

Re Hirani

IN THE MATTER OF:

**The Rules of the Investment Industry Regulatory Organization of
Canada (IIROC)**

and

Shafique Hirani

2018 IIROC 33

Investment Industry Regulatory Organization of Canada
Hearing Panel (Alberta District)

Heard: August 14, 2018 in Calgary, Alberta
Decision: September 4, 2018

Hearing Panel:

Alan Beattie, Q.C. – Chair, William Welton, and Bradley Whyte

Appearances:

Tayen Godfrey, Enforcement Counsel for IIROC

Jonathan Kroft, Counsel for the Respondent

Shafique Hirani, the Respondent

Kelly Osaka, Dentons Canada LLP Counsel for the Investors Group (“Interested Party”)

REASONS FOR DECISION

HEARING ON PRELIMINARY ISSUE

(MOTION FOR ORDER COMPELLING PRODUCTION OF DOCUMENTS)

INTRODUCTION

¶ 1 Mr. Hirani (“the Respondent”) by Notice of Motion filed August 7, 2018, seeks an order for the production of documents. We have carefully reviewed all the extensive documentation provided to us in connection with the Preliminary Hearing, commencing with the Notice of Hearing and Statement of Allegations dated November 29, 2017, and including:

Respondent

- (i) Response of the Respondent to Notice of Hearing dated January 11, 2018
- (ii) Affidavit of Shafique Hirani sworn August 8, 2018
- (iii) Motion Brief of the Respondent dated August 10, 2018
- (iv) Affidavit of Lori Watts sworn August 13, 2018, including 112 pages of emails at Exhibit “D” relating primarily to the transition process
- (v) Supplemental and Response Affidavit of Shafique Hirani sworn August 13, 2018

IIROC

- (vi) Motion Hearing Book including Response to Notice of Motion and Responding Brief, both dated August 13, 2018
- (vii) Affidavit of Danny Choy sworn August 13, 2018

We have also reviewed the transcript of arguments by Counsel at the Preliminary Hearing.

¶ 2 The parties agree that the Panel has the authority to issue an order for production of documents. [Consolidated Rules 8417(1), 8417(4), 8208(1) and 8421(1)].

¶ 3 An opportunity was afforded to Ms. Osaka, of Dentons, Counsel for Investors Group (“Interested Party”) to make submissions.

¶ 4 The Hearing on the merits is scheduled to proceed the week of September 24, 2018.

STATEMENT OF ALLEGATIONS

¶ 5 The Statement of Allegations issued by IIROC, concurrent with the Notice of Hearing, both dated November 20, 2017, includes:

PART 1 – CONTRAVENTIONS ALLEGED

Count 1

Between February 20, 2015 and April 16, 2015, the Respondent failed to use due diligence to learn and remain informed of the essential facts in regard to approximately 365 of his clients, contrary to Dealer Member Rule 1300.1(a).

Count 2

Between February 20, 2015 and April 16, 2015, the Respondent dealt with the personal information of his clients in a manner that was unbecoming and detrimental to the public interest, and inconsistent with high standards of ethics, contrary to Dealer Member Rule 29.1.

PART 11 – PARTICULARS

i. Overview

1. The Respondent ignored his professional obligation to know his clients. The Respondent asked his clients to sign blank account forms, which he then directed his staff to complete. The Respondent also failed to take appropriate care in his handling of documents containing his client’s personal information.

...

iii. Internal Discipline

3. On November 26 2014, the Respondent received a warning letter from the Compliance unit of Investors Group Financial Services Inc. relating to his use of Pre-Signed New Client Account Forms (the “NCAFs” or “NCAF”).

iv. Background

4. The Respondent was employed by Investors Group Financial Services Inc. (“IG Financial”) as a Mutual Fund Dealers Association licensed consultant from November 1995 to February 20, 2015. He then moved from IG Financial to Investors Group Securities Inc. (“IG Securities”), an IIROC firm. He was an IIROC Registered Representative from February 20, 2015, until his employment was terminated by IG Securities on April 16, 2015.

