

SUPERIOR COURT

CANADA
PROVINCE OF QUÉBEC
DISTRICT OF MONTRÉAL

Nos. 500-05-069668-018
500-05-071007-023

DATE: May 30, 2003

PRESENT: THE HONOURABLE ROBERT MONGEON J.S.C.

No. 500-05-071007-023

KIGANOUCHI PAPAZIAN
Plaintiff

v.

CIBC WORLD MARKETS INC.
Defendant

and

BEDROS S.F. PAPAZIAN
AIDA PAPAZIAN
COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC
INVESTMENT DEALERS ASSOCIATION OF CANADA
MONTRÉAL EXCHANGE
Impleaded parties

No. 500-05-069668-018

HAROUTIOUN MARKARIAN
ALICE MARKARIAN
125134 CANADA INC.
Plaintiffs

v.

CIBC WORLD MARKETS INC.
Defendant

and

RITA LUTHI
SUBUH GAZAROSYAN
COMMISSION DES VALEURS MOBILIÈRES DU QUÉBEC
INVESTMENT DEALERS ASSOCIATION OF CANADA
MONTRÉAL EXCHANGE
Impleaded parties

JUDGMENT

[1] The Court is seized of a series of objections raised by the attorneys of CIBC World Markets Inc. in the context of two actions instituted, on the one hand, by KiGanouchi Papazian (S.C. 500-05-071007-023) and, on the other, by Haroutioun Markarian, Alice Markarian and 125134 Canada Inc. (S.C. 500-05-069668-018).

[2] In both actions, the person examined is Harry Migirdic, who was in charge of, and managed, the plaintiffs' investment accounts with the defendant.

[3] Harry Migirdic was examined on July 17 and 18, 2002. The examinations resulted in no fewer than 142 objections, recorded in the transcript of each of the above cases and in the transcript common to the two cases.

[4] The objections were submitted for my adjudication on December 19, 2002. As frequently encountered in such an exercise, certain questions were withdrawn and many were decided without rising.

[5] The other objections were taken under advisement, but with the attorneys undertaking to explore the possibility of resolving some of their differences mainly concerning the confidentiality of certain information.

[6] On January 24, 2003, I was informed of certain conditions imposed by CIBC's attorneys to break the stalemate over the communication of information deemed confidential. On January 27, 2003, the plaintiffs' attorneys said they agreed with some of the conditions but were in profound disagreement with others.

[7] Ultimately, CIBC's attorneys informed me on February 4, 2003 that six of the eight conditions laid down by them had been accepted by the plaintiffs' attorneys and that the Court thus had to rule on the two conditions that were not the subject of an agreement. Once those two conditions were settled, a group of 35 objections would automatically be settled.

[8] On February 10, 2003, the plaintiffs' attorneys said they agreed with the above suggestion.

[9] On March 20, 2003, the plaintiffs' attorneys sent me a copy of a recent decision of the Ontario Superior Court of Justice dealing with the duty to "warn" and the duty of brokers and brokerage firms to inform.

[10] On April 3, 2003, the plaintiffs' attorneys sent me a copy of Mr. Migirdic's letter of dismissal.

G.P.

[11] On April 10, 2003, CIBC's attorneys objected to the communication of new evidentiary elements while the case was under advisement. The Court will not comment on the advisability of considering the content of that letter, since it has no impact on the outcome of this decision. The circumstances or grounds of the dismissal do not affect the parties' rights at this stage. What is important is that Migirdic was dismissed. That fact is not contested. However, if a letter of dismissal was sent to Migirdic, its content may be relevant for the plaintiffs and the trial judge, without it being relevant for me, as I need only decide whether the information must be communicated.

[12] In short, it is really since April 10, 2003 that the case has been complete and ready to be adjudicated.

THE RELEVANT FACTS

[13] The plaintiffs were investors who entrusted their savings to a broker (Migirdic) working on behalf of CIBC.

[14] Migirdic worked on behalf of a number of securities brokers. He is Armenian, as are the plaintiffs, and he developed a major clientele in that community.

[15] He first worked for Merrill Lynch in the early 1980s, then moved to CIBC Wood Gundy in 1993. He took with him the investment portfolios of a number of his clients. He was given the title of "Vice-President Director-Retirement Specialist".

