

**BUREAU DE DÉCISION ET DE RÉVISION  
EN VALEURS MOBILIÈRES**

PROVINCE DE QUÉBEC  
MONTRÉAL

DOSSIER N° : 2004-005

DATE : le 8 décembre 2005

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**EN PRÉSENCE DE :**                    **M<sup>e</sup> MARK ROSENSTEIN  
M<sup>e</sup> MICHELLE THÉRIAULT  
M. JEAN-MARIE GAGNON**

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**RÉSOLUTION CAPITAL INC.**

**ET**

**GASTON ENGLISH**

**DEMANDEURS**

**c.**

**ASSOCIATION CANADIENNE  
DES COURTIER EN VALEURS  
MOBILIÈRES (ACCOVAM)**

**INTIMÉE**

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**DÉCISION CONFIRMANT L'EFFET DE LA DÉCISION DU BUREAU DU  
13 JANVIER 2005**

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M<sup>e</sup> George R. Thibaudeau  
M<sup>e</sup> Sylvie Poirier  
Procureurs de l'ACCOVAM

M<sup>e</sup> Patrick de Niverville  
Procureur de Gaston English et Résolution Capital Inc.

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**DÉCISION**

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**LA DÉCISION**

Le 1<sup>er</sup> novembre 2005, les demandeurs, Gaston English et Résolution Capital, faisaient parvenir au Secrétariat du Bureau de décision et de révision en valeurs mobilières un désistement de leur demande de révision de la décision sur sanction du Conseil de section de l'Association canadienne des courtiers en valeurs mobilières (« l'ACCOVAM ») en date du 6 mai 2003.

Suite à ce désistement, le Bureau de décision et de révision en valeurs mobilières n'a plus à se prononcer sur le bien fondé de cette demande de révision.

Le Bureau de décision et de révision en valeurs mobilières avait suspendu l'effet de sa décision du 13 janvier 2005, jusqu'à la date à laquelle il rendrait sa décision sur la demande de révision de Gaston English et de Résolution Capital de la décision sur sanction du Conseil de section de l'Association canadienne des courtiers en valeurs mobilières.

Par conséquent, il est décidé que la décision du Bureau de décision et de révision en valeurs mobilières rendue le 13 janvier 2005 est maintenant en vigueur.

Fait à Montréal, le 8 décembre 2005.

*(S) Mark Rosenstein*

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**M<sup>e</sup> Mark Rosenstein, membre**

*(S) Michelle Thériault*

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**M<sup>e</sup> Michelle Thériault, membre**

**Copie conforme**

*(S) Jean-Marie Gagnon*

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**M. Jean-Marie Gagnon, membre en surnombre**

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**Claude St Pierre, secrétaire général  
Bureau de décision et de révision  
en valeurs mobilières**

*Gaston English et Résolution Capital Inc.*

-vs-

*Investment Dealers Association of Canada*

Decision no. 2004-005

Present:

For the Bureau de décision et de révision en valeurs mobilières ("**Bureau**"):

Mtre Mark Rosenstein, Member (Chair of the Tribunal)

Mtre Michelle Thériault, Member

Mr. Jean-Marie Gagnon, Member

For Gaston English and Résolution Capital Inc.:

Mtre Benoît J. Hudon

Mtre François Daigle

For the Investment Dealers Association of Canada ("**IDA**"):

Mtre Georges R. Thibaudeau

Mtre Sylvie Poirier (IDA staff attorney)

This was an application to the Quebec Securities Commission ("**Commission**") under Section 322 of the *Securities Act* (L.R.Q., c. V-1.1) (the "**Act**") for review of a decision rendered on March 31, 2003 by the Conseil de section du Québec of the IDA. The decision maintained in whole or in part 57 charges brought against Gaston English and Résolution Capital Inc. (collectively, the "**Applicants**") and dismissed or stayed the proceedings as regards the remaining 16 charges. In accordance with Section 4 of *Regulation 3 under Section 746 of the Act respecting the Agence nationale d'encadrement du secteur financier*, a matter such as this application, which was brought before the Commission before February 1, 2004, is continued before the Bureau.

