

**ALBERTA SECURITIES COMMISSION**

**DECISION**

**Citation: Lamontagne, Re, 2009 ABASC 490**

**Date: 20091001**

**Dustin Rene John Lamontagne**

**Appellant**

**- and -**

**Investment Industry Regulatory Organization of Canada**

**Respondent**

**Panel:** Glenda Campbell, QC  
Stephen Murison

**Appearing:** Dustin Lamontagne  
for himself  
Charlene McLaughlin  
for the Respondent

**Submissions Completed:** 24 August 2009

**Date of Decision:** 1 October 2009

## **I. INTRODUCTION**

[1] On 15 April 2009 Dustin Rene John Lamontagne ("Lamontagne") served on the Secretary to the Alberta Securities Commission (the "Commission") written notice of his appeal from a decision of a disciplinary hearing panel (the "IIROC Panel") of the Alberta District Council of the Investment Industry Regulatory Organization of Canada ("IIROC"). The IIROC Panel suspended Lamontagne for a six-month period, fined him \$35 000 and ordered him to pay costs of \$15 000.

[2] The appeal before us was a written appeal "on the record", which meant that we were given the documents that were before the IIROC Panel (including an agreed statement of facts dated 5 December 2008 (the "Agreed Facts")) and the transcript of the proceeding before the IIROC Panel (the "IIROC Hearing"). These, together with two versions of the IIROC Panel's decision, constitute the "Record". We also received written submissions from staff of IIROC ("IIROC Staff") and from Lamontagne, but we heard no new evidence and the parties declined the opportunity to make oral submissions.

[3] Our decision and reasons follow. Stated briefly, we confirm the IIROC Panel's decision, except to the extent that we set aside the costs order and grant Lamontagne until 1 October 2010 to pay the fine.

## **II. FACTUAL BACKGROUND**

[4] Most of the facts set out below are taken from the Agreed Facts and from Lamontagne's testimony at the IIROC Hearing.

### **A. Lamontagne**

[5] Lamontagne first became registered as a salesperson in 1996 under a predecessor to the *Securities Act*, R.S.A. 2000, c. S-4 (the "Act"). He had been employed by the same dealer (the "Employer") for some five years before an internal audit in October 2006 revealed the irregularities that led to the IIROC Hearing.

### **B. IIROC**

[6] Effective 1 June 2008 the Investment Dealers Association of Canada ("IDA") consolidated its regulatory operations with those of Market Regulation Services Inc. to form IIROC. IIROC now carries out the IDA's regulatory functions, including disciplinary proceedings against IIROC member firms and their registered employees. This appeal involves IDA By-laws that were in effect prior to 1 June 2008.

### **C. Lamontagne's Actions**

[7] Lamontagne forged client signatures on certain internal client account documentation required to be completed by the Employer (the parties referred to these as the "Investment Plans and Financial Advice Disclosure Acknowledgements"; we refer to them as the "Investment Plans").

[8] During an audit by the Employer in August 2006, Lamontagne had received an unsatisfactory audit rating. He was aware that he would not receive his annual bonus if he were to receive a second unsatisfactory audit rating. However, during a further audit in October 2006, the Employer identified several irregular client signatures. At that time, Lamontagne denied to the Employer that he had forged any of those signatures. On 8 December 2006, during formal

questioning by the Employer, Lamontagne admitted to client signature forgeries relating to six client files. In early January 2007, Lamontagne admitted to forgeries relating to three further files. No clients complained about Lamontagne's conduct, and all had consented to and received copies of their Investment Plans.

[9] The Employer notified the IDA in February 2007 that the Employer was conducting an internal investigation into Lamontagne's forgeries. At approximately the same time, the Employer imposed certain disciplinary measures on Lamontagne: placing a letter on file; forfeiture of over \$73 000 of deferred compensation; "close supervision" of Lamontagne's activities for six months; compelling him to rewrite a competency examination; and requiring him to obtain legitimate signatures on all the Investment Plans in question (although such signatures were not necessary for the implementation of Investment Plans unless certain monetary limits were exceeded). Lamontagne fulfilled these examination and signature requirements.

