Re DiCostanzo

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Neil DiCostanzo

2021 IIROC 25

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

Heard: November 1, 2021 in Toronto, Ontario via videoconference
Decision: November 1, 2021
Reasons for Decision: November 4, 2021

Hearing Panel:
Karen Weiler, Chair, Steven Garmaise and Stuart Livingston
Appearances:
April Engelberg, Enforcement Counsel
Kathryn Andrews, Enforcement Counsel
Neil DiCostanzo, Respondent (present)

DECISION ON A MOTION TO CALL REPLY EVIDENCE AND TO ADMIT A NEW DOCUMENT

¶ 1 Counsel for IIROC Enforcement ("IIROC Counsel") brought a motion to call reply evidence. The proposed evidence did not meet the requirements of reply evidence and the motion was dismissed with reasons to follow later. These are those reasons.

¶ 2 A brief outline of the facts will suffice to put the ruling into context. IIROC alleges that the Respondent contravened Dealer Member Rule 18.14 by engaging in outside business activity without the approval of his Dealer Member, Foster & Associates Financial Services Inc. ("Fosters"), by arranging investments in two companies for various clients "off the books" of the Dealer Member. In particular, IIROC alleges that he facilitated subscription agreements and the issuance of subscription certificates in two companies, namely, Qnext and Sustainable Growth Strategic Capital Corp (SSGC).

¶ 3 The Respondent denies these allegations. In response to an inquiry by Dan McVicker, an investigator for IIROC, he stated that he told the principal of Fosters, in at least two meetings with him in his office, "I was working with private and public companies to gain referrals from CEO's companies….I knew a successful CEO from Qnext who gave me referrals to meet his network of many potential clients, many of whom became Foster Clients. When looking at the near term, an IPO, one of the ideas was to have a Qnext IPO and that's what Chris Foster did not understand, the potential revenue that would be directed to Fosters."

¶ 4 Counsel for IIROC made the Respondent's reply part of her case in chief and it is an exhibit in IIROC's

Exhibit Book 1 at Tab 4.

¶ 5 After IIROC Counsel closed its case, the Respondent testified on his own behalf. He testified that Chris Foster was aware of "what he was doing" and that in 2016 he had told Foster he hoped his efforts in respect of Qnext and other private companies would lead to an IPO from which Foster's would make money due to the commission it would receive. (Indeed, in September 2015, Foster's had done a private placement for Qnext in the amount of $70,000 and received a commission of 6%.)

¶ 6 In cross-examination, counsel for IIROC drew the Respondent's attention to the Dealer Member Staff Questionnaire he completed in January 2017 and it was made an exhibit. The instructions in the Questionnaire specifically required Fosters' employees to disclose all "accounts outside Fosters" and all "outside business" even if previously disclosed to the Dealer Member. In response to the question: " Are you involved in any business or employment other than your position with Fosters ….", the Respondent answered "No.". In addition, under the heading labeled "General Policies Applicable to all Registered Staff" the Questionnaire included the following statements:

> Non Brokered Private Placements (NBPP)
>
> Any NBPP for which you or Fosters will receive any remuneration must be approved according to the Firm's procedures.
>
> ……
>
> Procedures Manual
>
> I confirm that I have access on my computer to the most recent Fosters Policy and Procedures Manual (dated June 2015). Additionally, I have received and am familiar with those sections of the manual that apply to my job/duties at Fosters."

¶ 7 Earlier, in its case in chief, counsel for IIROC had sought to make the entire Fosters Policy and Procedures Manual ("Manual") an exhibit but the Chair had not acceded to that request. This statement in the Questionnaire was now drawn to the Respondent's attention. The Respondent stated:

> Mr. DiCostanzo: Madam, I would like to make a point there.
>
> Chair: Yes, Mr. DiCostanzo
>
> Mr. DiCostanzo: There was never anything that Fosters had issues with this in the past. We had never anything, I was never given the manual, it wasn't even online, so I could testify to that.
>
> Chair: Okay. You're saying that 'I have access on my computer' that that is not correct, that it wasn't on your computer?
>
> Mr. DiCostanzo: I never had access to that on my computer.

¶ 8 At that point the Chair commented that IIROC Counsel could call Fosters in that regard and was at liberty to make argument with respect to the admissibility of the Manual but its admissibility continued under reserve. IIROC Counsel asked:

> Okay, thank you. If we were to call Mr. Foster, that would be in reply evidence or simply about the policy and procedures?

¶ 9 The Chair indicated she could not answer that question at this time and continued to reserve on the Manual.

¶ 10 On August 19, 2021, the hearing was adjourned until November 1, 2021. On October 26, 2021, IIROC Enforcement gave notice that it wished to call Mr. Foster in reply. The Chair asked for submissions and directed counsel's attention to the jurisprudence that prohibits the prosecution from splitting its case subject

to exceptions.