5. To facilitate his moving to IG Securities, the Respondent began the process of transferring the records of his IG Financial clients to the IG Securities IIROC platform in advance of his becoming an IIROC Registered Representative. During this process the Respondent oversaw an office which included two Associate Consultants and Three Assistants (the “Team”). The Team members were relatively young,

with limited or no experience working in the financial industry. The Respondent took advantage of this inexperienced staff by creating a hostile working environment in which he intimidated and bullied his Team members.

v. Failure to Know Clients

6. The Respondent disregarded his obligations to know his clients. The process of transferring the records of his IG Financial clients to the IG Securities platform involved having his clients sign incomplete or blank NCAF forms, and then have members of the Team complete them. The Respondent instructed the Team to fill in pre-determined investment objectives and risk tolerances for these clients.

7. As a result of this process, the NCAFs for 365 of the approximately 370 clients which were transferred to IG Securities contained the following identical investment profile:

- a. Investment Knowledge: High
- b. Time Horizon: 6 to 10 years
- c. Risk Tolerance: High
- d. Investment Objectives: 100% long-term growth
- e. Propose of Account: Retirement Savings.

8. In many instances the clients' NCAFs identified personal and financial information that did not appear to be consistent with these stated investment objectives and risk tolerances.

vi. Misuse of Personal Client Information

9. While at IG Securities the Respondent failed to take appropriate care in his handling of his clients' personal information. The Respondent instructed a Team member to set up an account with the cloud-based storage service Dropbox. He then had his staff upload various documents to the storage server. These documents included his clients':

- a. NCAFs
- b. account statements from financial institutions
- c. mortgage details
- d. life insurance summaries
- e. personal tax assessments
- f. account statements.

10. Many of the documents contained his clients' personal information, such as:

- a. telephone numbers
- b. banking information including account numbers
- c. home addresses
- d. income tax information
- e. social insurance numbers.

11. Over 35,000 documents were uploaded to the Respondent's Dropbox account. The use of the Dropbox service by the Respondent was motivated by a concern that his employment was going to be terminated by IG Securities, and he wanted to preserve ongoing access to his clients' account information.

12. Before his employment was terminated by IG Securities, the Respondent was suspended and was prohibited from attending his office as a result of an unrelated matter. During this time he instructed one

of his Team members to copy the client information that had been uploaded to Dropbox to a portable storage device.

13. The Respondent's use of Dropbox and the portable storage device resulted in a lack of control over his clients' personal information. After the Respondent's dismissal from IG Securities, a former IG Securities employee was in possession of a portable storage device containing client documents that were the same as those found on the Dropbox account.

14. The use of Dropbox and the portable storage device contravened IG Securities' security policies. Under these policies, both IG Securities and the clients were required to provide prior approval of the Respondent's use of any third party storage services. The Respondent did not seek such approval.

RESPONSE TO THE NOTICE OF HEARING

¶ 6 The Respondent's Response to the Notice of Hearing (including the Statement of Allegations), dated January 11, 2018, includes:

5. The Transition Process involved the preparation of IIROC account applications and related banking and other forms and documents for those clients transferring to the IIROC platform (the "**IIROC Documents**"). There were approximately 10,000 IIROC Documents that had to be completed as part of the Transition Process. To the extent available, the Transition Process approved by IGSI contemplated that pertinent client information in the records of IGFS would be entered into the IIROC Documents and that those documents would be provided to transferring clients who would confirm or correct the information in the IIROC Documents, add any missing information, and execute the IIROC Documents.

