Re DiCostanzo

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Neil DiCostanzo

2021 IIROC 26

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

Heard: November 1, 2021 in Toronto, Ontario
Decision: November 11, 2021

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

REASONS FOR DECISION ON ADMISSIBILITY OF DOCUMENTS

BACKGROUND

¶ 1 Between December 2016 and March 2018, the Respondent is alleged to have contravened IIROC Dealer Member Rule 18.14 in respect of two companies, Qnext and Sustainable Growth Strategic Capital Corp (SGSC).

¶ 2 The relevant portion of Rule 18.14 (1)(c) provides*:*

> (1) A Registered Representative or Investment Representative may have, and continue in, any business activity outside of the Dealer Member, including another gainful occupation if:
>
> c) The Registered Representative or Investment Representative informs the Dealer Member of the outside business activity and obtains the Dealer Member's approval to engage in such outside business activity;

¶ 3 In order to prove the allegation, Enforcement counsel is required to prove the following on a balance of probabilities:

1) That the Respondent engaged in business activity with respect to Qnext and SGSC and that such activity was "outside" the Dealer Member;

2) that the Respondent did not inform the Dealer Member of his activity and obtain approval to

engage in it.

¶ 4 In September 2015, Qnext did a private placement through Foster & Associates Financial Services Inc. ("Fosters"), which was "on the books" in that Fosters received a commission for doing the private placement. Emails dated September 29, 2015 show two buys of Qnext Shares for the Respondent's clients from which he earned commissions of $1,200 and $3,000. These emails are part of IIROC Enforcement's Exhibit Book 2, Tab 386 on which the Panel specifically reserved; the tab provides useful context and will be admitted into evidence. The Respondent also testified in cross-examination that he received warrants to purchase shares in Qnext when he was part of "the Fosters program". Qnext continued to have an account at Fosters until 2018.

¶ 5 The Respondent's position with respect to IIROC's allegation is partially contained in an email dated April 1, 2019 in response to questions from IIROC's investigator, the relevant portion of which is as follows:

> 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.
>
> As an adviser I had Ceo's of public companies as clients, but I wanted to expand my Client base by working with Ceo's who had excellent records of success.
>
> 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.
>
> Anthony DeCristofaro had a huge success with MGI Software another software company he founded as a private company and then sold as a public company which was a TSX listed company. Anthony gave me many contacts whom he referred me to, and these referrals opened accounts with me at Fosters.
>
> ……..
>
> This relationship would lead allow me to meet contacts of Anthony De Cristofaro, who were investing in Qnext through Anthony. I met with Anthony's contacts and [they] had the opportunity to open up accounts with me at Fosters. Many of my clients were clients of mine because they were referred to me by Anthony.
>
> When looking at the near term, an IPO, one of the ideas was to have a Qnext IPO and that's what Christ Foster did not understand, the potential revenue that would be directed to Fosters.

¶ 6 Enforcement Counsel presented their case by way of documentary evidence and the Respondent's email above was made an exhibit as part of their case.

¶ 7 The business activity alleged by IIROC in its Statement of Allegations includes the general promotion of Qnext and SGSC and solicitation to prospective clients. Exhibit 3, Tab 1 is a spreadsheet prepared by Frank Scali, an IIROC investigator ("Investigator"), containing a list of clients whose names are blacked out that received emails about Qnext. It is 13 pages long with each page containing approximately 48 lines and the title line of each email, such as, "link to generic router video enclosed," "possible investment in Qnext", "Qnext intro", "Fireflex positioning", "Qnext shareholder update."

¶ 8 In addition, IIROC's Enforcement Counsel seek to have admitted into evidence the content of the individual emails respecting these titles. The Panel ruled that these individual emails should not be admitted on the basis that they were overly duplicitous or not relevant.

¶ 9 Enforcement Counsel persisted in seeking to have the emails admitted into evidence. The Panel agreed to receive further written submissions and to reconsider its decision. IIROC Enforcement Counsel then made written submissions and attached two schedules of documents. The documents listed in Schedule A are the documents in respect of which IIROC Enforcement Counsel seek reconsideration. IIROC does not seek reconsideration with respect to the documents listed in its Schedule B.

