Re Steinhoff

IN THE MATTER OF:

THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

AND

THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

CAROLANN STEINHOFF

2009 IIROC 44

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

Heard: September 30, 2009
Decision: October 7, 2009
Amended Order: November 5, 2009
(20 paras.)

Hearing Panel:
Leon Getz, Q.C. and Chris Lay
Appearances:
Robert W. Cooper for Carolann Steinhoff
Nazeer T. Mitha for Wellington West Capital Inc.
Paul J. B. Smith for the Investment Industry Regulatory Organization of Canada
Keith E. W. Mitchell made supplementary submissions for Wellington West Capital Inc.

DECISION

Introduction

¶ 1 By Notice of Hearing dated June 30, 2009 (the "Notice of Hearing") IIROC alleged that Carolann Steinhoff had committed certain contraventions of IDA By-law 29.1 and IIROC Dealer Member Rule 29.1. Ms. Steinhoff has brought a motion seeking orders directed to her former employer, Wellington West Capital Inc. ("Wellington"), to make disclosure of a variety of information and records in its possession. Wellington is a stranger to the proceedings contemplated by the Notice of Hearing, who are IIROC and Ms. Steinhoff.

¶ 2 Ms. Steinhoff's motion seeks production from Wellington of a variety of documents and information. Wellington has agreed to provide her with much of what she seeks and their agreement has been incorporated in an order made by us and dated October 3, 2009, a copy of which is annexed to this Decision.

¶ 3 By paragraphs 1 (d) and (e) of her motion Ms. Steinhoff seeks an order that Wellington produce to her:

"(d) copies of all email communications . . . between or among Mr. Schneider, Ms.

Christiansen, Jan Trites, Tjerk de Gruitjer and Trish Terrell concerning the Applicant for the period from January 2004 to April 2007;

(e) copies of all email communications . . . between Mr. Schneider and the Applicant for the period from January 2004 to April 2007."

At the hearing Ms. Steinhoff amended her motion to limit her request to production of emails during the calendar years 2006 and 2007 only.

¶ 4 Wellington opposes the making of this order.

¶ 5 Before addressing the substance of the motion we should briefly note a preliminary matter. We are two of the members of a three-member panel that has been constituted to hear the merits of the allegations against Ms. Steinhoff at a hearing now scheduled to commence in November 2009. Due to the illness of one of the members of the panel, however, only two of us have participated in the hearing of this motion. This procedure is sanctioned by the applicable rules and all parties have, as required by those rules, consented to our doing so.

The legal principles

¶ 6 It was accepted in argument before us that we have the power to order Wellington to make disclosure of the documents and records sought by Ms. Steinhoff. It also seemed to be common ground that the applicable principles are substantially similar to those governing the exercise by a court in a criminal case of the discretion to order production of documents or other records in the custody of a third party. Those principles were recently reviewed and restated by the Supreme Court of Canada in *R v. McNeil*, [2009] 1 S.C.R. 66. The Court said, among other things:

> [28] The first step in any contested application for production of non-privileged documents in the possession of a third party is for the person seeking production — in this case the accused — to satisfy the court that the documents are likely relevant to the proceedings. This threshold burden simply reflects the fact that the context in which third party records are sought is different from the context of first party disclosure. We have already seen that the presumptive duty on Crown counsel to disclose the fruits of the investigation in their possession under *Stinchcombe* is premised on the assumptions that the information is relevant and that it will likely comprise the case against the accused. No such assumptions can be made in respect of documents in the hands of a third party who is a stranger to the litigation. The applicant must therefore justify to the court the use of state power to compel their production — hence the initial onus on the person seeking production to show "likely relevance". In addition, it is important for the effective administration of justice that criminal trials remain focussed on the issues to be tried and that scarce judicial resources not be squandered in "fishing expeditions" for irrelevant evidence. The likely relevance threshold reflects this gate-keeper function.
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> [29] It is important to repeat here, as this Court emphasized in *O'Connor*, that while the likely relevance threshold is "a significant burden, it should not be interpreted as an onerous burden upon the accused" (para. 24). On the one hand, the likely relevance threshold is "significant" because the court must play a meaningful role in screening applications "to prevent the defence from engaging in 'speculative, fanciful, disruptive, unmeritorious, obstructive and time-consuming' requests for production" (*O'Connor*, at para. 24; quoting from *R. v. Chaplin*, [1995] 1 S.C.R. 727, at para. 32). The importance of preventing unnecessary applications for production from consuming scarce judicial resources cannot be overstated; however, the undue protraction of criminal proceedings remains a pressing concern, more than a decade after *O'Connor*. On the other hand, the relevance threshold should not, and indeed *cannot*, be an onerous test to meet because accused persons cannot be required, as a condition to accessing information that may assist in making full answer and defence, "to demonstrate the specific use to which they might put information which they have not even seen" (*O'Connor*, at para. 25, quoting from *R. v. Durette*, 1994 CanLII 123 (S.C.C.), [1994] 1 S.C.R. 469, at p. 499).

. . . .

[33] "Likely relevant" under the common law O'Connor regime means that there is "a reasonable possibility that the information is logically probative to an issue at trial or the competence of a witness to testify" (O'Connor, at para. 22 (emphasis deleted)). An "issue at trial" here includes not only material issues concerning the unfolding of the events which form the subject matter of the proceedings, but also "evidence relating to the credibility of witnesses and to the reliability of other evidence in the case" (O'Connor, at para. 22). At this stage of the proceedings, the court cannot insist on a demonstration of the precise manner in which the targeted documents could be used at trial. The imposition of such a stringent threshold burden would put the accused, who has not seen the documents, in an impossible Catch-22 position.

¶ 7 Invoking these principles, Ms. Steinhoff contends, first, that the emails that she seeks to have produced to her are "likely relevant" to the allegations made against her in the Notice of Hearing and to her Response, dated July 28, 2009, and hence to her interest and ability to make a full answer and response to those allegations; and second, that her interest is not outweighed by any possible countervailing privacy interest of Wellington or the authors of the emails.

The Notice of Hearing and Particulars

¶ 8 The Notice of Hearing alleges three separate counts of contraventions by Ms. Steinhoff of IDA Bylaw 29.1. They are as follows:

Count 1

From approximately January 2004 until approximately March 17, 2007, the Respondent, while a Registered Representative, and for the later part of said time period, a Co-Branch Manager and Officer at Wellington in Victoria, British Columbia,

1.1 engaged in business conduct or practice that was unbecoming or detrimental to the public interest contrary to IDA By-law 29.1; or

1.2 failed to observe high standards of ethics and conduct in the transaction of her business contrary to IDA By-law 29.1,

in that she encouraged, instructed, or condoned a practice whereby her registered and nonregistered assistants:

(a) photocopied or cut client signatures from older or unrelated forms and then pasted or copied the client signature on to new forms or letters of direction with different instructions; or

(b) whited out the instructions and dates but not the signatures on older forms or letters of direction and inserted revised instructions and dates without having the client sign the revised document and faxed them to Wellington's Head Office as properly executed documents.

Count 2

On March 13, 2007 and again on March 14, 2007, the Respondent, while a Registered Representative, Co-Branch Manager and Officer at Wellington in Victoria, British Columbia:

2.1 engaged in business conduct or practice that was unbecoming or detrimental to the public interest contrary to IDA By-law 29.1; or

2.2 failed to observe high standards of ethics and conduct in the transaction of her business contrary to IDA By-law 29.1,

in that she directly instructed two different assistants to create a false client Guarantee and fax it to Wellington's Head Office as a properly executed document by:

(a) changing the date on an approximately 3 year old Guarantee and inserting a new date

without having the client sign and then photocopying and faxing it; or

(b) cutting out the client signature from another document already on file and pasting it on to a new Guarantee and then photocopying and faxing it.