6. Pursuant to the Transition Process designed and approved by Investors Group, the completed IIROC Documents would be sent to the Investors Group compliance department ("**Investors Group Compliance**") for review. If approved by Investors Group Compliance, the IIROC Documents were stored at the Investors Group head office in Winnipeg pending the Respondent's registration with IIROC, which was anticipated to occur in January/February 2015. If the IIROC Documents were not in a form acceptable to Investors Group Compliance, they would be sent back to the branch for correction and/or re-execution by the client.

7. The administration of the Transition Process was conducted primarily by the Respondent's existing assistants, new assistants hired by Investors Group to work on the Transition Process, and Investors Group head office employees. The Respondent says that Investors Group and Investors Group Compliance Department were responsible for the supervision of these assistants and employees.

...

11. As part of the ongoing litigation with Investors Group, the Respondent was required to turn over most of his copies of the relevant documents and records still in his possession to Investors Group such that he has limited access to documents and records necessary to respond to this Notice of Hearing.

12. The Notice of Hearing does not provide full particulars of the allegations contained in paragraph 8 and the Respondent is unable to respond to the allegations in the absence of such full particulars and access to the relevant documents.

13. In reply to paragraphs 9 through 14 of the Particulars of the Notice of Hearing, the Respondent says that, well before the times material to the current allegations, he had instructed one of his staff to set up a Dropbox account in his name (the "**Dropbox Account**") and that the Dropbox Account was used by the Respondent and his staff as a shared archive tool to facilitate the sharing of information among the team. The Dropbox Account was used by the Respondent and his staff since at least 2013 and says that Investors Group was aware or should have been aware of the existence of the Dropbox Account well prior to the material times. The Respondent therefore denies that the Dropbox Account was established in response to a concern about termination of his employment.

14. In reply to paragraph 12 of the Particulars of the Notice of Hearing, the Respondent admits that prior to his termination and during his suspension he requested a member of the Team to save the information in the Dropbox Account to a portable storage device. This portable storage device was later turned over to Investors Group.

15. In reply to the whole Notice of Hearing, the Respondent says that he has been provided with copies of documents, some of which are not legible or are partially obscured (the “**Documents**”). The Respondent does not have particulars of whether the Documents were located in the branch office, at Investors Group head office or elsewhere. The Respondent admits that the Documents provided, to the extent legible, appear to have been signed by clients while some information was missing. However, the Respondent denies that he asked his clients to sign blank account forms. The Respondent says that to the extent that clients signed partially incomplete documents which came into his possession or control, it was due to inadvertence, administrative error or client error in implementing the Transition Process. The Respondent says that the conduct alleged in the Particulars of the Notice of Hearing was all or mostly conduct which occurred prior to the Respondent becoming an IIROC registrant. This conduct occurred as part of the Transition Process under the supervision of other IIROC registrants employed by Investors Group, IGFS and IGSI.

RESPONDENT’S NOTICE OF MOTION

¶ 7 The Notice of Motion of the Respondent filed August 7, 2018, seeks an order of the Hearing Panel to compel the production (as amplified in the course of the Motion Brief of the Respondent, in italics) of:

- a) the Respondent’s email records (*including his received, sent and deleted emails for the period October 2012 to April 30, 2014*) in the possession of Investors Group (*IGFS and IGSI*);
- b) all internal correspondence among Investors Group staff relating to the design and implementation of the Transition Process (*during the same period*); and
- c) all documents and materials of IIROC’s investigation into IGSI’s supervision of the Respondent while he was a registered registrant of IGSI.

ARGUMENT OF THE RESPONDENT

(We have not summarized the arguments of the parties to any extent because they are fully set out in written form in the Briefs and in the transcript of the Hearing.)

¶ 8 The argument of the Respondent is essentially that he cannot know what emails and documents are relevant to the charges against him until he has reviewed the extensive emails and documents to which he seeks access in order to make “full answer and defence”. Counsel also referred to the concepts of “logically probative to the events...and to the credibility of witnesses” and “reasonable probability that the information is logically probative” set out in the cases referenced by the parties. Counsel also asserted that the effect on Mr. Hirani’s career, if this Panel were to find the allegations sustained, would be “catastrophic”, which accentuates the need for the emails/documents to be produced. In his reply to IIROC’s argument (below) Counsel submitted that the standard for disclosure proposed by IIROC is not fair because it requires Mr. Hirani to speculate on what may be relevant in thousands of documents to which he has been deprived access, including his own emails.