The Applicants also made an application for review of the decision of the Conseil de section on the sanction rendered on May 22, 2003 (the "**Sanction Decision**"). At the pre-hearing conference held on August 7, 2003, it was agreed that the Applicants' two applications for review be separated so that the hearing of the application for review of the Sanction Decision, if necessary, might be held after the decision of the Tribunal on this application has been rendered.

## **BACKGROUND**

The Applicant Résolution Capital Inc. is a brokerage firm which is a member of the IDA and, as such, subject to its jurisdiction, including periodic inspections to ensure compliance with its rules and regulations. The Applicant Gaston English is its principal officer.

In December, 1997, during one of these periodic inspections of Resolution Capital Inc. with regard to the period ending on October 31, 1997, the inspector detected a certain number of deficiencies. The inspection ended on or about February 9, 1998. This led to an investigation into the adequacy of the books and records of Résolution Capital Inc., of which notice was given by letter from the IDA addressed to Gaston English of Obligations Montréal Inc. (now Résolution Capital Inc.) on March 18, 1998. The investigation included a voluntary examination of Gaston English on April 15, 1998, and the investigation ended later in April, 1998.

Three years later, in May, 2001, the IDA submitted an offer of settlement to the Applicants which was followed by lengthy but ultimately fruitless negotiations, and, in April, 2002 or approximately four years after the end of the investigation, a notice of hearing was served upon the Applicants. The Applicants then attempted to obtain an injunction from the Superior Court to prevent the Conseil de section from holding its hearing. The attempt failed in the Superior Court, and the Court of Appeal of Quebec refused leave to appeal. Beginning on November 11, 2002, 12 days of hearings were held by the Conseil de section of the IDA, and, on January 24, 2003, the case was taken under advisement.

## **NATURE OF CHARGES**

A total of 73 charges were brought against the Applicants, 59 against Gaston English and 14 against Résolution Capital Inc. These charges dealt essentially with the failure to observe fully the "know your client" rule and various other safeguard rules for the administration of accounts.

The Applicant Gaston English was charged with failing to use the diligence required to learn the essential facts about his customer in opening accounts at the request of a third party for five customers residing in Indonesia without communicating with them. In addition, it was alleged that he accepted orders emanating from a third party without a power of attorney. It was also alleged that he carried out transactions at the request of an insider of the issuer of the securities in question without using the diligence required to ensure that the acceptance of the orders was within the bounds of good business practice. Finally, he was alleged to have failed to ensure that the monthly statements of account contained the information prescribed by regulation.

Gaston English was also alleged to have carried out transactions for the account of two residents of Alberta without having complied with regulations relative to the opening of accounts and by accepting instructions from a third party to transfer assets without previously obtaining a valid power of attorney. Furthermore, he was alleged to have failed to ensure that the monthly statements contained all necessary information.

Finally, Gaston English was charged with various irregularities in the opening of accounts and in the carrying out of transactions concerning three companies (i.e. Bre-X Minerals, Bresea Resources and the Walsh Foundation) based in Alberta.

The Applicant Resolution Capital Inc. was charged with similar failings both as regards the opening and approval of accounts as well as the acceptance of orders for transactions, the

maintenance of appropriate books and records and the failure to ensure that the operations of these accounts met the standards of good business practice.

The charges related to the internal administrative procedures of the Applicants. No allegation was made of any fraud, of any failure to carry out the transactions in accordance with the orders, of any prejudice suffered by any customer or of any complaint made by any customer.

### **NATURE OF REVIEW REMEDY**

The first paragraph of section 322 of the Act at the time read as follows:

"A person directly affected by a decision rendered under delegated powers or by a self-regulatory organization may within 30 days apply for a review of the decision by the Commission."

The Act gave no indication of the rules governing exercise of the remedy.

The remedy of review is typically a recourse made available to a party affected by an administrative decision and is expressly created by a specific legislative provision. Its nature and scope tend to vary not only according to the terms of the legislative provision but also according to the context of its exercise.