Count 3

In or about March 2007 and subsequently in approximately December 2007 and April, May and October 2008 the Respondent, while a Registered Representative, Officer, and for the first month of said time period, Co-Branch Manager at Wellington in Victoria, British Columbia:

3.1 engaged in business conduct or practice that was unbecoming or detrimental to the public interest contrary to IDA By-law 29.1 and IIROC Dealer Member Rule 29.1;

in that she attempted to frustrate and/or obstruct Wellington's internal investigation and/or Staff's investigation into the conduct alleged in Counts 1 and 2 above by attempting to deceive Wellington and/or Staff investigators by:

(a) not responding truthfully or completely to Wellington and Staff with respect to her actions and other circumstances relating to the allegations in Counts 1 and 2 above;

(b) not responding truthfully or completely to Wellington and Staff with respect to her intent when she sent the March 13, 2007 and March 14, 2007 emails referenced in Count 2 above;

(c) altering a courier delivery receipt and then presenting it to Staff as evidence which corroborated previous statements she made to Wellington and Staff with respect to her actions relating to the allegations in Counts 1 and 2 above; and

(d) counseling or otherwise encouraging or influencing BR, one of her unregistered assistants, to make evasive or misleading statements to Wellington and Staff that were favourable to the Respondent and consistent with statements the Respondent made to Wellington and Staff with respect to her actions relating to the allegations in Counts 1 and 2 above.

¶ 9 The Notice of Hearing also contains some 91 paragraphs of Particulars of the facts that IIROC alleges and intends to rely on in support of its assertion that Ms. Steinhoff has committed the contraventions asserted against her.

¶ 10 It is not necessary for the purposes of the present motion to undertake a detailed exploration of the matters set out in the Particulars. Some of those matters are, however, germane. They include the following:

(a) It is alleged in paragraph 8 that there was a "poor working relationship" between Ms. Steinhoff and her team of assistants and Mr. Schneider, the only other registered representative in Wellington's Victoria branch office (who was for a good deal of the time covered by the three Counts, the Branch Manager) and his team of assistants. Mr. Schneider is one of the people identified in the disclosure orders sought by Ms. Steinhoff.

(b) It is alleged in paragraph 83 that Ms. Steinhoff claimed to the staff of both IIROC and Wellington that Mr. Schneider had a personal vendetta against her that he had pursued by convincing two people, one of whom had been for a time one of her assistants but later became one of his, to report the contents of certain of her emails to Wellington's head office.

(c) In a number of instances it is alleged that conversations seemingly material to her alleged contraventions took place. Some of these conversations were between Ms. Steinhoff and various of her assistants (see, for example, Particulars, paragraph 12 (a), (b), (c), (f) and (g); others were between two assistants (see, for example, Particulars, paragraphs 30 and 41); and yet others were between Mr. Schneider and one of his assistants (see, for example, Particulars, paragraph 37).

Ms. Steinhoff's Response

¶ 11 In her Response, Ms. Steinhoff has denied that she committed the contraventions that form the substance

of the three Counts charged in the Notice of Hearing. She also denies most of the facts and allegations set out by IIROC in the Particulars. She does, however, acknowledge the poor working relationship alleged by IIROC. She says that the relationship between her and Mr. Schneider "seriously deteriorated" over time, that there was a "tense environment" within Wellington's Victoria branch office, and that there was "significant internal conflict" between them. She says that this impacted not only the two of them but also their assistants. (Response, paragraphs [14] and [15]).

Discussion

¶ 12 We cannot know with certainty how IIROC will seek to establish the Particulars that it intends to rely on. It seems a reasonable surmise, however, that it will do so, at least in part, by tendering the oral evidence of one or more of Mr. Schneider and the various assistants with or among whom conversations implicating Ms. Steinhoff are alleged to have taken place.