ARGUMENT OF IIROC

¶ 9 The argument of IIROC is essentially that the documentation being sought is tens of thousands of pages which would be very time consuming and costly to produce for examination and will cause the hearing scheduled to commence September 24 to be adjourned, but more particularly, that they are not documents which are “likely relevant” to the charges against the Respondent. Counsel also argues that the production request is “overly broad” and a “fishing expedition”.

SUBMISSIONS OF INVESTORS GROUP (“INTERESTED PARTY”)

¶ 10 Ms. Osaka of Dentons, Counsel for Investors Group, was given the opportunity to make submissions.

She referred, and presumably adopted, the submissions of IIROC Counsel regarding relevance of the documents sought. She emphasized that the Respondent's request for production of documents needs to be examined in light of the privacy consideration set out in *O'Connor*. She asserted that the information is confidential, proprietary information that belongs to Investors Group and that the right of privacy has to be weighed against the benefit the information would be to the Respondent. She said that if this Panel directs the production of any documents they would have to be examined for personal information which would require redaction.

CASE AUTHORITIES

¶ 11 We have reviewed the following case authorities relied upon or discussed by Counsel:

The Respondent:

R. v. Stinchcombe, [1991] 3 S.C.R. 326 (Supreme Court of Canada)

Re Carbonelli & Conway, 2011 IIROC 74 (IIROC Hearing Panel, Alberta District Council)

IIROC:

R. v. O'Connor, [1995] 4 S.C.R. 413 (Supreme Court of Canada)

College of Physicians and Surgeons of Ontario v. Au, [2005] O.J. No. 234 (Ontario Superior Court of Justice)

Steinhoff (Re), 2009 L.NIIROC 44 (IIROC Hearing Panel, Pacific Division)

Carbonelli (Re), 2011 L.NIIROC 74 (IIROC Hearing Panel, Alberta District Council).

DECISION

¶ 12 The concepts from the cases are, in general, agreed upon. The one main distinction is that the decision in *Stinchcombe* is considered as setting a "low standard" for the duty to disclose whereas other cases such as *O'Connor* are considered as setting a more stringent standard. We will not attempt to analyze the distinction because our decision, whether on the "low standard" or more stringent standard, is the same. We are guided by statements such as that by McLachlin, J. (as she then was) in *O'Connor*, at para. 194:

194 Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused's perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes. The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system – all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires.

¶ 13 We also have regard to the following rule in the Rules of Practice and Procedure:

8403. General Principles

(1) The *Rules of Procedure* shall be interpreted and applied to secure a fair hearing and just determination of a proceeding on its merits and the most expeditious and least expensive conduct of the proceeding.

¶ 14 We also have regard to IIROC's Enforcement Disclosure Policy which includes:

Underlying Rationale

The duty to disclose is fundamental to the principles of fairness and natural justice in administrative law proceedings.

According to the Supreme Court of Canada, there are three underlying reasons in support of

disclosure:

1. To ensure that justice is better served by eliminating the element of surprise;
2. To ensure that the defending party knows the case to be met and is able to make full answer and defence; and
3. To facilitate the early resolution of cases, thereby reducing delays.

The duty to disclose is also consistent with the public interest mandate of the Corporation's Enforcement Department. The Enforcement Department has a mandate to protect the investing public through the timely prosecution of Dealer Member firms and individual registrants. The Department's role is not a private one where the ultimate goal is winning a case. The role of the Department is to obtain a fair result and to view the facts and proceedings with a fair and objective mind. Disclosing relevant information to the Respondent facilitates the Enforcement Department's public interest mandate by resulting in a more fair proceeding. (Disclosure Policy, para. 2)

....