[10] The IDA notified Lamontagne by letter in July 2007 that it was investigating the forgeries. In July 2008 IIROC issued a notice of hearing and issued a news release stating that it would hold a hearing in October 2008. The IIROC notice of hearing alleged forgery of 13 "client signatures to [Lamontagne's] client account documentation" and that Lamontagne had provided false information to the Employer about the client signature irregularities. IIROC noted in the news release that Lamontagne was still working for the same Employer and stated: "The matter has been reported to the appropriate police authorities". Other evidence indicated that IIROC became aware in October 2007 that the police would not investigate the matter because no clients suffered financial losses.

[11] Lamontagne testified at the IIROC Hearing that the Employer fired him on 4 September 2008. In evidence was a letter from the Employer to Lamontagne dated 4 September 2008 that stated, in part: "Further to our discussion today, this letter confirms that as a result of our recent investigation and for reasons discussed with you effective immediately your employment with [the Employer] is terminated for cause and without payment". According to Lamontagne's testimony, the dismissal was "based on a sales ticket that I had submitted, which was in error, and also a report that I had sent to the Financial Planners Standards Council for my renewal". In the latter report (we refer to it as the "Renewal Document") Lamontagne answered "no" to a question as to whether he had been the subject of investigation or inquiry by self-regulatory bodies. He claimed that he discussed that question with his manager, and that they reached a "consensus" that Lamontagne need not report the investigation relating to the forgeries because it was not yet public. IIROC Staff entered as evidence some correspondence in which a representative of the Employer said that the manager denied having such a discussion or providing any advice or direction. Lamontagne maintained his version before the IIROC Panel. The manager did not testify during the IIROC Hearing.

[12] Also in evidence was a document titled "Employment Termination Detail" that apparently had been filed on the Canadian Securities Administrators' National Registration Database. That document, seemingly prepared by the Employer, confirmed Lamontagne's testimony regarding the reasons for his termination – his inaccurate response on the Renewal Document and his misidentification (presumably in "sales tickets") of two rollovers of funds as new funds (which resulted in an improper commission to Lamontagne). That document set out the Employer's conclusion that Lamontagne had violated the Employer's code of conduct relating

to "Honesty and Integrity" and that this "violation coupled with the fact that Mr. Lamontagne had been previously internally disciplined for forging client signatures, led to the decision to terminate his employment for cause". In addition, the letter placed on file by the Employer as part of its discipline stated: "This letter is a warning. A reoccurrence over signature integrity issues or failure to abide by [the Employer's] policies will result in termination of your employment with cause".

#### **D. IIROC Decision and IIROC Revised Decision**

[13] The IIROC Hearing was held on 11 December 2008. (It had been postponed from the originally-announced October 2008 period, apparently in response to a request by IIROC Staff for an adjournment to give them time to consider whether to add additional allegations to the IIROC notice of hearing.) Lamontagne was represented by counsel at the IIROC Hearing, although he is not for this appeal. Although there was some delay in finalizing the Agreed Facts, they were ultimately provided to the IIROC Panel. The IIROC Hearing therefore proceeded for the purpose of determining what penalty would be appropriate in light of the Agreed Facts.

[14] In making that determination, the IIROC Panel considered the Agreed Facts, received documentary evidence and heard testimony from Lamontagne. Both in the Agreed Facts and in his testimony Lamontagne admitted that, while employed as a registered representative, he forged 13 client signatures on Investment Plans and misled his Employer.

[15] The IIROC Panel issued its written decision dated 27 January 2009 (the "IIROC Decision"). Its concluding paragraph set out the IIROC "Panel's decision for [Lamontagne's] breach of [IDA] By-law 29.1": the suspension of Lamontagne for six months to end on 10 June 2009; and a fine of \$35 000 and costs of \$15 000, payment to be made within 12 months of the date of the IIROC Decision. Lamontagne received the IIROC Decision on 16 March 2009.

[16] Lamontagne notified the Commission of his intention to appeal the IIROC Decision by a letter dated 31 March 2009, which was stamped as being received by the Commission on 15 April 2009.