¶ 13 In support of her motion Ms. Steinhoff says, in essence, that the emails that she seeks may provide evidence, not otherwise available to her, that not only goes to the heart of a number of the key allegations against her but also to aspects – such as the existence of a tense and conflicted atmosphere in the Victoria branch office and of an "animus among certain individuals" that she claims existed – of her defence and to the credibility of some of IIROC's witnesses and the reliability of their evidence.

¶ 14 In the circumstances there is in our view, to quote again the Supreme Court in *R. v. O'Connor*, approved by that Court in *R. v. McNeil* and quoted above (paragraph [6]) "a reasonable possibility that the information [sought] is logically probative to . . . the unfolding of the events which form the subject matter of the proceedings . . . [and] . . . to the credibility of witnesses and to the reliability of other evidence in the case".

¶ 15 We are satisfied, therefore, that Ms. Steinhoff has shown that the emails in question are "likely relevant" to the proceedings contemplated by the Notice of Hearing.

Privacy considerations

¶ 16 The decision of the Supreme Court in *R. v. McNeil* does advert to the possibility that there may be competing privacy interests that have to be weighed in deciding whether disclosure should be ordered. In this case, Wellington has not, either on its own behalf or on behalf of the employees whose email communications Ms. Steinhoff seeks, raised any such considerations. In any event, having regard to the views expressed by the Supreme Court of Canada in *British Columbia Securities Commission v. Branch,* [1995] 2 S.C.R. 3, at paragraph [64], we do not think there are any such considerations.

Cost

¶ 17 Wellington has indicated that the cost and effort involved in producing the requested emails will be "substantial" and has tendered an estimate of the cost involved. It has suggested that we should order her to pay its reasonable costs in that connection. The parties did not really address the questions whether we have the power to make an order of the kind suggested and, if so, how it should be exercised and in those circumstances we make no order. We are, however, willing to receive written submissions on these points if the parties wish to make them.

Timing

¶ 18 As we understand it, Wellington estimates that it will take approximately 120 hours to access and extract the emails that we have decided should be made available to Ms. Steinhoff. Assuming an 8 hour working day, this comes to 15 working days or 3 working weeks. Approximately 5 weeks remain before the currently scheduled commencement of the hearing so not much time remains.

¶ 19 We think it is reasonable to require Wellington to proceed with all deliberate speed to access and retrieve the requested emails; to produce to Ms. Steinhoff or her counsel by the close of business (Vancouver time) on Friday, October 16, such of the requested emails as it has retrieved by that time; by the close of business (Vancouver time) on Friday, October 23, such of the requested emails as it has retrieved by that time and has not previously produced and if at that time all of the requested emails have not been produced to

provide an estimate in writing of the time required to retrieve and produce those not produced. We will hear on an expedited basis any appropriate application that may arise out of that estimate.

Summary and order

¶ 20 In summary

(a) we are satisfied that:

i. email communications between or among Mr. Schneider, Ms. Christiansen, Jan Trites, Tjerk de Gruitjer and Trish Terrell concerning Ms. Steinhoff during the calendar years 2006 and 2007; and

ii email communications between Mr. Schneider and Ms. Steinhoff during the calendar years 2006 and 2007

(together, the "Requested emails")

are likely relevant to the proceedings contemplated by the Notice of Hearing, and

(b) we order that:

(i) Wellington proceed forthwith and with all deliberate speed to retrieve the Requested emails;

(ii) Wellington must produce to Ms. Steinhoff or her counsel

(A) by the close of business (Vancouver time) on Friday, October 16, 2009 copies of all of the Requested emails that it is then in a position to produce; and

(B) by the close of business (Vancouver time) on Friday, October 23, 2009

1. the Requested emails that have been retrieved but have not previously been produced, and

2. an estimate of the time required to produce any of the Requested emails that have not been produced.

Leon Getz, Q.C.