¶ 11 In her submissions on the motion, IIROC Counsel sought to call Mr. Foster at large and argued that an exception to the rule applied in this case. She observed that the prosecution is not limited to calling reply evidence only when the defence has raised some new matter that it could not reasonably have anticipated and with which it had no opportunity to deal. The decision in *R. v. D(R),* 2014 ONCA 302, 120 O.R. (3d) 260 at para. 17 is authority that reply evidence is also permitted when an aspect of the Crown's case has taken on added significance as a result of the case put forward by the defence. IIROC Counsel submitted that the Respondent's acknowledgment that he had engaged in dealings with Qnext and in facilitating the issuance of shares of Qnext, gave "added significance" to the evidence and she now wished to call Mr. Foster. She further submitted that when putting in its case in chief "…all Staff had was the unofficial response from Mr. DiCostanzo". When IIROC Enforcement Staff completed their case, they did not know whether Mr. DiCostanzo would call evidence or testify. Additionally, Mr. DiCostanzo said he did not receive and he did not have access to the Policy and Procedures Manual. The prosecution could not have anticipated this. She submitted that there would be no surprise to Mr. DiCostanzo in calling Mr. Foster, that he had been given notice of Staff's intention the previous week and been given a proposed witness statement.

¶ 12 Two procedural rules were also brought to the Panel's intention. The first is Rule 8423 (3)(iv) which states," Enforcement Staff may present evidence in reply to any evidence presented for the first time by the respondent and examine witnesses, who may be cross-examined by the respondent." IIROC Counsel submitted that Mr. DiCostanzo's evidence was the first time the Respondent presented evidence that he was engaging in dealings with Qnext with the idea that Qnext would do an IPO and the potential revenue would be directed to Fosters.

¶ 13 IIROC Counsel's submission ignores the fact that she made Mr. DiCostanzo's "unofficial response" officially part of the Enforcement's case as an exhibit. The Respondent states:

> I told Chris Foster in at least 2 meetings with him in my office, I was working with private and public companies to gain referrals from Ceo's of companies.
>
> …..
>
> When looking at the near term, an IPO, one of the ideas was to have a Qnext IPO and that's what Chris Foster did not understand, the potential revenue that would be directed to Fosters.

¶ 14 The evidence of Mr. DiCostanzo is not evidence "presented for the first time" within the spirit of Rule 8423(3)(iv). Nor did counsel explain what the "added significance" of the Respondent's defence evidence was that would permit Enforcement counsel to call Mr. Foster at large in reply.

¶ 15 The Panel acknowledges that Enforcement counsel could not reasonably have anticipated that, despite signing a document to the contrary, the Respondent would say he did not have access to the Policy and Procedures Manual. That fact would support the calling of Mr. Foster for a limited purpose in reply. However, upon reflection, engaging in outside business activity without the approval of the Registered Representative's Dealer Member is not simply a matter in the Policy and Procedures Manual. It is a Dealer Member Rule.

¶ 16 When the Respondent was asked in cross-examination whether he knew it was contrary to Rule 18.14 to have outside business activities of which his firm was not made aware of, he did not deny knowledge of the rule. His reply was, "As I told you yesterday in my opening statement, I let Chris Foster know that I was working with companies, private companies such as Qnext and SGSCC, that's all I have to say."

¶ 17 In any event, the Respondent is deemed to know the IIROC Rules under which he operates whether or not he had access to the Policy and Procedures Manual on his computer. Accordingly, Mr. Foster's evidence as to the accessibility of the Manual on the computer of the Respondent is collateral evidence and, in any event, is irrelevant to the issue before the Panel.

¶ 18 The second rule on which IIROC Counsel relied is Rule 8403(3), which allows the hearing panel to control its own procedure. In this regard, she submitted the public interest aspect of the proceedings should be considered in deciding whether the reply evidence of Mr. Foster should be allowed.

¶ 19 In presenting IIROC's case in chief, counsel chose to rely on the evidence of the investigator, Mr. Scali, and documentary evidence from Mr. Foster such as the "Special Report from the CEO Re: Mr. Nello DiCostanzo." Rule 8203(3) of the IIROC Consolidated Enforcement Examination and Approval Rules permits this method of proof. It provides:

> A hearing panel may admit as evidence in a hearing any oral testimony and any document or other thing that is relevant, whether or not given or proven under oath or affirmation or admissible as evidence in a court.

¶ 20 In *Re Jones* 2020 IIROC 29, the Respondent's counsel objected to IIROC's method of proving its case. In that case, as here, the infraction alleged against the Respondent was that he had facilitated investments for two clients in an outside business activity without informing his Dealer Member and without his approval contrary to Rule 18.14. The panel heard the oral testimony of a senior investigator for IIROC whose evidence consisted mainly in identifying relevant documents in a Book of Documents. The evidence of one of the complainants, who had been introduced to the off the books business venture by the Respondent, was admitted by way of a transcript of the investigative interview. The Respondent's counsel objected on the basis that fairness required that IIROC call the complainants and make them available for cross-examination. The panel held that IIROC counsel was not obligated to do so. Neither of the complainants could have spoken to the real issue in the case which was Mr. Jones's obligation to advise and seek approval for his outside business activity.

