

Re Pope

IN THE MATTER OF:

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

and

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

Julian Pope

2011 IIROC 23

Investment Industry Regulatory Organization of Canada
Hearing Panel (Ontario District Council)

Heard: April 14, 2011

Decision: April 21, 2011

REVISED Decision: April 28, 2011

(18 paras.)

Hearing Panel:

Julia Dublin (Chair), Terry Bourne, David Kerr

Appearances:

Andrew Werbowski, IIROC Enforcement Counsel

Jeffrey Larry appearing for the Respondent

Nigel Campbell appearing for HSBC Securities (Canada) Inc. ("HSBC")

REASONS FOR DECISION

INTRODUCTION

¶ 1 By Notice of Hearing, dated January 27, 2011, IIROC made the following Allegations against Julian Pope ("the Respondent"):

1. Between April 4 and 7, 2008, inclusive, the Respondent participated in a bond offering through a client, thereby failing to give priority to other client orders for the same bond offering, contrary to IDA By-law 29.3A.
2. Between April 4 and 7, 2008, inclusive, the Respondent, failed to act fairly, honestly, and in good faith when executing and administering trades in the Domestic Debt Market by taking unfair advantage of non-public information, namely an upcoming bond offering and entering into an arrangement with a client whereby the client agreed to purchase bonds of the upcoming offering on the Respondent's behalf, contrary to IDA Policy 5, sections 4.1.

¶ 2 In particular, the Notice of Hearing alleged that Pope while employed by HSBC as head bond trader

with its Institutional Fixed Income Sales and Trading Group entered into an arrangement with an HSBC client whereby the client agreed to subscribe for certain bonds of HSBC Financial Corporation Limited (“HSBC Financial”) (4.80% due April 13, 2011, re-issued pursuant to a short form prospectus dated April 20, 2007) and immediately sold them back to HSBC at a profit of the client and a benefit to HSBC.

¶ 3 The re-issuance of HSBC Financial bonds occurred on April 4, 2008 and was oversubscribed. The client with whom the Respondent had made the pre-arrangement received the exact number of bonds needed to fill its own requirements and to complete the arrangements with the Respondent.

¶ 4 By Notice of Termination dated April 30, 2008, the Respondent was terminated by HSBC for Cause. The Notice of termination was received by IIROC Registrations staff in May 2008.

¶ 5 The Respondent his Response to the Notice of Hearing dated March 15, 2011 and the Memorandum of Fact and Law filed in connection with this motion the Respondent alleges that the practice of firms subscribing for prohibited bonds through a flip arrangement with a client is commonplace practice in the industry and at HSBC and was well known to HSBC.

¶ 6 On this preliminary motion the Respondent seeks production of five letters and attachments (the “Targeted Review Documents”) exchanged between IIROC and HSBC compliance staff between January 15, 2010 and February 23, 2011 regarding questions directed to 25 IIROC members, including HSBC, as part of an IIROC review of members’ practices in the primary debt market. This review was initiated in 2010 and covered the fiscal year April 2009 to March 2010 (“IIROC Review”).

¶ 7 IIROC has refused to disclose the Targeted Review Documents on the grounds they are irrelevant to the Respondent’s alleged misconduct.

¶ 8 The Respondent has brought this motion to compel IIROC to produce the Targeted Review Documents.

¶ 9 Neither IIROC nor HSBC had argued the Targeted Review Documents are privileged.

¶ 10 The Targeted Review Documents had been reviewed by both counsel and were produced to us for inspection in making our decision.

THE LAW

¶ 11 It is common ground that the duty to disclose the non-privileged fruits of investigation in the possession of criminal prosecution authorities as set out in *R. v. Stinchcomb*, [1991] 3 SCR 326 governs IIROC disciplinary proceedings. Under the *Stinchcomb* test, the prosecution is obliged to disclose all relevant information in its possession where there is a reasonable possibility that the information could assist the accused in making a full answer in defence.