IIROC's Submissions

¶ 10 Enforcement counsel's written submissions may be summarized as follows:

- The Respondent has not formally admitted any facts in the Statement of Allegations.
- The Respondent has not yet testified in this proceeding and may choose not to.
- The documents establish that the Respondent (a) was in regular contact with various representatives of Qnext; (b) regularly provided marketing materials from Qnext to prospective investors; (c) sent emails regarding Qnext to over 100 prospective investors; (d) facilitated the completion of Subscription Agreements and Subscriber Certificates for investors he recruited and coordinated payment for the shares; and (e) was involved in the purchase of over $2 million worth of Qnext shares.
- The chart summarizing these documents created by the Investigator, which was admitted into evidence, does not contain the body of the emails or attachments which are key.
- The documents all speak to how, when and why the Respondent facilitated the investments in Qnext and SGSC.
- The documents are relevant circumstantial evidence that the Respondent committed the alleged infraction; they should all be admitted and their weight determined after the Panel has considered all the evidence and closing arguments.

RULING

The Respondent's statement is in evidence; it is no longer an "informal" document.

¶ 11 The Respondent's statement to the investigator was made part of the IIROC's case in chief. The inference from the statement is that the Respondent was engaged in promotional activity with respect to Qnext and more generally "other private companies" and that he informed Mr. Foster, and therefore his Dealer Member.

The title line of the emails in the chart created by the Investigator does sufficiently capture the body of many of the emails.

¶ 12 Enforcement Counsel submit that the title line of the emails contained in Mr. Scali's summary of emails does not sufficiently capture the content in the body of the email or the attachments. At least with respect to many emails that is certainly not the case. We will not deal with all of the documents individually; one example will suffice.

¶ 13 Two emails dated February 23, 2016 that Enforcement Staff sought to introduce into evidence and on which the Panel reserved, because they were prior to the time frame of the contravention alleged by IIROC beginning in December 2016, provide informative context for the Panel's ruling and, for this reason, will be admitted. The first email was sent by the Respondent to Mr. DeCristofaro in which he mentions an "amazing award" that Qnext won for "best startup in Silicon Valley". Mr. DeCristofaro replied saying Qnext was voted the winner out of 10 start-ups in the contest and attached their 3-minute pitch.

¶ 14 Following this, in December 2016, the Respondent sent an email to 26 clients about the award winning Qnext product, FireFlex, with a link to a video about it. The title line of the email is, "FW Link to Generic Router

video enclosed." The body of the email contains the single line, "Here is a link to the generic router animated video" and contains a link to the video in Google and Dropbox.

¶ 15 Clearly, the Investigator's summary of the email title is sufficient to indicate the promotional activity in which the Respondent engaged. The text in the body of these emails contributes nothing more and is unduly repetitious. The video about the product is irrelevant to the issues in this case.

¶ 16 As stated in the manual, "Practice and Procedure Before Administrative Tribunals" by Macaulay, Sprague and Sossin ("Macaulay") at 22:15:

> [T]here is no doubt that an agency has the discretion to refuse to allow ….the tendering of evidence which is irrelevant (or unduly repetitious) to its proceedings and that such refusals do not offend the principles of fairness.

IIROC's submission ignores the other documents already in evidence.

¶ 17 Mr. Scalie's list of the titles of the emails does not stand alone in relation to whether the Respondent facilitated the completion of Subscription Agreements and Subscriber Certificates for investors in Qnext and SGSC and coordinated payment for the shares. The documents the Panel admitted into evidence include the following: emails with subscription agreements attached, emails regarding money transfers for the payment of shares; emails concerning money given to the Respondent for facilitating the sale of Qnext shares or, in the case of SGSC, money that was given to his wife; an email dated September 28, 2017 in which in response to an inquiry from the Respondent about an email he had been expecting, the assistant advises, "It might have gone to your sympatico (the Respondent's personal email) address because you said you wanted to keep Qnext emails separate from Foster", the 2017 Annual Staff Questionnaire signed by the Respondent stating he had not engaged in any outside business activity; Mr. Foster's email to the Respondent terminating his employment "due to your undisclosed outside business activities", the Notice of Termination form giving the reason for termination, and Mr. Foster's report to the IIROC investigator. In the Notice of Termination form, Mr. Foster states, "On March 23, 2018, it became known to the member that the registrant was engaging in transactions outside of the dealer for which he and his spouse were receiving direct commissions from certain issuers, which were not disclosed to the dealer member". The Special Report from Mr. Foster characterizes the Respondent's activity as "multiple tranches of a Private Placement for Qnext". Thus, the body of the emails already in evidence shows the how, the when, and the result of the Respondent's facilitation of investments in the two private companies. In asking the Panel to reconsider its ruling, Enforcement Counsel's submission does take into consideration the considerable body of documentary evidence already admitted and explain how the admission of the further documentation in issue advances its case.