[16] In 1993, Migirdic had plaintiff Kiganouchi Papazian sign a form in which she guaranteed the balances of the transactions carried out in the accounts of various people whom she did not know. With little experience in that type of transaction, and unable to read or understand English well, the plaintiff alleged she did not realize what she was signing.

[17] It is alleged that, in 1998, Migirdic obtained by subterfuge the renewal of that guarantee.

[18] In March 2001, Migirdic was suddenly absent [TRANSLATION] "for health reasons". A few weeks later, the jig was up: the plaintiff Papazian's portfolio was being liquidated to cover the overdrafts from the account of the impleaded parties, which had been used by Migirdic to make speculative investments.

[19] Migirdic ultimately admitted his machinations. But the plaintiff Papazian lost all her money through the liquidation of her portfolio by CIBC, using the guarantee she signed in 1993 (and renewed in 1998).

[20] Despite the protests of the plaintiff Papazian and her family, nothing could be done: she lost \$299 275.42, which was used to cover the overdrafts from the accounts of complete strangers.

[21] She is therefore claiming her losses, plus exemplary damages of \$10 000 000.00, from CIBC further to Migirdic's fraudulent acts.

G.P.

[22] The same thing happened to Haroutioun Markarian and his wife, Alice, who sustained pecuniary losses of \$1 088 761.77 and who are also claiming exemplary damages of \$10 000 000.00.

[23] CIBC denies any liability for the allegedly fraudulent acts of its employee. CIBC maintains more specifically that the guarantees given are valid and were provided by the plaintiffs with full knowledge of the facts.

[24] That is, very briefly, the context in which the examinations after the filing of defence were held of both a third party in the case (who is not being sued) and an [TRANSLATION] "authorized representative" of the defendant, CIBC, that is, its former Vice-President.

ANALYSIS

[25] After hearing the arguments of all the parties, I was informed of certain negotiations aimed at resolving, in whole or in part, the disputes between them. The negotiations led to a partial agreement on February 4, 2003.

[26] The letter containing the agreement reads as follows:

- Re: 1) Kiganouchi Papazian vs. CIBC World Markets Inc. (S.C.M. 500-05-071007-023)
2) Haroutioun Markarian & als. vs. CIBC World Markets Inc. (S.C.M. 500-05-069668-018)
-

Dear Mr. Justice Mongeon:

This is further to our letter dated January 24 and the one of Mtre Gagné dated February 3, 2003 with respect to the above-mentioned files.

After discussion with Mtre Gagné, we confirm that we have reached the following partial agreement with respect to the communication of Mr. Migirdic's past compliance, disciplinary, credit and regulatory files.

1. Mtre Létourneau, any other attorney from Létourneau & Gagné and Plaintiffs' expert will be given full access to the above-mentioned files in our Montreal office, for their eyes only and under their personal undertaking of confidentiality;
2. For confidentiality and privacy reasons, we will hide the clients' names and account numbers in each file;
3. The files disclosed will exclude all judicial proceedings, Court Exhibits and account documentation, all correspondence or documentation already exchange with Mtre Létourneau and all privileged exchanges between our client and ourselves;

4. No agreement was reached with respect to any information requested that relates to Merrill Lynch Canada, Mr. Migirdic's former employer. Our client maintains its position that this information is not relevant as CIBC Wood Gundy cannot be held responsible for, nor has it assumed any of, Merrill Lynch Canada's liabilities incurred prior to the closing in December 1989 of Wood Gundy's acquisition from Merrill Lynch Canada of its retail brokerage business assets.
5. Mtre Létourneau will identify the documents that he thinks are relevant to the two cases and will then be entitled to take copy of any such document;
6. No agreement was reached with respect to the prohibition of communicating the information that will be provided to Mtre Létourneau to third parties. Our client insists that any person who will have access to the documentation shall refrain from communicating or transmitting, in any way, such information to his clients or any third party unless otherwise agreed to;
7. The whole process will be made under reserve of CIBC Wood Gundy's right to object in due time to the production of any of the documents disclosed;
8. If Mtre Létourneau decides to file any of the documents he will be given access to or to make reference to any information contained in these documents, he will give us prior notice of such decision and will give us the opportunity to contest such and/or present a motion to protect the confidentiality of the information.

