# Re DiCostanzo

**IN THE MATTER OF:**

**The Rules of the Investment Industry Regulatory Organization of Canada**

**and**

**Neil DiCostanzo**

2022 IIROC 10

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

Heard: August 16-20, 2021 and November 1-2, 2021 in Toronto, Ontario
Decision: May 18, 2022
Reasons for Decision: May 18, 2022

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

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# DECISION ON THE MERITS

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**OVERVIEW**

¶ 1 These are the reasons for decision for the liability portion of an IIROC hearing held pursuant to a Notice of Hearing dated December 11, 2020.

¶ 2 The Respondent was a registered representative with Foster & Associates Financial Services Inc. (Fosters). Chris Foster is the CEO of Fosters. Between December 2016 and March 2018, the Respondent is alleged to have contravened IIROC Dealer Member Rule 18.14(1)(c). It provides:

> 18.14 (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 The rule allows a firm to supervise the activities of a salesperson and to make sure that conflicts of interest and potential client confusion are identified and addressed. When outside business activity, also called an activity "off the books", takes place, it cannot be monitored and the protection provided for in securities regulation is missing.[1] The rule also protects the integrity of the securities market and the

[1] See *Trueman (Re)*, 2016 IIROC 29 at paras. 2-3, 21 and *Hoshizaki (Re)*, 2017 IIROC 40 at para. 11

reputation of the Dealer Member.[2]

¶ 4 The Respondent is alleged to have contravened the rule by arranging for subscription agreements and the issuance of subscription certificates in respect of two private companies, QNext and Sustainable Growth Strategic Capital Corp. (SGSCC) without informing Fosters and obtaining the firm's approval.

¶ 5 The Respondent does not dispute that he carried on activities relating to QNext and SGSCC. His position is that he advised Foster he would be "working with" the two companies. He disputes that his activities were not approved.

¶ 6 The substantive issue for us to decide is whether IIROC has proven its case against the Respondent.

¶ 7 The second issue before the Panel arises out of the fact that Enforcement Staff chose not to call Chris Foster, the CEO of Fosters as a witness in presenting its case in chief. Chris Foster is the author of three unsworn documents that Enforcement Staff introduced into evidence. They are, an email terminating the Respondent on March 24, 2018 for "undisclosed business activities", the Notice of Termination, and Chris Foster's report to the Board dated March 29, 2018. The Report states that on March 23, 2018, Foster discovered that" the Respondent had struck an arrangement with Meadowbank Asset Management to receive a secret commission for $12,000." Meadowbank is an exempt Market Dealer with whom the Respondent's wife had an arrangement to receive a commission for securing investments in SGSCC. Chris Foster's report continues: "Subsequent digging through Fosters email archive showed that the Respondent had also been doing multiple tranches of a private placement for QNext."

¶ 8 The Respondent submits that as the documents are hearsay, in order for the documents to be admitted into evidence, Enforcement Staff had to show that their admission was necessary, that they were reliable and that their probative value outweighed their prejudicial effect. In other words, he submits that the requirements for the principled exception to the rule against the reception of hearsay evidence used by courts applies to this hearing and, since these requirements were not considered and met, Chris Foster's documentary evidence should be disregarded. As a result, the Respondent's evidence that Chris Foster knew and approved of his activity in relation to the two companies is not directly contradicted and should be accepted. IIROC has failed to prove its allegations.

¶ 9 The Respondent submits in the alternative that he had no opportunity to cross-examine Chris Foster on the key issue, whether Chris Foster approved his conduct. Enforcement Staff made a tactical decision to rely on the documents instead of calling Chris Foster to testify. He says this is unfair and he was denied natural justice.

