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File No. 2019-16

IN THE MATTER OF JOSEPH DEBUS

REASONS FOR DECISION ON A MOTION

Hearing: In Writing

Decision: January 18, 2021

Panel: M. Cecilia Williams Commissioner and Chair of the Panel

Submissions: Gavin S. MacKenzie For Staff of the Commission
Alexandra Matushenko

Kathryn Andrews For Staff of the Investment Industry
Sally Kwon Regulatory Organization of Canada

No written submissions were filed by
or on behalf of Joseph Debus

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REASONS FOR DECISION

I. OVERVIEW

- [1] Joseph Debus (**Debus**) applied for a hearing and review of the Investment Industry Regulatory Organization of Canada (**IIROC**) merits¹ and sanctions² decisions against him, pursuant to sections 8 and 21.7 of the *Securities Act*³ (the **Act**). The hearing and review is scheduled to be heard on January 27 and 28, 2021.
- [2] Debus provided notice of his intention to rely on documents or things not included in the record of the original proceeding before IIROC, pursuant to my order.
- [3] IIROC Staff objects to the admission of this new evidence and requests that the motion be heard in advance of the hearing and review (the **New Evidence Motion**). Staff of the Commission (**OSC Staff**) filed materials supporting IIROC Staff's position. Though given the opportunity to file responding submissions, Debus did not file any additional materials.
- [4] The New Evidence Motion was heard in writing. On December 2, 2020, I ordered, with reasons to follow, that, at the hearing and review, Debus shall not be permitted to examine the five individuals named in his witness list, and he shall not be permitted to adduce the documentary evidence he proposes to introduce.⁴ These are my reasons.

II. BACKGROUND

- [5] The IIROC hearing on the merits in this matter took place over 18 hearing days in 2018 and 2019. The hearing included a number of motions relating to production and disclosure, the summons of witnesses, and requests for adjournment.⁵
- [6] On April 16, 2019, Debus filed an application for the hearing and review.
- [7] On August 26, 2019, I ordered Debus to provide notice of his intention to rely on documents or things not included in the record of the original proceeding before IIROC, and to disclose such documents or things.
- [8] On December 10, 2019, Debus provided notice of his intention pursuant to my order.
- [9] At an attendance in this proceeding on February 11, 2020, Debus sought an order from this Panel seeking summonses of certain documents from a third party, his former Member, Richardson GMP. I requested written submissions from the parties as to whether I had the authority to summons documents from a third party, and if so, whether I should summons the documents requested by Debus.

¹ *Debus (Re)*, 2019 IIROC 5 (the **Merits Decision**)

² *Debus (Re)*, 2019 IIROC 18 (the **Sanctions Decision**)

³ RSO 1990, c S.5

⁴ (2020) 43 OSCB 9259

⁵ Merits Decision at para 1

- [10] In his written submissions, Debus narrowed the date range of documents he sought to summons. The documents Debus sought to summons from Richardson GMP were any and all emails exchanged between the parties listed below from January 2009 to March 2013:
- i. between RN and clients PE, DB and AP;
 - ii. between RN and AB and RN and TB;
 - iii. between RN and AA;
 - iv. between AA and clients PE, DB and AP;
 - v. between AA and AB, and between AA and TB; and
 - vi. between JI and clients AP and DB.
- [11] RN and AA were Debus’s assistants. AB and TB were Debus’s managers. PE, DB and AP were clients of Debus. JI was a former colleague of Debus at Richardson GMP.
- [12] On April 9, 2020, I denied Debus’s request for summonses, and advised that reasons for that decision would be included in the final reasons for the hearing and review.
- [13] On May 8, 2020, I ordered Debus to serve and file his hearing brief containing copies of the documents and identifying the other things that he intends to rely on or enter as evidence at the hearing and review.
- [14] Because the documents I declined to summons were many of the same documents listed in Debus’s notice of intention, on October 1, 2020 I ordered Debus to confirm his intention to rely on additional documents or things, and list what those documents or things were.⁶
- [15] Debus confirmed his intention to rely on these same emails on October 15, 2020.
- [16] Debus also confirmed that he intends to call five witnesses at the hearing and review.