The respondent has testified in these proceedings.

¶ 18 The respondent has now testified. The Respondent's evidence does not dispute (a) that he was in contact with various representatives of Qnext; (b) that he provided marketing materials from Qnext to prospective investors; (c) that he sent emails regarding Qnext to prospective investors. However, IIROC has not triaged its submission as to the volume of emails that should be admitted.

¶ 19 What the Respondent denies is the characterization that Mr. Foster did not know of his activity and that the activity is outside business activity.

¶ 20 Enforcement Counsel's position appears to be that because the Respondent did not specifically tell Mr. Foster that he was also soliciting investments in Qnext from persons that had not been referred to him by Mr. DeCristofaro, Mr. Foster could not have known the extent of the Respondent's activity and approved of it.

¶ 21 During the Respondent's cross-examination, IIROC Enforcement Counsel attempted to put to the Respondent certain documents showing yet again solicitation of clients respecting Qnext. The Panel objected

on the basis that the understanding with Counsel was that further oral submissions on the subject of solicitation were not going to be made following the written submissions. Enforcement Counsel then stated that she had intended to take the Respondent to Tabs 23-26, 31, 39, 43 and 49 for the purpose of showing the Respondent soliciting Qnext not through any connection from Anthony DeCristofaro.

¶ 22 Enforcement Counsel ought to have prefaced her attempt to put these documents into evidence by telling the Panel the point she wished to make with them. That point appears to be that Mr. Foster's knowledge of the extent of the Respondent's activities was relevant to whether or not he approved of them. Although the client names were blacked out on all the emails, her submission appears to be that because the email says what an astute businessman Mr. DeCristofaro is, it can be inferred from the body of the email that the persons being solicited were not referred to the Respondent by Mr. DeCristofaro or it would not be necessary to tell them this.

¶ 23 Enforcement Counsel ought then to have directed the Respondent's attention to the email at Tab 51 of IIROC's Compendium, Exhibit 2 already admitted in evidence. The Respondent's email dated February 28, 2017 reads:

> Hi, (name of client blacked out), It's been a long time, please give me a call when you have a minute on my cell at (number). I want to talk to you about Qnext , a software company I am helping with a .81 financing and Strike Minerals.
>
> Please watch the Qnext video on the Fireflex link at the bottom of this email. Qnext is run by Anthony DeCristofaro who ran MGI Software a TSX listed company which was bought out by Roxio and he was a founding director of Delrina Software which was bought out by Symantec.

¶ 24 The email from the respondent at Tab 91 of IIROC's Enforcement Compendium, Exhibit 2, on which the Panel specifically reserved, states, "My brother, his partners, my clients and myself also, have invested in Qnext at .81 a share." That email will also be admitted.

¶ 25 The emails at Tabs 23-25 simply ask the client whose name has been blacked out to look at a video or Google link, and do not contain additional information beyond solicitation. Neither do the emails at Tabs 31 and 39. The three emails at Tab 49 are cryptic and two of them speak of a company called DVR, whereas the only companies in the Statement of Allegations are Qnext and SGSC. The Panel confirms that none of these emails is admissible.

¶ 26 Arguably, the inference that other persons not referred to the Respondent by Anthony DeCristofaro were investing in Qnext can also be drawn from the Special Report by Mr. Foster in evidence dated March 29,2018, which states that "[A] large number of the purchasers were current Foster clients (approx.. 15 of the 25-30 customers). A large number of them seem to be accredited."

¶ 27 From the Respondent's perspective it can be argued that when he told Mr. Foster he would be working with Qnext and SGSC and helping them with a view to bringing the companies to an Initial Public Offering, he was not saying he was going to restrict his endeavors to clients referred to him by Mr. DeCristofaro.