[17] On 20 April 2009 the IIROC Panel issued a revised version of its decision (the "IIROC Revised Decision"). The differences between the IIROC Decision and the IIROC Revised Decision seem to have been: titling the latter "Revised Decision"; the inclusion, in a delineated box, of additional text under the heading "Decision"; and the April date. The added text set out the findings of the IIROC Panel on each of the two counts alleged against Lamontagne – that Lamontagne engaged in the forgery of 13 client signatures on the Investment Plans and provided false information to the Employer, which conduct the IIROC Panel found "unbecoming a registrant and detrimental to the public interest, contrary to [IDA] By-law 29.1".

[18] The IIROC Decision did not contain explicit findings on the two counts. However, we consider that such findings can reasonably be inferred from the very purpose of the IIROC Hearing – as mentioned, this was to determine penalty (not culpability) in light of the Agreed Facts – coupled with the quoted concluding statement in the IIROC Decision that the IIROC Panel was imposing penalties for Lamontagne's breach of IDA By-law 29.1.

[19] There is no indication in the Record or the parties' submissions to us as to when – or whether – IIROC notified Lamontagne of the IIROC Revised Decision. As it forms part of the Record, Lamontagne presumably knew of it, by the latest, at the time he received the Record. Neither party explicitly mentioned to us the existence of the IIROC Revised Decision, but IIROC Staff counsel did refer quite extensively to that version in her written submissions.

### **III. CERTAIN OBSERVATIONS**

[20] The Record discloses certain troubling aspects of IIROC's process, which we think merit comment. Although these did not affect our conclusion on this appeal, we believe they demonstrate room for improvement in IIROC processes so as to ensure fairness and clarity in future IIROC proceedings.

#### **A. Service of IIROC Decision**

[21] Inexplicably, Lamontagne did not receive the 27 January 2009 IIROC Decision until 16 March 2009 – one-and-one-half months after it was issued.

[22] We agree with Lamontagne's characterization of this delay as "extremely unprofessional". In our view, there is no excuse for IIROC not to have notified Lamontagne promptly of the IIROC Decision, particularly given the effect of the suspension on his livelihood and the fact that the IIROC Decision set a deadline for payment of the fine and costs. As a general principle, moreover, we do not believe it fair for a decision-maker to delay unduly the delivery or sending of its decision, once issued, to a respondent.

[23] We expect no similar delays in future IIROC cases.

#### **B. IIROC Revised Decision**

[24] Even more troubling are the circumstances surrounding the IIROC Revised Decision, which IIROC issued on 20 April 2009.

[25] First, the IIROC Revised Decision was issued after Lamontagne had launched his appeal.

[26] Second, it is unclear whether the changes from the original IIROC Decision were brought to Lamontagne's attention – or, indeed, whether or when the very existence of the IIROC Revised Decision was communicated to him.

[27] Third, this panel learned of the existence of the IIROC Revised Decision only from our own review of the Record provided by IIROC in this matter.

[28] These facts prompt several observations.

[29] If a decision, once issued, is found to contain an error or omission requiring rectification, there are appropriate methods for so doing. At minimum, the fact that a change is made to an issued decision, and precisely what the change is, should be clearly and promptly communicated. This is even more obviously the case if the change is made after an appeal has begun.

[30] Here, although the added text was set out in a delineated box, it was not entirely obvious from a perusal of the IIROC Revised Decision that the box contained new text or that this was the only textual change. We note, moreover, that the version of the decision posted on IIROC's

website bears the 27 January 2009 date of the original IIROC Decision but includes the text added in the IIROC Revised Decision dated 20 April 2009 – without mention of it being a revised version, without the delineation around the added text, and without mention of the April date. In effect, this seems to amount to a further amendment of both the IIROC Decision and the IIROC Revised Decision. This falls far short of the degree of transparency appropriate for disciplinary decisions.

[31] We do not have evidence as to when IIROC informed Lamontagne of the existence of the IIROC Revised Decision or of the actual changes made. It is possible that Lamontagne may first have seen the IIROC Revised Decision only when it was included in the Record for this appeal. His submissions did not indicate that he appreciated that the IIROC Decision had been changed.

[32] The fact that the IIROC Decision was changed was also not communicated forthrightly to this panel. True, it was included in the Record, and IIROC Staff counsel referred to it more than once, but at no time were we alerted to the fact of changes or the reasons or circumstances that prompted them. We think it was incumbent on IIROC – specifically, its counsel – to have done so.