The IDA is a voluntary association which carries on the activity of self-regulatory organization throughout Canada, including Quebec. At the time that the infractions were alleged to have occurred, every person registered as a broker in Quebec was obliged, pursuant to Section 29(14) of Instruction générale Q-9 of the Quebec Securities Commission, to be a member of a self-regulatory organization, and the Applicants chose the IDA. In joining the IDA, the Applicants acknowledged that they had received a copy of the IDA's rules and regulations and in effect contracted with the IDA that they would be bound by and respect them. The Applicants in effect agreed that in the event that they were charged with having breached any of such rules and regulations, the competent Conseil de section would have the contractual power to try them and, if found responsible, to impose sanctions upon them.

In the regulation of the securities industry in Canada, self-regulatory organizations such as the IDA play a critical role, particularly in the area of disciplinary proceedings. The primary responsibility for imposing professional discipline upon its members lies with the self-regulatory organization and the recourse of a member against a decision of a self-regulatory organization which affects him is the application for review of the decision by the securities regulator in his jurisdiction.

In the absence of any legislative provisions regarding the nature and scope of the remedy of review under the Act and of any prescriptions regarding its exercise, the Tribunal considered the relevant jurisprudence. The only Quebec decision cited by counsel was an *obiter dictum* of the Quebec Securities Commission in the case of Ostiguy -vs- Bourse de Montréal (Bulletin CVMQ, vol. XXVIII, no. 12, p. 1 ) in which the Commission, after quashing the decision of a disciplinary committee of the Bourse de Montréal on the grounds of partiality, stated as follows on page 5:

"Cette décision aurait pu amener la Commission à renvoyer le dossier pour adjudication devant un autre comité de discipline dont l'impartialité n'aurait pu être mise en doute. Toutefois, considérant le voeu des parties exprimé séance tenante à

l'effet de soumettre directement le présent litige à la Commission, nous sommes d'avis qu'il y a lieu pour la Commission de procéder *de novo* à l'audition de la requête d'Ostiguy et de statuer à la place du comité de discipline."

Counsel for the IDA suggested that, through this comment, the Commission made clear that its normal role was not to act as the primary forum for the adjudication of the matter or to judge *de novo* a matter within the competence of a self-regulatory organization.

It is our view that, given the silence of the law regarding the remedy of review, the legislator has granted to the Bureau a wide measure of discretion to determine its limits and the principles governing its exercise. This wide measure of discretion suggests to us that the standard of review is correctness. It must be noted that the Bureau is not a court nor is it confined by the narrower scope of a judicial appeal, and its ability to act will extend to a broader range of circumstances. Professor Yves Ouellette, in his book *Les tribunaux administratifs au Canada - Procédure et Preuve*, Montréal, Les Éditions Thémis, 1997, pp 505 and 506, observes:

"Lorsqu'un texte de loi est clair et que l'intention du législateur ressort à sa simple lecture, il faut lui donner tout son sens et un organisme a tort de limiter sa propre compétence en réécrivant la loi pour y insérer des distinctions ou des limites que le législateur n'a pas jugé bon d'imposer. En particulier, il faut que les tribunaux administratifs et leurs partenaires comprennent que la révision pour cause promet un contrôle plus large que la révision judiciaire et que ces deux mécanismes obéissent à des règles tout à fait différentes."

This does not mean, however, that the Bureau will intervene lightly in matters decided by a self-regulatory organization. Considerations of a practical nature dictate that the Bureau show some degree of deference to self-regulatory organizations and their disciplinary bodies, including such factors as:

- a) the disciplinary system of a self-regulatory organization is usually predicated upon the principle of trial by one's peers, which confers upon the disciplinary decision a great deal of its legitimacy. It is the member's peers who have direct experience of the conditions in which the members must work, the challenges they must face and the pitfalls they must avoid;
- b) the members of the disciplinary body are very familiar with the operating rules of the securities industry which must be observed by the members of the self-regulatory organization; and
- c) the members of the disciplinary body actually hear the witnesses and are best able to gauge their credibility.

The degree of deference required will depend upon the context. In the present case, the hearing before the Conseil de section lasted 12 days, and the Applicants were represented by counsel and given a full opportunity to know and meet the case against them. The proceedings were recorded and the entire record was introduced into the hearing before this Tribunal. Under the circumstances, the Tribunal was able to satisfy itself that the issues were fully and fairly examined and debated by the parties before the Conseil de section. Although the Tribunal allowed the Applicants to adduce additional evidence, a trial *de novo* was not necessary. In reviewing the decision of a disciplinary committee of a self-regulatory organization in circumstances such as these, the Tribunal believes that it should not hasten to intervene and

that the decision being reviewed should stand until the applicant discharges the burden of demonstrating that the decision is incorrect.