¶ 21 In this case, IIROC was well aware that the Respondent's position is that his Dealer Member, Mr Foster, was aware of the business activity in which he was engaging because of conversation he had with him in 2016. The person with first-hand knowledge who could speak to the real issue in the case is Chris Foster. Rule 8203(3) is permissive. It does not dictate the appropriate method of proof in all cases. It would have been logical to call Mr. Foster in presenting IIROC's case in chief. It would have been a more efficient concise manner of presenting the case that would have enabled the Panel to get to the heart of this case. Instead, IIROC Counsel chose to present voluminous repetitive email correspondence concerning the Respondent's promotional activities with respect to Qnext and SGCC in addition to a spreadsheet prepared by the investigator containing a one-line summary of the various emails. A useful guide for choosing the appropriate method of proof is to present the case bearing in mind the real issue.

¶ 22 IIROC Counsel has offered no real explanation as to why she chose not to call Mr. Foster when presenting IIROC's case in chief. Stating that the Respondent's evidence has taken on added significance now that he has testified is a conclusory statement that does not explain why or how that is. The Respondent, who is self-represented, objects to Mr. Foster being called at this stage of the proceedings.

¶ 23 In this case, the public interest is best served by protecting the Respondent's right to have known the full case put against him when he testified. It would not be fair to force him to deal with a piecemeal prosecution.

¶ 24 For these reasons the motion was dismissed.

¶ 25 Following the dismissal of the motion to call Mr. Foster in reply, IIROC Counsel asked the Panel to admit into evidence a document dated March 9, 2020 which was a letter by Chris Foster responding to certain questions the investigator, Frank Scali, had sent him. The import of the document is that it contradicts the Respondent's evidence that Mr. Foster was aware of his activities. IIROC Counsel submitted that the document was not a further attempt to introduce evidence in reply. She acknowledged that she had not specifically referred to this document in presenting her case in chief; rather it was part of a larger group of

documents that she had submitted were relevant without giving specific reasons as to why the various documents were relevant. The first paragraph of that letter states:

> I personally discovered the first incriminating email from Neil DiCostanzo when doing a search of our email records for a copy of a document unrelated to this matter. It was a referral agreement between Neil DiCostanzo and Meadowbank Asset Management which evidenced that he had arranged for his wife to be paid directly by Meadowbank on a private placement. It was only after having dismissed Neil that we discovered that he had also done several tranches of a private placement directly with Qnext (again circumventing Foster & Associates).

¶ 26 The Panel reserved on the request to admit this document overnight. This paragraph is substantially the same as the two opening bullet points in the "Special Report from the CEO RE: Nello DiCostanzo" written about two years earlier by Mr. Foster which was already in evidence. They read:

> I discovered on Friday March 23rd that Nello had struck an arrangement with Meadowbank Asset Management to receive a secret commission for 12k (attached). This email was sent from Nello to Rahn Lawhan at Meadowbank.
>
> Subsequent digging through our email archive showed that Nello had also been doing multiple tranches of a Private Placement for Qnext, a private Cloud Storage firm for whom Foster had done a legitimate placement in the past. Explicitly, Nello had been keeping these deals separate from the firm (one email spoke of the practice of NOT doing Qnext business on Foster email.

¶ 27 In the morning, when IIROC Counsel was asked why she was now attempting to have the Panel admit a document that was essentially the same as one already in evidence, she stated that there was nothing wrong with doing that. If that was her view, it is unclear why she did not state at the outset of her request that the document she was seeking to have admitted was essentially the same as one already in evidence and explain why she felt the later document should nonetheless be admitted.

¶ 28 The Panel refused to admit the March 9, 2020 document into evidence on the basis that it duplicates the evidence that has already been admitted. Mere repetition of the evidence is inefficient and misconceives the purpose of evidence. The purpose of evidence is to convince by proof. Each new piece of evidence should add some additional probative value to the case being put forward. In circumstances such as the present, the proof being put forward is not made more convincing by its mere repetition. Tendering the later document by Mr. Foster is an attempt to bolster the credibility of the earlier document by Mr. Foster which says the same thing. It is trite law that evidence of statements consistent with a prior statement is ordinarily inadmissible because that evidence is self-serving in that it attempts to bolster the credibility of the witness who made the statement. The concern of the law is that the trier of fact may give the repetition of the statement false credence. Further, when the document was tendered, the Respondent had already finished testifying.

Dated at Toronto, Ontario this 4 day of November 2021.

Karen Weiler

Steven Garmaise

Stuart Livingston