[33] The version of the IIROC Revised Decision forming part of the Record contains an internal inconsistency. IIROC Panel members signed the IIROC Revised Decision in counterpart. Alan V.M. Beattie signed page "29". Donald W. Milligan signed an identical page "29". However, Peter McWilliams signed a different page "31", which has approximately ten fewer lines of text (although the text that is there is identical to the corresponding text on the others' page "29"). There may be an innocuous explanation for the discrepancy in the page numbers but none was proffered.

[34] A further and more significant inconsistency arises from the different dates of the IIROC Decision and the IIROC Revised Decision and their effect. The IIROC Decision – dated 27 January 2009 – stated that the fine was "to be paid within twelve months of the date of this Decision" and the costs "within the same twelve months". That would seem to make the amounts payable by 26 or 27 January 2010. The IIROC Revised Decision – dated 20 April 2009 – stated that the fine was "to be paid within twelve months of the date of this Decision" and the costs "within the same twelve months". That would seem to make the amounts payable by 19 or 20 April 2010. Neither party addressed this discrepancy. In the result, it is unclear what deadline the IIROC Panel ultimately intended for the payment of the fine and costs. The questionable melding of the two versions of the decision on the IIROC website, mentioned above, obscured the issue (by omitting mention of the April date) but does not resolve this uncertainty.

#### **IV. PARTIES' POSITIONS**

##### **A. Lamontagne**

[35] Lamontagne did not contest that he forged client signatures and misled his Employer in violation of IDA By-law 29.1 or that his conduct was unbecoming a registrant and detrimental to the public interest. He did, however, dispute the penalties ordered by the IIROC Panel on the ground that in his circumstances the fine of \$35 000 is punitive, the six-month suspension unduly harsh and costs of \$15 000 exorbitant. He contended that a fine of \$20 000 and costs of \$5000 would be appropriate and that he should be given 24 months to pay, rather than the 12 months ordered in the IIROC Decision. Lamontagne further submitted that any suspension imposed

should have commenced from the originally scheduled 1 October 2008 hearing date and not the 11 December 2008 hearing date, because it had been IIROC Staff who requested the adjournment. Lamontagne said that he was also "shocked" to finally receive the IIROC Decision on 16 March 2009, even though it was dated 29 (he presumably meant 27) January 2009. As he stated, "I should not have had to wait 1 and ½ months extra to learn my fate when the document was already prepared".

[36] Lamontagne also argued that the IIROC Panel erred in several respects in its assessment of appropriate penalties. In his view, these errors included: overemphasizing a subsequent event – the fact that Lamontagne, after his forgeries, answered "no" on the Renewal Document (discussed above); not highlighting that IIROC found no "regulatory wrong-doing" surrounding Lamontagne's firing; not considering the financial impact of Lamontagne's lost bonus and income when determining the appropriate fine; not giving appropriate weight to the damaging result of IIROC mentioning a referral to the police in the July 2008 news release; admitting and referring to "hearsay" evidence; and, in the IIROC Decision, misquoting portions of his testimony.

[37] There were other portions of Lamontagne's submissions that concentrated on the conduct of IIROC Staff, such as raising a 2003 disciplinary incident and "accusing me of lying". Lamontagne also raised certain settlement discussions held with IIROC Staff before the IIROC Hearing commenced. However, we do not consider those particular submissions because this appeal is from the IIROC Decision and not from acts or alleged acts of IIROC Staff.

## **B. IIROC**

[38] IIROC opposed the appeal, arguing that Lamontagne set out no particular grounds of appeal and suggested no specific relief. In responding to Lamontagne's various points, IIROC contended that: the IIROC Panel properly considered the "no" on the Renewal Document as an aggravating factor, but did not make findings related to it or to Lamontagne's dismissal from the Employer; there was no procedural unfairness in the adjournment from October to December; the IIROC Panel properly considered the guidelines and law before it; the decision to impose a six-month suspension "was reasonable and supported by the evidence"; the IIROC Panel properly considered the evidence relating to other discipline taken against and consequences suffered by Lamontagne as a result of his actions, including the mention of the referral to the police, and the amount of the fine "in all the circumstances was reasonable and supported by the evidence"; the IIROC Panel was in the best position to determine the appropriate costs assessment and that award was both "reasonable and supportable in the particular circumstances"; IIROC Staff properly presented evidence and facts to the IIROC Panel and nothing rose to the level of procedural unfairness by IIROC Staff; and any errors or misquotes by the IIROC Panel were minor and did not affect the result of the IIROC Decision.