¶ 12 IIROC compliance staff sought and obtained information from HSBC as part of a separate, unrelated compliance monitoring exercise aimed at publishing a general report on member supervisory practices in the primary bond markets. In addition to challenging relevance, IIROC staff argued in effect that IIROC enforcement and compliance sections should be viewed as separate parties for purposes of establishing competing privacy interests in document disclosure.

¶ 13 The Respondent relies on *R. v. McNeill*, 2009 SCC 3 [2009] 1 S.C.R. 66 in response to IIROC’s position. *McNeill* applies the *Stinchcomb* test to disclosure of non-privileged third party information in the possession of parties other than the prosecution. In *McNeill*, an individual accused of multiple drug offences had sought disclosure of the police records of drug-related internal disciplinary proceedings brought against his arresting officer. The court held that the test of production from third parties is whether information would be produced if it had been gathered in the investigation. Once the *Stinchcomb* relevance test is met, (i.e. on inspection the information appears to relate to events forming the subject matter of the proceedings, to the credibility of witnesses or to the reliability of evidence in the case pertaining to issues at trial), the interests of the accused in making a full answer in defence must be balanced by any privacy interest of the third party. However, as a practical matter, once the relevance test is met, an accused’s right to make full answer in defence generally outweighs most third party privacy interests in non-privileged information except for a few highly

sensitive matters such as a criminal complainant's sexual or mental history.

¶ 14 IIROC submitted that the Respondent's actions took place before the time period covered by the IIROC review and Targeted Review Documents making them irrelevant. IIROC also submitted that the prospect of publication of regulatory correspondence with IIROC in separate disciplinary proceedings against a third party might induce compliance chill in future industry inquiries. HSBC submits that the Targeted Review Documents exchanged are commercially sensitive as well as irrelevant and should not be disclosed to the Respondent as they were exchanged in confidence pursuant to HSBC's duty as a member firm to cooperate in IIROC's industry monitoring efforts.

¶ 15 The Respondent submitted that under *McNeil*, the test of relevance is not limited to information directly generated in the investigation of an offence. He submitted that the *Stinchcomb* relevance test was met as the Targeted Review Documents provided material evidence regarding HSBC's observance of the client priority rule in By-law 29.3A.

DECISION

Relevance

¶ 16 The *Stinchcomb* test sets a low threshold for relevance. Respondent's counsel submitted that the Respondent made the client arrangements alleged, but that the Respondent wanted to raise his employer's knowledge or complicity in connection with the penalty. We find that the Targeted Review Documents do not refer to the Respondent's activities at HSBC specifically or to bond flip arrangements in general. However they do address supervisory practices and some conflicts of interest in the distribution of new bond issues and so we conclude that they are not clearly irrelevant to an argument the Respondent wishes to raise in his defence. This "tips the balance" (to quote *McNeill*) in favour of production.

Privacy Interest

¶ 17 HSBC cannot be said to be in an unusually vulnerable situation by virtue of what we find on inspection to be the relatively innocuous Targeted Review Documents. However, HSBC is a third party. It has not been accused of any misconduct. The Targeted Review Documents are not the "fruits of an investigation" in that they were not obtained by IIROC enforcement staff in connection with the investigation of the Respondent's alleged misconduct. We understand HSBC's concern that some of this material is commercially sensitive and their preference that it not be widely disseminated. The ability of the Respondent to make full answer in defence does not require the wide public dissemination of confidential regulatory correspondence between IIROC staff and HSBC. There is a public interest in promoting full and frank member responses to IIROC questionnaires and in maintaining an effective self-regulatory system.

Restricted Disclosure

¶ 18 We have concluded that whether IIROC enforcement staff and IIROC compliance staff are viewed as part of a single organisation (*Stinchcomb* test) or as two separate parties (*McNeill* test) the result is the same. The Targeted Review Documents meet the relevance standard and there is no offsetting privacy interest. Accordingly the Targeted Review Documents will be disclosed to the Respondent. However this is subject to the restriction that the hearing will be held *in camera* while they are discussed and that the Targeted Review Documents will otherwise remain sealed and will not form part of the public record of these proceedings.

DATED the 28th day of April, 2011.

Julia Dublin, Chair

Terry Bourne, Member

David Kerr, Member

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