The parties are available to appear again before you should you require any further particulars with respect to the issues that have not been completely settled (points 4 and 6 above).

With a ruling regarding points 4 and 6 above, we believe that the following objections, which were submitted to you on December 19, 2002, will be resolved.

- Objections no. 1 to 3, 10 to 12, 16, 17, 22 to 24, 26 to 39, 49, 56, 57 and 58 of the first book (common proof for both files);
- Objections no. 9 to 11 of the second book (examination held on July 17, 2002 in the file of Haroutioun Markarian); and
- Objections no. 7, 8 and 22, of the examination held on July 18, 2002 in the file of K. Papazian.

We thank you for your kind collaboration and remain,

Yours very truly,

HEENAN BLAIKIE
Mtre. Bernard Amyot

BA//lb

c.c. Mtre Serge Létourneau
Ms. Cheryl Allain-Mee (CIBC Wood Gundy)

[sic]

[27] The Court must therefore decide, firstly, whether CIBC must provide the plaintiffs with the information it holds from Merrill Lynch Canada concerning Harry Migirdic. That information is not relevant, according to CIBC, because CIBC cannot be held responsible for the liabilities of Merrill Lynch before Wood Gundy acquired it in 1989.

[28] What the plaintiffs seek is a finding that CIBC is or was aware of Migirdic's performance while he was with Merrill Lynch. That information has nothing to do with the possible assumption of any responsibility for Merrill Lynch by CIBC. It has to do with what CIBC knows about the disciplinary record of its employee before he became its employee.

[29] That case seeks a finding that CIBC is responsible for the acts of its former employee. It appears inevitable that CIBC's knowledge of the acts, omissions or actions of its employee Migirdic be scrutinized in more detail. That issue is relevant to the debate.

[30] If CIBC knows or knew that Migirdic failed (as one claims or is trying to demonstrate) to fulfil his ethical, disciplinary or regulatory compliance obligations, etc., while he was with his former employer, it may be relevant, in this case, to know what he was doing and how it was that CIBC's investor clients working with him were not informed.

[31] The information sought by the plaintiffs and dealt with in point 4 of the letter of February 4, 2003 should be provided, subject, however, to the confidentiality undertaking in that letter, cited above.

[32] Point 6 deals with the right of Mtre. Létourneau, the plaintiffs' attorney, to communicate the information gathered in his examination of the documentation placed at his disposal, either to his clients or to third parties.

[33] The foundation for the plaintiffs' proceeding is the alleged fraud committed by Migirdic, which, according to the plaintiffs, incurred the responsibility of CIBC, Migirdic's master and employer. It is obvious to me that the information gathered by the plaintiffs' attorneys can be communicated to the parties represented by Mtre. Létourneau's office. It is just as obvious that the information thereby gathered must not be communicated to third parties or otherwise made public without the explicit authorization of a judge of this Court if the information has not been publicly disclosed in the record or in arguments.

[34] The Court, in ruling on point 6 of the letter of February 4, 2003, is therefore of the opinion that the communication of the information to Mtre. Létourneau's clients who are parties to one of the actions should be allowed, provided those parties sign an undertaking to abide by the terms of the letter of February 4, 2003.

[35] As for the third parties, that is, those who are not parties to the two disputes, whether they are represented by Mtre. Létourneau or not, they are not entitled to the information until it is formally filed at the eventual trial and until a judge of this Court amends the confidentiality agreement in the above-cited letter.

[36] The portion of that letter accepted by the plaintiffs assumes that this must be so. Mtre. Létourneau already accepted, in point 1, that the information be communicated only to him (or to a member of his law office), subject to his personal confidentiality undertaking. That condition excludes the possibility of communicating the information to third parties, without the agreement of CIBC.

[37] However, it is agreed that this judgment is interlocutory, and that its effect and scope do not bind the judge eventually seized of the merits of the two actions. It will be up to that judge to rule on the confidentiality of, and access to, the information contemplated by the letter of January 24, 2003, if the examination is adduced in evidence in whole or in part.

[38] As already noted, that letter disposes of certain objections taken under advisement. Others that remain must be decided hereinafter. However, to prevent any confusion, the Court will list below each of the objections raised in the three examinations and indicate how they are disposed of.