III. ANALYSIS

A. Issue

- [17] The issue I must decide is whether Debus is precluded from seeking to admit at the hearing and review the additional documents and testimony proposed in his correspondence dated October 15, 2020.
- [18] IIROC Staff submits that the additional documents were the subject of Debus’s summons motion, which was denied, and there is no new basis for the Panel to reconsider allowing these additional documents to be introduced at the hearing and review.
- [19] In addition, IIROC Staff submits that the oral testimony Debus proposes to introduce does not meet the *Canada Malting* test of being “new” and “compelling”. Therefore, Debus should not be permitted to examine the five individuals identified in his witness list.

⁶ (2020) 43 OSCB 7868

- [20] OSC Staff submits that Debus has failed to satisfy the “new and compelling” standard for the admission of new evidence at a hearing and review. In particular, OSC Staff submits that Debus has failed to demonstrate that the evidence was neither known nor ought to have been known to him at the time of the original proceeding and that the proposed new evidence would have changed the IIROC Hearing Panel’s decision.
- [21] As noted above, Debus did not file any additional materials in response to IIROC’s motion.
- [22] Applicants in a hearing and review proceeding are required to provide notice of their intention to rely on documents or things not included in the record of the original proceeding and disclose such documents or things.
- [23] As above, Debus provided notice and subsequently confirmed his intention to rely on documents or things not included in the record of the original proceeding.
- [24] Debus disclosed the new oral evidence he seeks to rely on in the form of witness summaries, which were served on June 23, 2020.
- [25] However, the same is not true of the documentary evidence he seeks to rely on. It is clear to me from Debus’s October 15, 2020 correspondence that the emails he seeks to rely upon are not in his possession, as he refers to “relevant e-mails we are requesting from RGMP”. These are the very emails I declined to summons.

1. Test for admitting new evidence in a hearing and review

- [26] An applicant is not required to bring a motion to adduce new evidence. Any party who objects to the admissibility of documents or things not included in the record of the original proceeding is entitled to do so, either at the hearing and review, or in advance of the hearing by bringing a motion.
- [27] On an application for hearing and review under section 21.7 of the Act, the Commission has original jurisdiction to make a decision and can, in its discretion, admit new evidence that was not before the decision maker below.⁷
- [28] However, in the past the Commission has taken a restrained approach in exercising its discretion to allow new evidence to be introduced.⁸
- [29] When admitting new evidence at a hearing and review, the Commission must be cautious that in admitting the additional evidence, they are not permitting the applicant the opportunity to re-argue the initial hearing with an augmented record of evidence that was available at the time of the initial hearing and is of questionable probative value. This would, as this Commission has said in respect of intervening in the decisions of self regulatory organizations (**SROs**), “introduce an unacceptable degree of uncertainty in our regulatory regime”.⁹
- [30] The test for overturning a decision of an SRO is set out in *Canada Malting*.¹⁰ There are five possible grounds on which the Commission might interfere with a

⁷ *Northern Securities Inc. (Re)*, 2013 ONSEC 48, (2014) 37 OSCB 161 (**Northern Securities**) at para 27, citing *HudBay Minerals Inc. (Re)*, 2009 ONSEC 15, (2009) 32 OSCB 3733 (**HudBay**) at paras 111-112

⁸ *Northern Securities* at para 28

⁹ *HudBay* at para 114

¹⁰ *Canada Malting Co. (Re)*, (1986) 9 OSCB 3565 (**Canada Malting**) at para 24

decision of an SRO, the fourth of which is that “new and compelling evidence was presented to the Commission that was not presented to the [SRO]”.¹¹

- [31] It follows that any new evidence admitted on an application for hearing and review must meet the standard of “new and compelling”.¹²
- [32] The Commission has held that “new” means “information that was not known to the party purporting to introduce it as new at the time of the SRO’s decision”.¹³ In that regard, the Commission has expressed concern with parties classifying as new “evidence which that party knew or ought to have known at the time of the [SRO hearing]”.¹⁴
- [33] The Commission has also held that evidence would be considered “compelling” if it would have changed the SRO’s decision had it been known at the time of the decision.¹⁵