Counsel for the IDA cited to us the cases of Wilkinson -vs- The Toronto Stock Exchange ((1993), 16 OSCB 3545) and Re Derivative Services Inc. and Kyle (2001), 24 OSCB 4891 which set forth the criteria for intervention by the Ontario Securities Commission in disciplinary matters adjudicated by self-regulatory organizations, namely:

- i) the self-regulatory organization proceeded on some incorrect principle;
- ii) the self-regulatory organization erred in law;
- iii) the self-regulatory organization overlooked the material evidence;
- iv) new and compelling evidence was presented to the Ontario Securities Commission that was not presented to the self-regulatory organization; and
- v) the self-regulatory organization's perception of the public interest conflicts with that of the Ontario Securities Commission.

This approach was followed recently in Re Boulieris (2004), 27 OSCB 1597.

It is our view that, while these criteria may provide a useful indication of the circumstances in which the securities regulator will intervene in disciplinary matters adjudicated by a self-regulatory organization, the list is not necessarily exhaustive. Accordingly and particularly in light of the fact that the legislator in Quebec has never seen fit to provide any restrictions regarding the remedy, we prefer merely to rely upon correctness as the standard of review, and we will intervene whenever an applicant is able to show that the decision of the self-regulatory organization is not correct. We must be mindful of the deference due to the self-regulatory organization whose decision is being reviewed but we will intervene where it is shown that the decision is incorrect in any significant regard.

## **GROUND FOR REVIEW**

The main grounds for the application for review of the decision of the Conseil de section relied upon by the Applicants were as follows:

1. Unreasonable delay.

The Applicants argued before us, as they did before the Conseil de section, that the Conseil de section had erred in fact and in law in failing to stay the disciplinary proceedings against the Applicants. They argued that the delay of almost four years (including one year of unsuccessful settlement negotiations) between the filing of the inspector's report in May, 1998, and the filing of charges against the Applicants in April, 2002, caused a breach of trust between the IDA and the Applicants, that the Applicants were prejudiced by the manner in which the matter was handled and that the disciplinary proceedings should have been stayed in view of the unreasonable delay. The Applicants cited a number of cases involving similar and even lesser delays in support of their argument that the proceedings should be stayed (Brown -vs- Association of Professional Engineers and Geoscientists of British Columbia [1994] B.C.J. No. 2037, Elmer Harry Ratzlaff -vs- Medical Services Commission of British Columbia 1996

Carswell BC 58, 17 B.C.L.R. (3rd) 336, Misra -vs- Council of College of Physicians and Surgeons of Saskatchewan 1988 Carswell Sask 296, [1988] 5 W.W.R. 333, Comité - Avocats - 2 [1987] D.D.C.P. 11, Richard Caron, ès-qualité de syndic de l'Ordre des infirmières et infirmiers auxiliaires du Québec c. Pétrin 99D-22 and [1999] D.D.O.P. 305. Bombardier Inc. and La Commission des valeurs mobilières du Québec, communiqué de la CVMQ du 16 décembre 2002.)

The Conseil de section, however, relied upon the more recent judgment in Blencoe -vs- British Columbia Human Rights Commission [2000] 2 R.C.S. 307 in which the Supreme Court of Canada, after reviewing the relevant jurisprudence, including the Brown, Ratzlaff and Misra decisions cited by Applicants, observed as follows:

"101...le délai ne justifie pas, à lui seul, un arrêt des procédures comme l'abus de procédure en common law...En droit administratif, il faut prouver qu'un délai inacceptable a causé un préjudice important.

102...Lorsqu'un délai compromet la capacité d'une partie de répondre à la plainte portée contre elle, notamment parce que ses souvenirs se sont estompés, parce que des témoins essentiels sont décédés ou ne sont pas disponibles ou parce que des éléments de preuve ont été perdus, le délai dans les procédures administratives peut être invoqué pour contester la validité de ces procédures et pour justifier réparation...