[39] **THEREFORE**, the Court:

ACKNOWLEDGES for the parties their agreement set forth in the letter of February 4, 2003 (except in regard to points 4 and 6) reproduced above, and orders them to abide by it;

ORDERS CIBC World Markets Inc. to communicate to the plaintiffs the information it has on Harry Migirdic from the records of Merrill Lynch Canada Ltd., subject to the other provisions of the letter of February 4, 2003;

DECLARES that the information communicated by means of the agreement contained in the letter of February 4, 2003 may be communicated to the plaintiffs provided they sign an undertaking to abide by the terms of the letter of February 4, 2003.

EXAMINATION OF HARRY MIGIRDIC ON JULY 17, 2002, COMMON TO THE TWO ACTIONS

[40] That examination gave rise to 67 objections:

Objection

Decision

- | | |
|-------|--|
| No. 1 | Overruled. The information is governed by the letter of February 4, 2003 and by the decision of the Court on points 4 and 6. |
| No. 2 | The same as for No. 1. |

Q.P.

- No. 3 The same as for No. 1.
- No. 4 Overruled. That information may be relevant.
- No. 5 The same as for No. 4.
- No. 6 The same as for No. 4.
- No. 7 The same as for No. 4.
- No. 8 The same as for No. 4.
- No. 9 The same as for No. 4.
- No. 10 The same as for No. 1.
- No. 11 The same as for No. 1.
- No. 12 The same as for No. 1.
- No. 13 See minutes of December 19, 2002.
- No. 14 The same as for No. 13.
- No. 15 The same as for No. 13.
- No. 16 The same as for No. 1.
- No. 17 The same as for No. 1.
- No. 18 The same as for No. 13.
- No. 19 The same as for No. 13.
- No. 20 The same as for No. 13.
- No. 21 The same as for No. 13.
- No. 22 The same as for No. 1.
- No. 23 The same as for No. 1.
- No. 24 The same as for No. 1.
- No. 25 Overruled.
- No. 26 The same as for No. 1.

G.P.

- No. 27 The same as for No. 1.
- No. 28 The same as for No. 1.
- No. 29 The same as for No. 1.
- No. 30 The same as for No. 1.
- No. 31 The same as for No. 1.
- No. 32 The same as for No. 1.
- No. 33 The same as for No. 1.
- No. 34 The same as for No. 1.
- No. 35 The same as for No. 1.
- No. 36 The same as for No. 1.
- No. 37 The same as for No. 1.
- No. 38 The same as for No. 1.
- No. 39 The same as for No. 1.
- No. 40 The same as for No. 13.
- No. 41 The same as for No. 13.
- No. 42 This objection is based on the fact that Migirdic should not have to relate the circumstances of his dismissal. The Court sees no justification for that. Here again, the basis for the plaintiffs' action is Migirdic's alleged fraud. The evidence already shows that Migirdic was dismissed and that the dismissal took place when CIBC discovered the alleged facts. Hence, it follows that the writings and circumstances of his dismissal are relevant.
- No. 43 The same as for No. 42.
- No. 44 The same as for No. 42.
- No. 45 The same as for No. 42.
- No. 46 The same as for No. 42.

- No. 47 The same as for No. 42.
- No. 48 The same as for No. 42.
- No. 49 The same as for No. 1.
- No. 50 The same as for No. 13.
- No. 51 The same as for No. 13.
- No. 52 The same as for No. 13.
- No. 53 The same as for No. 13.
- No. 54 The same as for No. 13.
- No. 55 The same as for No. 13.
- No. 56 The same as for No. 1.
- No. 57 The same as for No. 1.
- No. 58 The same as for No. 1.
- No. 59 The same as for No. 13.
- No. 60 The same as for No. 13.
- No. 61 The same as for No. 13.
- No. 62 The same as for No. 13.
- No. 63 The same as for No. 13.
- No. 64 The same as for No. 13.
- No. 65 The same as for No. 13.
- No. 66 The same as for No. 13.
- No. 67 The same as for No. 13.
- No. 68 The same as for No. 13.