¶ 28 In support of his position that Fosters knew that he was soliciting clients to invest in Qnext, the Respondent relies on an email sent December 21, 2016 from the administrative assistant in charge of "back office" duties, Trisha Bjorklund, advising him that the "back office" had been told a share certificate in the respondent's client account could not be registered and requesting further information from him. The attachment indicates "Qnext Corp-Certificate .jpg". The Panel had specifically reserved on the admissibility of this document. Given the reliance placed on this email by the Respondent, it is admitted into evidence. It appears that the inference the Respondent wishes the Panel to draw is that the knowledge of the assistant should be attributed to Fosters and to Mr. Foster. Because Fosters took no action at that time with respect to the Respondent's activity, the Respondent's position appears to be that there was tacit approval of it.

Eventually, the company would go public and at that time Fosters would receive a commission.

¶ 29 In giving his evidence, the Respondent referred to a further email in Mr. Scali's chart, Exhibit 3. The email contained a reference to a note by Trisha Bjorkland stating, "cert for client Reeve can't be registered". An email dated January 5, 2018 states, "Qnext shares at Foster plus 2 more certs". The Respondent's position is that these emails support his position that Fosters knew about his activity respecting Qnext. Given the Respondent's reliance on them, the Panel will admit the body of these two additional emails.

¶ 30 In relation to SGSC, the Respondent's position appears to be that Mr. Foster also knew generally that the Respondent was engaging in promotional activity with respect to private companies and this was one of them. In any event, his position appears to be that it was his wife, not him, who was involved with the company and, again, he was not engaging in any "outside business activity" but simply assisting her administratively from time to time.

The Respondent was involved in the purchase of over $2 million worth of Qnext shares.

¶ 31 That the Respondent facilitated $2 million worth of investments in Qnext is at statement found in Mr. Foster's Special Report, already in evidence. In any event, the dollar amount of the investments facilitated by the Respondent goes to the question of penalty if and when the Respondent is found to have committed the infraction alleged.

All the documents in Schedule A are not relevant circumstantial evidence that the Respondent committed the alleged infraction; they should not all be admitted, and their weight determined after the Panel has considered all the evidence and closing arguments

¶ 32 The "Let's admit everything" approach on the basis that it's circumstantial evidence whose weight the Panel can determine after final submissions as advocated by Enforcement Counsel, is not one that is recommended. Macaulay gives several reasons for not adopting this course of action. Pertinent to this case are the following. A hearing has a purpose to accomplish. "Time taken on irrelevant matters is time taken away from relevant ones. It is inherent in the mandate of an agency conducting a hearing that the agency take the trouble of restricting the proceeding to the matters at hand." This accords with IIROC General Principles stated in Rule 8403 (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.

¶ 33 An additional reason given by Macaulay is that the purpose of a hearing is not to allow counsel to vent their frustration vis a vis the respondent. In its motion to have admitted the documentary evidence in Schedule A, under the heading Procedural History, Enforcement Counsel state at paragraphs 4 and 5:

> Throughout IIROC's investigation of this matter, the Respondent asserted that he would not attend an interview for medical reasons. The Respondent did not cooperate with the investigation, nor did he provide his banking records as requested by Enforcement.
>
> Enforcement Staff obtained evidence for this proceeding by making requests to:
>
> > Fosters for the Respondent's emails, regarding QNext and Sustainable Growth Strategic Capital Corp and related documents regarding the Respondent;
> >
> > The Ontario Securities Commission for documents from QNext and Meadowbank Asset Management;
> >
> > Searches through the National Registration Database "NRD".

¶ 34 While Enforcement Counsel's frustration is understandable, the difficulty in obtaining documentary evidence does not inform their admission.

¶ 35 A third reason given by Macaulay that is particularly apt in this case, is that allowing great amounts of irrelevant or, we will add, repetitious evidence, clutters the proceedings and makes it difficult for the decision maker to focus on the real issues in the case. We would add that it also makes it more difficult for the Respondent who is self-represented.

¶ 36 Trying to introduce a large volume of repetitious documentation respecting whether the Respondent engaged in promotional and solicitation activity in relation to Qnext and SCSG impacts the fairness of the proceedings especially where, as here, the Respondent has no legally trained advocate to object to its admissibility on his behalf. Unless the Panel rules on this documentation before final argument, the Respondent may be under the misconception that the documents in issue are reflective of an aspect of the case to which he must respond. With this in mind, the Panel has done its best to make clear the reason for our ruling on the documentation.