103 L'intimé a fait valoir, devant la Cour suprême de la Colombie-Britannique, que le délai écoulé dans le déroulement du processus administratif lui avait causé un préjudice équivalant à un déni de justice naturelle du fait qu'il n'était plus en mesure d'obtenir une audience équitable. Il a allégué que deux témoins étaient décédés et que les souvenirs de bien des témoins avaient pu s'estomper avec le temps. Le juge Lowry a qualifié ces allégations de [TRADUCTION] "vagues assertions n'établissant pas l'incapacité de prouver les faits nécessaires pour répondre aux plaintes" (par. 10). Il a conclu que la possibilité de l'intimé de présenter une défense pleine et entière n'avait pas été compromise et il a donc refusé de mettre fin aux procédures.

115 Je serais disposé à reconnaître qu'un délai inacceptable peut constituer un abus de procédure dans certaines circonstances, même lorsque l'équité de l'audience n'a pas été compromise. Dans le cas où un délai excessif a causé directement un préjudice psychologique important à une personne ou entaché sa réputation au point de déconsidérer le régime de protection des droits de la personne, le préjudice subi peut être suffisant pour constituer un abus de procédure. L'abus de procédure ne s'entend pas que d'un acte qui donne lieu à une audience inéquitable et il peut englober d'autres cas que celui où le délai cause des difficultés sur le plan de la preuve. Il faut toutefois souligner que rares sont les longs délais qui satisfont à ce critère préliminaire. Ainsi, pour constituer un abus de procédure dans les cas où il n'y a aucune atteinte à l'équité de l'audience, le délai doit être manifestement inacceptable et avoir directement causé un préjudice important. Il doit s'agir d'un délai qui, dans les circonstances de l'affaire, déconsidérerait le régime de protection des droits de la personne. La question difficile dont nous sommes saisis est de savoir quel "délai inacceptable" constitue un abus de procédure.

120 Pour conclure qu'il y a eu abus de procédure, la cour doit être convaincue que [TRADUCTION] "le préjudice qui serait causé à l'intérêt du public dans l'équité du

processus administratif, si les procédures suivaient leur cours, excéderait celui qui serait causé à l'intérêt du public dans l'application de la loi, s'il était mis fin à ces procédures" (Brown et Evans, op. cit., à la p. 9-68)... Pour reprendre les termes employés par le juge l'Heureux-Dubé, il y a abus de procédure lorsque les procédures sont "injustes au point qu'elles sont contraires à l'intérêt de la justice" (p. 616). "Les cas de cette nature seront toutefois extrêmement rares" (Power, précité, à la p. 616)...

121...La personne visée par des procédures doit établir que le délai était inacceptable au point d'être oppressif et de vicier les procédures en cause...

122 La question de savoir si un délai est devenu excessif dépend de la nature de l'affaire et de sa complexité, des faits et des questions en litige, de l'objet et de la nature des procédures, de la question de savoir si la personne visée par les procédures a contribué ou renoncé au délai, et d'autres circonstances de l'affaire. Comme nous l'avons vu, la question de savoir si un délai est excessif et s'il est susceptible de heurter le sens de l'équité de la collectivité dépend non pas uniquement de la longueur de ce délai, mais de facteurs contextuels, [page 377] dont la nature des différents droits en jeu dans les procédures.

180 Quinconque demande l'arrêt des procédures assume un lourd fardeau...L'arrêt des procédures ne devrait pas généralement être considéré comme la seule réparation possible ni même comme la forme de réparation préférée...Il serait plus prudent de limiter l'arrêt des procédures aux cas où l'équité même de l'audience est compromise et où le délai dans les procédures menant à l'audience constituerait un abus de procédure grossier ou scandaleux...

181...Pour qu'un arrêt puisse être ordonné afin de remédier à un abus déjà commis, l'abus doit être tel que la seule poursuite de l'affaire choquera le sens de la justice de la société...

182 L'approche des tribunaux judiciaires devrait changer lorsqu'il appert que le délai ne portera pas atteinte à l'équité de l'audience et qu'il ne constitue pas un abus scandaleux en dépit de sa gravité. Des réparations plus limitées et mieux ciblées seraient alors appropriées."