## **V. ANALYSIS**

### **A. Standard of Review**

[39] An appeal of a decision of a self-regulatory organization ("SRO"), such as IIROC, is governed by sections 73 and 36 of the Act.

[40] Section 73 states, in part:

(1) A person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a bylaw, rule, regulation, policy, procedure, interpretation or practice of a recognized exchange, recognized self-regulatory organization, recognized clearing agency or recognized quotation and trade reporting system may appeal that direction, decision, order or ruling to the Commission.

(2) Section 36 applies to an appeal made under this section.

[41] Section 36 of the Act provides that, in conducting an appeal such as this, the panel may:

(a) make any decision that the person who heard the matter in the first instance could have made and substitute the [panel's] decision for the decision of that person;

(b) confirm, vary or reject the decision;

(c) direct the person whose decision is being appealed to re-hear the matter.

[42] Although we are empowered to reject the IIROC Panel's decision in whole or in part, or to substitute our own, we would be reluctant to do so simply because, had we heard the matter in the first instance, we might have reached a different conclusion than the IIROC Panel. IIROC, as an SRO, is a delegate of certain authority by the Commission under the Act. That authority is to be exercised (like the Commission's own authority) in the public interest. Recognizing this, the appropriate standard of review is not that of "correctness", but of reasonableness. The Commission will not generally interfere with a decision such as that in issue here if, as the British Columbia Securities Commission (the "BCSC") has expressed the point, "the decision under review is reasonable and was made in accordance with the law, the evidence, and the public interest" (see BCSC Policy 15-601 and *Re Rahmani*, 2009 BCSECCOM 279 at para. 19).

[43] It is, thus, appropriate for us in this case to consider the law relevant to the issues before the IIROC Panel; the evidence presented to it; any material evidence that the IIROC Panel might have overlooked; any new and compelling evidence before us that was not available to the IIROC Panel; the relevant public interest; and the reasonableness of the IIROC Panel's conclusions in all the circumstances.

[44] As in *Rahmani*, we consider that the essential issue for determination in this appeal is the reasonableness of the IIROC Panel's conclusions in the circumstances.

## **B. Application of Standard**

[45] As discussed below, we do not consider that the IIROC Panel misapplied relevant law, overlooked material evidence (or lacked any compelling evidence that is now before us), or misapprehended the public interest.

[46] The IIROC Panel had before it the Agreed Facts, in which Lamontagne admitted to committing 13 client signature forgeries on 12 Investment Plans during the period 24 August 2006 to 23 October 2006. In addition, Lamontagne acknowledged that he initially denied the forgeries when confronted by his Employer, although he later admitted to them. It was not disputed that there were no client complaints related to these forgeries. Further, Lamontagne "fulfilled all internal disciplinary requirements" imposed on him by his Employer in relation to these forgeries, as discussed earlier.

[47] Because Lamontagne admitted to the alleged misconduct – as he phrased it, he "plead[ed] guilty" – the IIROC Hearing was a penalty hearing. Although the IIROC Decision stated that Lamontagne breached IDA By-law 29.1, there were no express findings in it about the counts alleged. As noted, the express findings were later added by the IIROC Panel in the IIROC Revised Decision. Clearly these express findings should have been part of the original IIROC Decision in order to explicitly establish the foundation for the analysis then undertaken by the IIROC Panel in assessing appropriate penalty. While this omission was not ideal, there was in our view a sufficiently clear finding of misconduct in the concluding paragraph of the IIROC Decision which itself, as mentioned, was the culmination of a hearing in which penalty, not culpability, was the issue. Although it was imperfect, we find in the circumstances a sufficient basis to justify the imposition of penalties.