The other documents on which the Panel expressly reserved

¶ 37 Counsel for IIROC seek to introduce into evidence Fosters' "Policies and Procedures Manual" ("Manual") which is 71 pages long. In the Manual, reference to "the Rules" means "the IIROC Rulebook, UMIR and the various instruments and Policies set out by the provincial securities commissions."

¶ 38 The Panel is of the opinion that most of this Manual has no bearing on these proceedings and should not be admitted. There are, however, four sections that appear to have some relevance that will be admitted. They are as follows:

> **2.6 Gifts and Gratuities**
>
> Employees of Foster including members of their immediate families may not, directly or indirectly, take, accept or receive bonuses, fees, commissions, gifts, gratuities, excessive entertainment or any other similar form of consideration, from any person, business or association with which Fosters does or seeks to do business.
>
> **2.7 Business Activities outside of Fosters**
>
> This is often referred to as an "OBA". Outside Business Activity. It includes any business or employment other than your position with Fosters ….(…whether you are paid or not).
>
> Any Fosters staff who have an "OBA" need to advise the CCO or the UCP.
>
> An OBA at Fosters should not create any conflict of interest with your duties at Fosters or with regard to an client's account activity at Fosters. In general, an OBA should not involve Foster's clients (there are a few exceptions, like having an insurance licence). It should also not take up so much of your time that it interferes with your job duties at Fosters.
>
> Registered staff will have the OBA reported to IIROC.
>
> All OBA's will be reviewed by the CCO and/or the UDP. While most OBA's are likely to be approved, the firm reserves the right to prohibit any OBA.
>
> **2.12 Email**
>
> All email communications relating to the firms business should be done via your Foster's email address. Do not email clients from your phone, home, etc. (unless you cc: yourself at your Fosters email).

All the email sent to or from a "@fostersgroup.ca" email is retained in a permanent archive. Both Fosters and regulators expect all email to or from clients to be in the archive.

2.13 Referral Agreement

If a person or a company wishes to refer potential clients to Fosters, we need to enter into a written referral agreement with them and provide disclosure to the client.

…..

In general, an Advisor should not solicit someone for business (e.g. to be their client) once they become aware that the person is already a Fosters client.

¶ 39 Another type of document on which the Panel expressly reserved are emails from Mr. Scali to the Respondent, culminating on November 11, 2019, respecting IIROC's attempts to interview him. The co-operation or lack thereof by the Respondent is a procedural matter and not part of IIROC's allegations. It is not a substantive matter with which these proceedings are concerned. It is apparent from the documentation in evidence that IIROC took other steps to obtain information respecting this proceeding. The Respondent's evidence is now before the Panel. The Panel declines to admit the emails at IIROC's Enforcement Compendium Book Ex 1, Tab 5.

¶ 40 For these reasons, the Panel rules that the remainder of the documents listed in Schedule A, not specifically admitted into evidence, are excluded and not admitted into evidence.

¶ 41 In order to assist the Respondent with respect to his written submissions, the Panel requests that he be provided with a Book of Exhibits containing the exhibits the Panel has admitted into evidence organized chronologically.

Dated at Toronto, Ontario this 11 day of November 2021.

Karen Weiler

Steven Garmaise

Stuart Livingston

Schedule A

Staff Compendium – Volume 2 tabs to be included in evidence:

Solicitation	Investment Details
2 – 98	104 – 116
196	118
219 & 220	120 – 195
222	197 – 218
225	221
227	223 & 224
229 – 236	226
240 – 243	228
246	237 – 239
248	244 & 245
254	247

Solicitation	Investment Details
261	250 – 252
264 – 266	258 – 260
267	268
269 – 273	274 & 275
276 & 277	278
279 – 281	282 & 283
284 & 285	286
287 – 289	290
291	293 & 294
297	301
298 – 300	304
303	306
315	313
317 – 320	321 – 323
324 - 325	326
327	328
331	330
345	332 – 336
348	338 – 344
355 – 360	347
362	349 – 353
	360 & 361
	363 & 364