The Conseil de section considered these observations, amongst others, and concluded, rightly in our view, that the Blencoe decision accurately sets forth the state of the law on this question and does not support the arguments of the Applicants.

## 2. Comment of the Conseil de section on lack of inquiry by Applicants

In our view, the Conseil de section correctly applied the principles set forth in Blencoe to the facts of the present case, including the principles relating to the nature, cause and gravity of the prejudice allegedly suffered by the Applicants, and concluded that neither of the Applicants has been prejudiced by the delay. The Conseil de section commented as follows:

"Objectivement, ce délai de 36 mois est très long et n'est aucunement justifié par la complexité de l'affaire. Mais il faut ajouter que l'enquête de l'ACCOVAM est restée une affaire privée et que les Intimés n'ont jamais, selon la preuve, cherché à connaître ou à accélérer l'aboutissement du processus d'enquête. Les droits en jeu dans cette affaire

n'exigeaient pas une action rapide et le Comité a peine à conclure de la preuve que les Intimés en aient été préjudiciés."

The Applicants argue that the Conseil de section in this comment itself concluded that the delay of 36 months was unjustified and too long but then went on to impose a duty on the Applicants to find out how the investigation was proceeding. In other words, they argue that this comment wrongly suggests that the Applicants were under a duty to attempt to find out about or to expedite the outcome of the investigation process. We believe, however, that this argument of the Applicants is based upon a mistaken interpretation of the true intent of the Conseil de section which was merely to observe that the matter had remained private and that the failure of the Applicants to attempt to find out about or to expedite the outcome of the investigation process suggests that the Applicants were not really suffering great prejudice from the delay (and not that the Applicants were under a duty of any kind to find out about or expedite the outcome of the investigation process).

### 3. Prescription

The Applicants maintain that the charges are prescribed in light of the fact that disciplinary proceedings were served more than three years after the commission of the alleged infractions. They argue that the delay of three years provided in Article 2925 of the Civil Code of Quebec applies to the present case.

We believe that the delay of three years provided in Article 2925 of the Civil Code of Quebec applies to legal actions to enforce rights. It has no application in what are essentially internal matters of professional discipline by a self-regulatory organization.

The Applicants contend that one of the elements which the Conseil de section considered, to determine whether the delay of four years in the present case was reasonable, was section 21 of By-law 20. This section provides that no proceeding can be taken against a former member unless a notice of hearing is served upon him within five years from the date on which he ceases to be a member. The Applicants maintain that this provision is tantamount to a delay of prescription since it defines a specific delay for taking disciplinary proceedings against a former member. The Applicants argue that considering this delay would make it difficult for a member to submit a defence based on unreasonable delay and on the IDA's failure to comply with the rules of procedural fairness. They conclude that the Conseil de section should not have considered this delay of five years, which does not respect the delay of prescription in the Civil Code, to determine what is an unreasonable delay.

We do not agree with the pretensions of the Applicants. The Conseil de section in no way based itself upon the five-year delay in section 21 to determine whether the delay was unreasonable. It referred to section 21 merely to emphasize that the IDA By-laws provide for no delay of prescription whatsoever and that the lapse of five years is not generally considered by the IDA By-laws as a bar to prosecution.

### 4. Lack of competence of the Conseil de section

The Applicants argue that the Conseil de section, as the disciplinary committee of the IDA, a non-governmental private body, exceeded its competence in applying the laws of Quebec, Alberta and Indonesia. They contend that the IDA is entitled to police its own members by applying its rules and regulations to them but that it does not have the power to interpret foreign

laws, such as the laws of Alberta and Indonesia, or even Quebec laws or to apply them to its members. The Applicants ask that the decision of the Conseil de section be revised so as to annul all conclusions of the Conseil holding the Applicants responsible for infractions based on the laws of Quebec, Alberta and Indonesia.