Information is relevant for disclosure purposes if there is a reasonable possibility that it may be useful to the Respondent in making full answer and defence. This includes not only information that the Enforcement Department intends to rely upon to prove its case, but also information relating to the credibility of witnesses, the nature of the department's investigative process or any other issue that may be relevant to the Respondent's defence. These disclosure standards applicable to IIROC and its Enforcement Department are set out in *R. v. Stinchcombe* [1991] 3 S.C.R. 326, which have subsequently been applied to various administrative proceedings. [Disclosure Policy, para. 4.1(a)]

¶ 15 There are references in the 113 pages of emails (Exhibit "D" to Ms. Watts' Affidavit sworn August 13, 2018) to Mr. Hirani's Assistants being attentive to client account forms such as "KYCs" being "filled out and revised" properly (e.g. February 11, 2014 email from Raylene Francis; July 10, 2014 email from Katie McNeil; February 3, 2015 email from Katie McNeil). It seems clear from the emails that although there was confusion and delay at times in the transition process, in the end everyone involved was satisfied with the completion of the process (e.g. October 17, 2014 email from Nick Taylor, President of IGS). Much of the Respondent's argument relates to the transition process and emails within it that he contends may be of some relevance. It is not the transition process which is on trial. What is to be determined is whether the very specific allegations of misconduct by the Respondent are proven. It is virtually inconceivable that the thousands of emails being sought would be "likely relevant" to the specific alleged contraventions which relate to a limited time period in late 2014 and early 2015. The production process would involve considerable time and expense, although those factors are not in themselves a reason not to provide the documents. We agree with Mr. Godfrey that there is no reference in the Respondent's Brief and Argument to the Respondent being aware of some communications with clients or with IG which rebut the specific allegations of misconduct [with the possible exception of reference to Tom Vowell of the IGFS Compliance divisional team leader for the transition, which primarily relates to the transition process (Respondent's Brief, para. 54)]. The Respondent will surely have **some** recollection of communications, if there are any, about such important matters, particularly regarding whether he had any knowledge of the improper completion of the documents or learned that someone else had completed the forms without authorization or that clients had given those instructions. The same comments apply to the Dropbox allegation. The issue presumably is whether the Respondent had approval to use the Dropbox to unload the documents to the storage server after he was suspended. That is an issue which arose in early 2015 so involves a very limited time period and if there are relevant documents they could be produced without too much difficulty. The Respondent made no reference to any such documents other than an email in January, 2014 (towards the end of Exhibit "D" in Ms. Watts' Affidavit) which has reference to a Dropbox and "video re-approval". We do not know whether that is the same Dropbox as the one in March, 2015, or the

extent to which any approval was obtained regarding the documents unloaded in March, 2015.

¶ 16 The Panel cannot judge whether there are any “likely relevant” documents that should be provided without some evidence and factual matrix to put the production request in perspective. It is possible, once IIROC’s evidence is presented, that Mr. Hirani’s memory will be refreshed regarding emails/documents which might bear on the alleged contraventions. In fairness to Mr. Hirani we therefore reserve jurisdiction, on the Respondent’s Motion, to hear submissions from both Counsel at the Hearing on the merits in September on whether, and which, documents should be produced which may be identified with some specificity as to time periods and people who may have been involved. If an adjournment is necessary for a day, or longer period, to produce the documents and have them agreed upon, it will of course be granted and dates agreed upon for reconvening the hearing as soon as possible. In our view, because we consider it unlikely there will be many, if any, documents which are identified and determined as likely relevant, we consider this the fairest, and most expeditious, manner of proceeding.

Dated this 4th day of September, 2018

Alan Beattie

William Welton

Bradley Whyte

Copyright © 2018 Investment Industry Regulatory Organization of Canada. All Rights Reserved.