[48] As noted, the IIROC Panel imposed a package of penalties – a six-month suspension and a \$35 000 fine. It is evident from the IIROC Decision that the IIROC Panel referred – properly – to the "Disciplinary Sanction Guidelines", both general and specifically, relating to forgery, and to various cases referred to by the parties (we need not address those in detail as they are set out in the IIROC Decision). The IIROC Panel then discussed various mitigating factors, including that: Lamontagne "has paid a significant price for his misconduct"; no clients were affected; Lamontagne had no disciplinary history with IIROC (or its predecessor, the IDA); Lamontagne "likely . . . has learned his lesson"; and the harm to Lamontagne from IIROC's description of the documents at issue (implying they were more critical documents, rather than internal documents) and its omission to explain that the police would not be investigating the matter. Having considered these mitigating factors, the IIROC Panel concluded that they were outweighed by aggravating factors, notably "the revelation of character and moral judgement that was manifested by [Lamontagne falsely] answering 'no' to the question on the [Renewal Document]". The IIROC Panel expressed the view that even if Lamontagne's manager told Lamontagne to record that response, Lamontagne "should have had the good sense and moral judgement to reach his own decision as to what was right", and characterized the whole of the transgressions by Lamontagne as "an appalling lapse of judgement".

[49] In our view, the IIROC Panel appropriately considered the evidence, applied relevant authority (the guidelines and appropriate precedents), weighed aggravating and mitigating factors and considered the public interest. We conclude that the package of penalties (with the exception of the payment deadline, as discussed below) was not imposed in error or on an incorrect principle and that it was within a reasonable range of penalties. We find Lamontagne's suggestion that the suspension should have run from the originally-scheduled hearing date rather than the actual date without merit. Our own inclination would be that (absent a clear explanation) any suspension should run from the date of a decision rather than from the hearing date, but the issue is moot because, either way, the suspension would by now have come to an end. In short, although we might not have imposed identical sanctions had we been determining the case from the outset, we are satisfied that the IIROC Decision should not be disturbed on that ground (again, with the exception of the deadline for payment).

[50] It was not unreasonable for the IIROC Panel to have considered Lamontagne's subsequent behaviour in its determination of appropriate penalty. In particular, we consider it appropriate for the IIROC Panel to have considered Lamontagne's "no" answer on the Renewal Document as a relevant consideration. Although it was not related to his admitted forgeries some months earlier, such act clearly indicated that Lamontagne had a predilection or

willingness to be untruthful or deceptive. This aspect of his character is evident whether he did or did not rely on advice from his manager – we would expect a registrant to be capable of understanding the importance of veracity both independently and in the face of inappropriate guidance. Such indication of character is highly relevant in determining the need for specific deterrence in an assessment of appropriate penalty.

[51] In our view, the process undertaken by the IIROC Panel in arriving at a six-month suspension and \$35 000 fine as the penalties for Lamontagne's misconduct was reasonable and we discern no error (other than in the deadline for payment). We therefore find that the IIROC Decision as it relates to the imposition of a six-month suspension and \$35 000 fine was made in accordance with the law, the evidence and the public interest.

## **VI. COSTS**

[52] The IIROC Panel reduced IIROC Staff's claimed costs of \$31 679.75 to \$15 000, stating that the claimed costs seemed high. The IIROC Panel also noted that in only one other case discussed were the ordered costs \$15 000; in no others did the ordered costs exceed \$5000. There were no other reasons given, nor any discussion of IIROC Staff's evidence for the costs claimed.

[53] The dearth of evidence in the Record concerning costs and the lack of analysis disclosed in the IIROC Decision leave us unable to determine whether the IIROC Panel's decision on this issue – or its process for reaching that decision – was reasonable. Nor was there sufficient information for us to substitute an alternative quantum. We therefore conclude that the costs portion of the IIROC Decision must be set aside.

## **VII. TIME TO PAY**

[54] As noted, the IIROC Decision required Lamontagne to pay the fine and costs by January 2010, while the IIROC Revised Decision required Lamontagne to pay the fine and costs by April 2010. We are unable to determine which date the IIROC Panel intended to apply. To resolve that uncertainty, we grant Lamontagne 12 months from the date of this decision to pay the \$35 000 fine to IIROC.

## **VIII. DECISION**

[55] For the reasons set out above, we vary the IIROC Decision by setting aside the order for costs and ordering that Lamontagne has until 1 October 2010 to pay to IIROC the fine of \$35 000. The remainder of the IIROC Decision is confirmed.

1 October 2009

**For the Commission:**

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"original signed by"  
Glenda Campbell, QC

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"original signed by"  
Stephen Murison