it. I would do it and I managed my personal accounts and those of my mother. I did it, so, I could self-approve it. I did it myself for the clients, for my accounts, for everyone who did that. […] and if I wasn't able to do it, I could ask one of my colleagues to do it because I ... I forgot to self-approve it in the system or I wasn't able to do it because I was absent. So we could ask that and the other director would quite simply self-approve it. It was within the team that we could do it amongst ourselves without any problem.* […] *R. For all the accounts*." [ibid, p. 100].

¶ 180 Therefore, from that date onwards, the accounts managers granted each other the approval required for the completion of the transaction – which the Respondent did 29 times - and the data processing system that they could operate from their workstation allowed them to do it. The Respondent described this measure as a quest for efficiency, but also to avoid the risk of transactions being executed and refused because the representative had forgotten to involve a second accounts manager. When that happened, various cash or margin problems would occur as a result, for both the Firm and the clients.[43]

¶ 181 The Dealer's Compliance Officer stated, however, that the accounts managers of the department where the Respondent worked had specific authorized access to the Firm's computer systems, but that they were never allowed to approve their own requests for transfers (Exhibit P-13, September 25, 2007, p. 3). In the same breath, she added (p. 4) that the compliance criteria followed for these approvals were *"variable"* from one accounts manager to the next, which prompted Counsel for the Respondent to say that, in plain text, this meant that everyone could do as they wished and that the practices at the VIP Service could deviate from the Firm's Policies and Procedures.

[43] Thi Sen Chher, trans. April 13, 2011, p. 117.

¶ 182 Despite the general policy which the Firm was supposed to follow in this matter, when you went down to the more operational levels of management, alternative rules applied for particular departments. The evidence[44] shows that, as of October 2007: (i) it was common practice for the accounts managers of the VIP Service to initiate and complete their trades themselves, including personal transactions; (ii) they forwarded their instructions to the Firm's administrative services to have the transaction recorded on the books of the Firm; (iii) some of the transfers listed in the Table marked P-86 / D-4 were actually made by the accounts managers (including the Respondent) in accordance with this procedure; and (iv) all transactions were completed as requested.

¶ 183 These observations accredit the Respondent's claim that the practice of self-approving transfer instructions did indeed exist at the VIP Service and that it was accepted.

¶ 184 This is the factual situation on which the Respondent based one of the defences he raised, namely that the acts alleged against him were done in good faith, in the belief that they were consistent with the rules and the Policies and Procedures of his employer, and if they were not, the violation is attributable to the Firm, which did not supervise, or which improperly supervised, the activities carried out by his colleagues of the VIP Service and himself.

¶ 185 Upon perusal, the Settlement Agreement leaves no doubt that the Respondent may have been more or less seriously, more or less attentively supervised, and that this may have facilitated the carrying on of the activities currently under review. The Firm's control systems allowed it, he initiated it, and the Firm's administrative services completed it.

¶ 186 However, this state of affairs and, in particular, the deficiencies in supervision and compliance control acknowledged by the decision marked P-89, are not a defence that can exculpate the Respondent. His duty to observe high standards of ethics and conduct as well as to comply with securities legislation and IDA rules, in accordance with Association By-law 29.1, was personally applicable to him and he had a duty to comply, despite the influence of those around him who contravened the same through carelessness, negligence or deliberate acts.

¶ 187 In this regard, we adopt the principles set forth in *Re Blackmont Capital Inc. & Duke* [2010] IIROC No.40:

> *"52 The fact that Mr. Duke kept his managers and supervisors fully informed of his dealings with Mr. Civelli, Clarion, the Banks and the Accounts does not in any manner relieve him of his responsibilities as a registered representative to comply with the Rules. This obligation on an employee was canvassed by the Ontario District Council in* […] *Re Kasman 2009 LNONOSC 502, (2009) 32 OSCB 5729, Ontario Securities Commission July 14, 2009, a decision of the Ontario Securities Commission on an appeal of a decision rendered by the Ontario District Council of the IDA.* […]
>
> ¶ *54 In Kasman, the Ontario District Council observed as reported at pg. 4*
>
> > *… while a good compliance culture and a decent compliance infrastructure can be of great assistance and comfort to a registered representative and may permit reasonable reliance by the registered representative on the firm in appropriate circumstances, <u>the lack of a decent compliance infrastructure does not obviate the primary responsibilities and duties of a registered representative to his clients, his firm and the market.</u>*
>
> ¶ *55 We agree with and adopt the sentiments expressed by the Hearing Panels in these two decisions. <u>Mr. Duke cannot satisfy his obligation to comply with the Rules merely by reporting details of his activities with respect to the Commission Arrangement to</u>*

[44] Including the admissions made by NBDB in the Settlement Agreement and the evidence targeted by IIROC's Objections in particular.

representatives of Blackmont. Mr. Duke as a registered representative is responsible for ensuring that in carrying on his professional duties, he does so in full compliance with the Rules."

(Emphasis added)

¶ 188 As regards the transfers of funds, the Firm considered the POA to be an instrument which conferred unlimited, therefore full, powers upon the Respondent in respect of the monies in Mrs. C's account (General Procedure marked P-13-A regarding *Monetary Transfers*).

¶ 189 However, it was not his employer's Policies and Procedures, or what the employer decided to accept or reject in the way of instructions from an attorney, that served as the law of the parties between the Respondent and his mother, but rather the POA that the mother had granted him and from which his mandate was derived. The POA is the basis on which we must assess whether, in his capacity as a representative of the Firm doubling as the attorney of a client, the Respondent acted loyally, honestly and fairly towards this client in his capacity as a securities professional.

¶ 190 The Respondent could not be unaware that the POA granted to him by his mother (and which, according to the preponderance of the evidence, has never been amended by her) did not authorize him to "*receive monies in his name"*, i.e. to appropriate such monies for his own purposes, regardless of the fact that he may have agreed to reimburse the same.[45] The less so as his employer's Policies and Procedures prohibited making, in his capacity as an attorney, a transfer from an account for any purpose other than for the benefit of the holder thereof (General Procedure marked P-13-A) and he had excellent knowledge of these Policies.

¶ 191 Knowing for these reasons that he was not validly authorized to act, or neglecting to verify whether the POA, granted to him many years before, vested him with sufficient authority to put his plans into effect, he chose to disregard the facts. He cannot now argue in his defence that the Dealer's supervisory controls were insufficient or inadequately applied.

¶ 192 The evidence shows that, on dozens of occasions, the Respondent transferred monies from Mrs. C's accounts to his own accounts held with NBDB. These monies served to finance trades which were substantially more aggressive that those authorized by Mrs. C's investor profile (even after the amendment made at the request of the Respondent), or to compensate overdrafts in his accounts which the Respondent did not have the wherewithal to cover.

¶ 193 Table P-86 / D-4 reveals, moreover, that four of the 49 transfers mentioned therein were effected (initiated and approved) by accounts managers other than the Respondent: namely transactions Nos. 9 of July 31, 2006; 11 of September 6, 2006; 29 of December 18, 2006; and 38 of September 12, 2007.

¶ 194 The Respondent admitted giving instructions to carry out these four transactions, but he did so as his mother's attorney, under a POA that allowed him to give such instructions validly. Also, he did so in a civilian capacity and not as a registered person who is subject to the standards of conduct set forth in By-law 29.1. He therefore cannot be held liable for the purposes of these proceedings.

¶ 195 Furthermore, investigator Yannick Béland states that, for the last three of the 45 other transfers (dated May 15 and 17, 2007), he found specific documents attesting that the client accepted or acquiesced after the fact to some of her funds being transferred from her account to that of the Respondent in the form of a gift to her son in the relevant amounts ("*… transfer effected […] as part of a gift or donation").*

¶ 196 These documents, produced in a bundle and marked P-11-F (and subsequently as Exhibits D-13, D-14 and D-15), were accepted to satisfy the Firm's requirement that the Respondent present satisfactory proof that the client ratified transfers considered problematical. In fact, these documents were produced and signed by Mrs. C on May 22, 2007, subsequent to the three relevant transfers.