2. Admissibility of documentary evidence

- [34] Debus has not disclosed the emails he proposes to rely on at the hearing and review because they are not in his possession. I declined to summons them.
- [35] If the emails had been properly disclosed, I would have considered whether these emails were “new and compelling” in the context of the *Canada Malting* test, as was done by the Panel in *Northern Securities*.¹⁶
- [36] In my view, these emails would not meet the standard of “new and compelling”.
- [37] The emails are not new. They date from January 2009 to March 2013 and were available at the time of the IIROC hearing in 2018 and 2019.
- [38] On the record before me I find that Debus and his agent brought several successful production motions and numerous documents were provided by Richardson GMP as a result.
- [39] The basis for Debus’s production requests was that the information sought was critical to Debus’s ability to make full answer and defence to the allegations against him. Debus would have known, or ought to have known, at the time of making these requests that his assistants RN and AA and associate JI worked closely with him and dealt with his clients. The will-say statements of RN and JI filed in advance of the IIROC hearing indicate that they worked closely with Debus’s clients. Yet, among the production requests during that hearing, Debus did not specifically request the emails of these individuals.
- [40] Permitting Debus to introduce this documentary evidence, that he knew or ought to have known about at the time of the IIROC hearing, would, in my view, threaten the orderly conduct of litigation and the integrity of IIROC’s disciplinary process.

¹¹ *Canada Malting* at para 24

¹² *Northern Securities* at para 30

¹³ *Hahn Investment Stewards & Co. Inc. (Re)*, 2009 ONSEC 41, (2009) 32 OSCB 8683 (**Hahn**) at para 197

¹⁴ *Hahn* at para 196

¹⁵ *Hahn* at para 198

¹⁶ *Northern Securities* at paras 29-34

3. Admissibility of oral evidence

- [41] Debus proposes to call five witnesses. Two of those witnesses (RN and JI) he planned to call in the original proceeding, but ultimately did not, and one witness (LC) testified in the original proceeding. Another proposed witness (AA) was Mr. Debus's assistant for part of the relevant period. The final proposed witness (HP) was a law clerk of Debus's agent in the original proceeding.
- [42] The first four witnesses are not new. RN and JI had will-say statements filed at the IIROC hearing and Debus chose not to call them.
- [43] AA was Debus's assistant for a portion of the material time. Debus knew, or should have known, that her evidence existed during the IIROC hearing.
- [44] LC testified at the IIROC hearing. He provided evidence on the record, which is available for my review. By allowing this witness to testify again and augment the record of the proceeding, we risk re-opening the IIROC hearing.
- [45] HP is a former law clerk of Debus's agent in the original proceeding. Although arguably new, HP's proposed evidence is not compelling or relevant.
- [46] Debus proposes to call HP to provide evidence as to the experience and qualifications of his agent at the IIROC hearing, as well as the nature and quality of the representation provided by his agent.
- [47] I agree with the submissions of IIROC Staff and OSC Staff that HP is not qualified to give evidence about the quality of Debus's representation at the IIROC hearing. HP's personal assessment or opinion of Debus's agent is not relevant.
- [48] Accordingly, while new, the evidence of HP is not relevant, and therefore not compelling for the purposes of the hearing and review.
- [49] The nature and quality of the agent's representation is an issue to be determined at the hearing and review and can be determined by reviewing the record of the IIROC proceeding.

IV. CONCLUSION

- [50] As per my order dated December 2, 2020, at the hearing and review, Debus shall not be permitted to examine the five individuals named in his witness list filed with the Commission on October 15, 2020, and the proposed documentary evidence set out by Debus in his correspondence dated October 15, 2020, shall not be admitted.

Dated at Toronto this 18th day of January, 2021.

"M. Cecilia Williams"

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