Although we agree that the Conseil de section is not a Quebec judicial or quasi-judicial tribunal and is not vested with the powers of such a tribunal, we cannot accept the proposition of the Applicants that it was not permissible for the Conseil de section to consider whether the Applicants had violated the laws of Quebec or of any other jurisdiction. In considering whether the Applicants had violated any of those laws, the Conseil was not applying those laws to the Applicants but rather was applying its own rules to them. By-law 20.10 (a) (1) provides that sanctions may be imposed upon any member who has “failed to comply with or carry out the provisions of any federal or provincial statute relating to trading or advising in respect of securities... or of any regulation or policy made pursuant thereto”. By-law 29.1 (i) prohibits members from engaging “in any business conduct or practice which is unbecoming or detrimental to the public interest”. No definition of “unbecoming” business conduct is provided, but we believe that the Conseil de section was quite correct in observing that any violation of the IDA’s By-laws or of the securities legislation of Quebec or any other jurisdiction constitutes “unbecoming” business conduct. For example, By-law 2 b) of the IDA requires that every member be registered in each jurisdiction in Canada where the nature of its business requires such registration and be in compliance with the application legislation and the requirements of any securities commission having jurisdiction. Alberta and Indonesia both have registration requirements. The Applicants were charged with opening accounts, while they held no registration authorizing them to carry on business in these jurisdictions, for three corporate clients based in Alberta, two individuals resident in Alberta and five individuals resident in Indonesia, thereby engaging in unbecoming business conduct. The Conseil de section did not purport to apply the laws of Alberta or Indonesia to the Applicants but rather to determine whether the Applicants had violated the By-laws of the IDA by failing to comply with the laws of Alberta and Indonesia. The failure to comply with the IDA’s By-laws or the By-laws of Quebec, Alberta or Indonesia constitute the measure of the “unbecoming” conduct. The Applicants claimed that, under the laws of Alberta or Indonesia, they were not obliged to be registered under the circumstances. This argument of the Applicants required the Conseil to examine the laws of Alberta and Indonesia, but the examination was undertaken in the context of determining whether the Applicants had violated the By-laws of the IDA and not in any attempt to apply the laws of Alberta or Indonesia to the Applicants.

Furthermore, as regards the argument that the conduct in question occurred in Alberta and Indonesia beyond the territorial competence of the Conseil de section, the Conseil de section correctly pointed out that its competence is personal (*rationae personae*) and applies to the conduct of IDA members regardless of where such conduct takes place. In Paquette -vs- Corporation professionnelle des médecins du Québec, [1995] A.Q. No. 135, the Quebec Court of Appeal held:

“Une analyse de la jurisprudence révèle que, d’une façon majoritaire, les tribunaux canadiens considèrent la compétence des corporations professionnelles à l’endroit de leurs membres comme personnelle et s’étendant donc aux actes sans égard au lieu où ils ont été posés.”

In brief, the Conseil de section did not apply the laws of Quebec, Alberta or Indonesia. It merely exercised its personal jurisdiction in weighing the conduct of the Applicants against the IDA’s

standards, which include compliance with the IDA's By-laws as well as the laws of any jurisdiction to which the Applicants were subject under the circumstances, and applied the IDA's By-laws to them accordingly.

5. New and compelling evidence

The Applicants adduced additional evidence before us, claiming that such evidence was "new and compelling". We found, however, that none of such evidence was sufficiently new or compelling to influence our decision and that indeed much of it was not relevant and lacked significant probative value.

6. Other grounds

The Applicants presented a number of other grounds in support of their application. All of these grounds were either rejected by the Conseil de section for reasons with which we agree or were held by us to be without merit.

One of these grounds requires further comment. The evidence indicates that the Applicants failed to obtain a certified copy of the required resolution of the board of directors of Bre-X Minerals, Bresea Resources and the Walsh Foundation prior to opening accounts for them or within a reasonable delay thereafter. The Applicants claimed that they were not required to obtain such a resolution for Bre-X Minerals and Bresea Resources on the grounds that these two companies qualified as "financial institutions".

In 1996, at the time of the commission of the infractions by the Applicants, section 63 of Instruction générale Q-9 entitled "Dealers, Advisers and Representatives" read as follows:

"Art. 63 Avant d'ouvrir un compte au nom d'une personne morale, **sauf dans le cas d'une institution financière**, le courtier ou le conseiller en valeurs doit obtenir de celle-ci:

1° une copie certifiée conforme d'une résolution du conseil d'administration autorisant l'ouverture du compte;

2° une copie certifiée conforme d'une résolution du conseil d'administration habilitant des personnes nommément désignées à faire des opérations sur le compte.