Chris Lay

October 7 , 2009

ORDER

ON THE APPLICATION of the Respondent Carolann Steinhoff for the relief sought in the Notice of Motion dated September 11, 2009 heard September 30, 2009, this Hearing Panel orders that Wellington West Capital Inc. ("Wellington") produce to the Respondent the following:

1. The identity of the clerks and/or supervisors at Wellington responsible for reviewing letters of direction and/or letters of authorization ("LODs") by Wellington's head office between 2004 and 2007;

2. The identity of the clerks and/or supervisors at Wellington's head office responsible for implementing the instructions contained in LODs between January 2004 and April 2007;

3. To the extent that they can be located, the electronic form of template(s) for LODs provided to

Wellington's offices between January 2004 and April 2007;

4. A copy of Wellington's personnel file for Kim Christiansen; and

5. Produce or make available for inspection the Applicant's client files at Wellington.

Dated this 3rd day of October, 2009.

Mr. Leon Getz, Chair

Mr. Chris Lay

DECISION AND AMENDED ORDER

¶ 1 On October 7, 2009, following a hearing, we issued the following Order:

(i) Wellington proceed forthwith and with all deliberate speed to retrieve the Requested emails;

(ii) Wellington must produce to Ms. Steinhoff or her counsel

(A) by the close of business (Vancouver time) on Friday, October 16, 2009 copies of all of the Requested emails that it is then in a position to produce; and

(B) by the close of business (Vancouver time) on Friday, October 23, 2009

1. the Requested emails that have been retrieved but have not previously been produced, and

2. an estimate of the time required to produce any of the Requested emails that have not been produced.

¶ 2 The "Requested emails" referred to in that Order were defined as:

i. email communications between or among Mr. Schneider, Ms. Christiansen, Jan Trites, Tjerk de Gruitjer and Trish Terrell concerning Ms. Steinhoff during the calendar years 2006 and 2007; and

ii. ii email communications between Mr. Schneider and Ms. Steinhoff during the calendar years 2006 and 2007.

¶ 3 The implementation of that Order gave rise to a further hearing on October 28, following which we received written submissions, some in response to a request from us, from counsel for Wellington and for Ms. Steinhoff. Having considered those submissions we have concluded, for various reasons that it is neither helpful nor necessary to rehearse, that the Order should be amended.

¶ 4 We accordingly make the following Amended Order:

1. Wellington must forthwith produce to or make available for inspection by counsel for Ms. Steinhoff all of the Required emails, as defined in the Order dated October 7, 2009 (the "Original Order") that have been retrieved but not yet delivered or made available for inspection;

2. Wellington must without delay and in any event by no later than 4:00 p.m. (Vancouver time) on Monday, November 9, 2009 retrieve and, without prior review by it or on its

behalf, produce to or make available for inspection by counsel for Ms. Steinhoff:

(a) all emails in the mailbox of Kim Christiansen:

(i) sent to or received from Mr. Schneider between March 1 and September 30, 2006, inclusive;

(ii) sent to or received from Jane Trites between June 1 and September 30, 2006, inclusive;

(b) all emails in the mailbox of Jane Trites:

(iii) sent to or received from Mr. Schneider between January 1 and March 31, 2007 inclusive;

(iv) sent to or received from either Trish Terrell or Tjerk de Gruitjer between January 1 and March 31, 2007 inclusive;

(c) all emails in the mailbox of Trish Terrell sent to or received from Mr. Schneider or Tjerk de Gruitjer between January 1 and March 31, 2007 inclusive;

(d) all emails in the mailbox of Tjerk de Gruitjer sent to or received from Mr. Schneider between January 1 and April 30, 2007 inclusive.

3. All emails produced to or made available for inspection by counsel for Ms. Steinhoff pursuant to the Original Order or this Order shall be used by such counsel only for the purposes of the hearing of the allegations against Ms. Steinhoff contained in the Notice of Hearing issued by IIROC and dated June 30, 2009 (the "Hearing");

4. Issues of privilege, privacy or confidentiality with respect to the contents of any of the emails delivered or made available for inspection pursuant to this Order or the Original Order will be decided by the Panel at the Hearing.

Leon Getz, Q.C.

Chris Lay

November 5, 2009