¶ 197 The Panel understands that these documents are drafted on a form intended by the Dealer for the

[45] See also Marie-Emmanuèle Cardinal, trans. April 5, 2011, at pp. 26 ff. and 54.

transfer of securities and not sums of money, incidental to the application of Universal Market Integrity Rules (UMIR). But they do, in fact, establish that a gift of money was made for no consideration from Mrs. C to the Respondent. In our estimation, this ratification has, in these three cases, validly cured the absence of authorization to transfer sums of money as evidenced in the POA.

¶ 198 On the other hand, even if the Firm's Policies and Procedures indicate a clear preference for prior authorizations, a retroactive ratification by the client remains acceptable to the Dealer under IDA rules (Regulation 200.1(i)(3)). The evidence also shows that NBDB was willing to accept them.

¶ 199 Therefore, we are left with 42 unauthorized transfers of funds initiated or effected by the Respondent.

¶ 200 The Respondent would, in part, reimburse amounts drawn from his mother's accounts by transferring them back from time to time whenever the available funds generated in his accounts by his own transactions allowed him to do so. In his opinion, the transfers between his accounts and those of Mrs. C were consistent with the exercise of his powers as an attorney under the POA, based on a strategy he had agreed upon with Mrs. C *for her benefit*, in accordance with NBDB's General Procedure marked P-13-A concerning *Monetary Transfers*. For this reason, he maintains that they were consistent with the Policies and Procedures of the Dealer.

¶ 201 The Respondent claimed before this Hearing Panel that this strategy made use of the trades effected in his PRO accounts with funds drawn from his mother's accounts, and that the gains and losses resulting from the implementation thereof were to be shared equally between the Respondent and Mrs. C.

¶ 202 There is no direct evidence to support these claims, and we therefore cannot follow the Respondent down this path. In his successive interviews with Gilles Lavergne and the IIROC investigators, as the events at issue were still fresh in his mind, the Respondent never once mentioned any such formal agreement with his mother. In addition, he testified with conviction to the effect that, since he left the industry, he has been voluntarily compensating, through monthly payments, the losses he caused his mother and the family patrimony. This moral debt he is discharging can hardly be reconciled with the alleged agreement under which Mrs. C allegedly agreed to assume half the risk of losses resulting from the transactions conducted by the Respondent in his own accounts.

¶ 203 We conclude that is much likelier that, driven by a personal financial situation which he himself described as disastrous to investigator Lavergne (Statutory Statement marked P-4-I) and by the pressing demands of the National Bank's credit department that wanted him to sort out the situation in his sometimes overdrawn accounts, he saw to it that the transfers would be made from his mother's accounts to his own whenever required.

¶ 204 Furthermore, even if Mrs. C showed great trust in the Respondent, this trust had its limits. The evidence leads us to conclude that if his mother had known what he was really doing with her money, should would undoubtedly have disapproved of her son's conduct.

¶ 205 The fact that he made sure she would know as little as possible about the way he availed himself of the authorizations under the POA shows that he acted with full knowledge of the facts when he abused his mother's trust, beginning in February 2006, by skimming off the assets entrusted to him to wipe his trading losses or reconstitute his PRO accounts. He risked his mother's assets on personal trades and she is the one who incurred the losses. His behaviour is thus a serious breach of his duties as an attorney (*Laflamme* v. *Prudential-Bache Commodities Canada Ltd.* [2000] 1 S.C.R. 638, Gonthier J., at para. 28).

¶ 206 Even on May 22, 2007, when he caused his mother to sign gifts marked P-11-F at the demand of the Dealer, the Respondent did not tell Mrs. C everything about the substantial losses incurred by him through aggressive trading with her money.