Le courtier ou le conseiller ne peut exécuter un ordre donné pour le compte d'une personne morale par une personne non désignée dans la résolution initiale qu'après avoir reçu copie d'une nouvelle résolution habilitant cette personne à donner des ordres." [Emphasis added]

It is true that in virtue of this section, a financial institution need not provide the resolution in question. Instruction générale Q-9 in force at the time of the commission of the infractions contained no definition of the term "financial institution". The Applicants maintain that the term "financial institution" must be defined in accordance with the former Schedule 1 of Instruction générale Q-9 in effect in 1994, which read as follows:

“ANNEXE 1

COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC

RAPPORT FINANCIER DU COURTIER DE PLEIN EXERCICE

(Nom du Courtier)

(Date des états financiers)

(...)

DÉFINITIONS

Aux fins des états financiers, il faut entendre par :

(...)

« institution financière »:

1<sup>o</sup> la Banque du Canada, une banque canadienne, une banque d'épargne du Québec et les fonds de pension de ces banques;

2<sup>o</sup> les compagnies d'assurances ou de fidéicommiss canadiennes ou québécoises et les fonds de pension de ces compagnies;

3<sup>o</sup> le gouvernement du Québec, du Canada ou d'une province canadienne, une corporation municipale de plus de 50 000 habitants, un organisme public ou une société d'État des gouvernements fédéral et provinciaux;

4<sup>o</sup> les caisses populaires régionales dont le capital libéré et le surplus sont au minimum de 5 000 000 \$;

5<sup>o</sup> les fonds communs de placement ou sociétés d'investissement à capital variable ayant un actif de 5 000 000 \$ ou plus;

**6<sup>o</sup> les sociétés ou leurs fonds de pension en fidéicommiss ayant une valeur nette minimum de 25 000 000 \$;**

(...)” [Emphasis added]

We do not accept this view. Schedule 1, which was no longer part of Instruction générale Q-9 in 1996, is not applicable to the present case. Furthermore, even when Schedule 1 was still in effect, it applied, in our opinion, to a very specific context in view of the title of the Schedule and especially in view of the use of the words “Aux fins des états financiers,” (i.e. “For the purposes of the financial statements”) preceding the list of words to be defined. It is therefore far from clear that this Schedule could have been used even in 1994 to interpret Section 28 of Instruction générale Q-9 (which later became the current Section 63). We are therefore of the opinion that this term must be given its normal meaning which refers to banks, savings banks, trust companies, etc.

Since Schedule 1 of Instruction générale Q-9 of 1994 cannot be applied to the present case, we are of the opinion that the Conseil de section erred in even discussing the meaning of “valeur nette minimum” which is set forth in paragraph 6. This error, however, does not require any intervention on our part. Indeed, we have arrived at the same conclusion as the Conseil, namely, that the Applicants did in fact commit the infractions alleged.

The Applicants also claim that the term “financial institution” should be defined according to section 14 of the Rules of the Alberta Securities Commission or according to section 96 of Rule 1015 of Ontario. These definitions are also cited out of context and cannot be applied to this case. They form part of the provisions dealing with registration requirements.

## **CONCLUSION**

For the reasons set forth above, the application of the Applicants is dismissed, with effect from the date of the decision of the Bureau to be rendered on the application of the Applicants for review of the Sanction Decision.

Montreal, January 13, 2005.

*(S) Mark Rosenstein*

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**MARK ROSENSTEIN**

Je souscris à l’opinion de mon collègue Mark Rosenstein ainsi qu’à tous les motifs invoqués et, en conclusion, je suis d’avis de rejeter la demande de révision telle que formulée.

Et j’ai signé

*(S) Michelle Theriault*

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**MICHELLE THÉRIAULT**

Je souscris à l’opinion de mon collègue Mark Rosenstein ainsi qu’à tous les motifs invoqués et, en conclusion, je suis d’avis de rejeter la demande de révision telle que formulée.

Et j’ai signé

*(S) Jean-Marie Gagnon*

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**JEAN-MARIE GAGNON**