EXAMINATION OF HARRY MIGIRDIC ON JULY 17 AND 18, 2002 IN ACTION 500-05-069668-018

[41] That examination gave rise to 37 objections:

(a) July 17, 2002

<u>Objection</u>	<u>Decision</u>
No. 1	Overruled.
No. 2	Withdrawn. See minutes of December 19, 2002.
No. 3	See minutes of December 19, 2002.
No. 4	Overruled.
No. 5	Overruled.
No. 6	Overruled.
No. 7	Overruled.
No. 8	Overruled.
No. 9	Overruled. The information is governed by the letter of February 4, 2003 and by the decision of the Court on points 4 and 6.
No. 10	The same as for No. 9.
No. 11	The same as for No. 9.
No. 12	Overruled. That objection raises a question of confidentiality related to professional secrecy. However, the Court is of the opinion that Mtre. Amyot was not acting in that instance as Migirdic's attorney. At the time of the meeting, he was a third party in relation to CIBC and its attorneys. Mtre. Amyot was not present at the meeting to advise or protect Migirdic's interests. Furthermore, the question per se does not deal with any element of confidentiality. The length of the meeting has nothing confidential about it.
No. 13	Overruled. The information is not confidential.

G.P.

- No. 14 Overruled. For the same reasons as in the case of the two preceding objections.
- No. 15 Overruled. For the same reasons.
- No. 16 Overruled. That objection is not aimed at protecting confidential information.
- No. 17 See minutes of December 19, 2002.
- No. 18 See minutes of December 19, 2002.
- No. 19 See minutes of December 19, 2002.
- No. 20 See minutes of December 19, 2002.
- No. 21 See minutes of December 19, 2002.
- No. 22 See minutes of December 19, 2002.
- No. 23 See minutes of December 19, 2002.

(b) July 18, 2003

- No. 24 Overruled. The witness should respond if he is able to do so.
- No. 25 Overruled. The witness should respond if he is able to do so.
- No. 26 Overruled. The witness should respond if he is able to do so.
- No. 27 Overruled.
- No. 28 See minutes of December 19, 2002.
- No. 29 See minutes of December 19, 2002.
- No. 30 Overruled.
- No. 31 Overruled.
- No. 32 Overruled.
- No. 33 Overruled.
- No. 34 Overruled.

G.P.

- No. 35 Overruled.
- No. 36 Overruled.
- No. 37 Overruled.

EXAMINATION OF HARRY MIGIRDIC ON JULY 18, 2002 IN RECORD 500-05-071007-023

[42] That examination gave rise to 37 objections:

<u>Objection</u>	<u>Decision</u>
No. 1	Overruled.
No. 2	Overruled.
No. 3	Overruled.
No. 4	See minutes of December 19, 2002.
No. 5	See minutes of December 19, 2002.
No. 6	Overruled. The witness must respond if he is able to do so.
No. 7	Overruled. Given the alleged facts as a whole, what occurred in the accounts before the guarantees were signed may also be relevant.
No. 8	See minutes of December 19, 2002.
No. 9	Overruled.
No. 10	See minutes of December 19, 2002.
No. 11	See minutes of December 19, 2002.
No. 12	See minutes of December 19, 2002.
No. 13	See minutes of December 19, 2002.
No. 14	See minutes of December 19, 2002.

G.P.

- No. 15 See minutes of December 19, 2002.
- No. 16 See minutes of December 19, 2002.
- No. 17 Overruled. The witness must respond if he is able to do so.
- No. 18 Overruled.
- No. 19 Overruled.
- No. 20 See minutes of December 19, 2002.
- No. 21 See minutes of December 19, 2002.
- No. 22 Overruled.
- No. 23 Overruled.
- No. 24 Overruled.
- No. 25 Overruled.
- No. 26 Overruled.
- No. 27 Overruled.
- No. 28 Overruled.
- No. 29 Overruled.
- No. 30 See minutes of December 19, 2003.
- No. 31 Overruled.
- No. 32 Overruled.
- No. 33 Overruled.
- No. 34 Overruled.
- No. 35 Overruled.
- No. 36 See minutes of December 19, 2002.
- No. 37 See minutes of December 19, 2002.

COSTS TO FOLLOW.

(s)
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Date of hearing:
Last attorney communication:

December 19, 2002
April 10, 2003