¶ 207 His request, shortly thereafter on June 15 to internal inspector Gilles Lavergne of the National Bank (Synthesis of the Investigations marked P-4-F) to allow him, the Respondent, more time to inform his mother about what had happened, his testimony to the effect that when he informed his mother of his dismissal, she did not understand what he had done wrong (trans., April 13, 2011, at p. 25), as well as the episode of the

demand notice marked P-87 from Paul Chher to the Dealer after Mrs. C discovered the extent of her losses (October 30, 2007), confirm that, even if the Respondent dared act openly with his employer to carry out the transfers on the assumption that they would be allowed, he was much more circumspect with his mother about the fact that he was using her funds for his own transactions.

¶ 208 Nothing however, indicates that the Respondent intended to defraud Mrs. C or steal her money as such. In all likelihood, he seems to have convinced himself for a time that, by trading in his own accounts and financing the same off his mother's accounts, he could realize gains that would allow him to repay what he had withdrawn without his mother's knowledge. When he realized that he could not do it, it was too late to escape the vortex of a system of accommodation that, first and foremost, served his own interests rather than those of Mrs. C.

¶ 209 This system, we believe, made him breach his duty of loyalty to Mrs. C in that it caused him to use the available liquidity in her accounts in a way that the POA did not permit. Thus he strayed from exemplary standards of conduct which he knew well, which his Firm's Policies and Procedures (which he also knew very well) constantly endeavoured to enforce and, basically, from the standards that a client is entitled to expect his securities representative and dealer's employee to respect.[46] Therefore, he violated the high standards of ethics and conduct imposed on him by IDA By-law 29.1.

¶ 210 We believe the Respondent when he says he regrets having lost his way and the losses he caused his mother and his family to suffer. But the fact that the client yielded to her maternal instincts, forgave a son who undertook to repay the losses he caused her to incur, and continues to include him in her businesses, does not relieve the Respondent of the consequences of the inappropriate conduct he engaged in as a securities representative and employee of the Dealer.

¶ 211 We therefore declare the Respondent guilty of having misappropriated funds belonging to a client of NBDB, on 42 occasions, during the period from February 28, 2006 to May 4, 2007.

¶ 212 Counsel for both parties have submitted arguments that are incidental to the debate surrounding the decision of the Court of Quebec in *IIROC* v. *Beaudoin* [2010] QCCQ 9574 and the appeal therefrom, which calls into question the power of this Hearing Panel to impose a fine on the Respondent as a result of the disciplinary charges of which we declare him guilty in this decision. We believe it is preferable to dispose of that argument at the penalty hearing stage, to the extent that that decision is relevant to the decisions rendered at that time, with the benefit of any additional representations that may be made on the subject.

¶ 213 **FOR THE FOREGOING REASONS**, the Hearing Panel:

> **DECLARES** the Respondent NOT GUILTY of having, on August 2, 2005, engaged in conduct that was unbecoming and detrimental to the public interest by making unauthorized changes to a client's personal address, contrary to IDA By-law 29.1;
>
> **DECLARES** the Respondent NOT GUILTY of having made unauthorized changes, on November 3, 2006, to a client's investor profile so as to gain greater latitude to trade in her accounts, contrary IDA By-law 29.1;
>
> **DECLARES** the Respondent GUILTY of having misappropriated funds belonging to a client of his employer in the period from February 28, 2006 to May 4, 2007, contrary to IDA By-law 29.1; and
>
> **REQUESTS** that IIROC, through the National Hearing Coordinator, determine an appropriate date for a hearing to be held by our Hearing Panel on the penalties to be imposed as a result of this decision, communicate this decision to the parties and their respective counsel and give them sufficient prior notice of the penalty hearing.

Montreal, August 12, 2011

[46] Conduct and Practices Handbook, CSI, Standard B — Loyalty, Honesty and Fairness.

Jean Martel, Ad. E., Chair
Gilles Archambault, Member
Lise Casgrain, Member