¶ 10 Natural justice or procedural fairness is entirely dependent on context. One of the factors that informs our decision is IIROC's Consolidated Enforcement Examination and Approval Rules (IIROC's Rules). Rule 8203 (3) specifically permits the reception of documents into evidence at the discretion of the hearing panel even although that evidence would not be admissible in a court of law. Thus, the Respondent's argument that the Hearing Panel could not receive documentary evidence unless it met the test for the admissibility of hearsay evidence in a court cannot succeed. The Respondent's submission that he was denied procedural or natural justice because Enforcement Staff did not call Chris Foster when presenting its case in chief thereby depriving him of an opportunity for contemporaneous cross-examination also fails. Considered in context, Enforcement Staff's omission to call Chris Foster does not mean the hearing was unfair. The Respondent does not suggest he was taken by surprise when Enforcement Staff did not call Chris Foster. As a result of the disclosure made, the Respondent knew the case he had to meet. Moreover, had the Respondent indicated he wished to cross-examine Chris Foster before giving his evidence and asked for assistance, under IIROC's Rules, the Panel could have made an order that would have been responsive to the Respondent's request and enabled him to cross-examine Chris Foster. A further consideration is that when Enforcement Staff sought to call Chris Foster to give

[2] *Hoshizaki (Re)*, *ibid*

evidence at large in reply, the Respondent objected to Chris Foster giving evidence and the Panel upheld his objection. Considered in context, the hearing was not unfair to the Respondent, and he was not denied procedural fairness or natural justice.

¶ 11 As to whether Mr. DiCostanzo had the approval of Fosters for his activities, the Respondent's evidence is that Chris Foster knew the Respondent was "working with" private companies with a view to bringing in an initial public offering for the firm. This vague and broad statement cannot be taken to meet the first requirement of the Rule, namely, that he informed Fosters of his outside business activities. It was not a statement of substance. The Respondent's statement is not the same thing as telling Chris Foster that he would be facilitating subscription agreements for shares in QNext and SGSCC for clients and that he and his wife received money for their efforts. Thus, IIROC has proven that the first requirement, that the Respondent inform Fosters, his Dealer Member, of his outside business activities was not met. Inasmuch as the Respondent did not inform Fosters of the substance of his activities, Fosters did not approve them. The documentary evidence filed indicates that when Chris Foster learned that the Respondent had received money in relation to QNext and that the Respondent's wife received a commission in relation to SGSCC that was not disclosed to the firm, he strongly disapproved and terminated the Respondent. IIROC has proven that the Respondent infringed Rule 18.14(1)(c).

¶ 12 In expanding on our conclusion below, we will address the natural justice or procedural fairness issue first.

## II. THE RESPONDENT WAS NOT DENIED NATURAL JUSTICE

### a) The Requirements of Natural Justice or Procedural Fairness

¶ 13 The Respondent submits that "It is unfair that Enforcement Staff has had the opportunity to cross-examine DiCostanzo and test his credibility, while at the same time DiCostanzo has not had the opportunity to test Foster's evidence and his credibility by way of cross-examination." He relies on *Manikam v. Toronto Community Housing Corporation*, [2019] O.J. No. 1620 (Div. Ct.) in support of his position that, as a result, he was denied procedural fairness. At paragraph 21 of its decision in *Manikam*, the Divisional Court states that where a party raises an issue of procedural fairness, the court should determine the issue taking into account the five factors enunciated in the Supreme Court of Canada's decision in *Baker v. Canada (Minister of Citizenship & Immigration)*, 2 S.C.R. 817 at paras. 23-27. They are:

1) the nature of the decision being made and the process followed in making it;
2) the nature of the statutory scheme and the terms of the statutes pursuant to which the body operates;
3) the importance of the decision to the individual affected;
4) the legitimate expectations of the person challenging the relevant decision; and
5) the choices of procedure made by the agency itself.

¶ 14 Overall, Justice L'Heureux-Dubé emphasized that procedural fairness is flexible and entirely dependent on context.

### b) Adopting a contextual approach and applying the factors in *Baker*, the proceeding was not unfair to the Respondent

¶ 15 The content of the duty of fairness increases in proportion to the importance of the particular decision to the person it affects. Justice L'Heureux-Dubé cited Justice Dickson's observation in *Kane v Bd. of Governors of U.B.C.*, [1980] 1 SCR 1105 at para. 25 of her reasons that "A high standard of justice is required when the right to continue in one's profession or employment is at stake." This is often the case in IIROC disciplinary hearings. Although in this particular case, the Respondent is no longer employed in his profession, the hearing

has an impact on his future in the investment industry and a finding that he has transgressed the Rule may subject him to significant fines.

¶ 16 With respect to process, Justice L'Heureux-Dubé stated at para. 23:

> The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determination that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial mode will be required by the duty of fairness.

¶ 17 As in a trial in a civil proceeding, IIROC must prove its allegations on a balance of probabilities. The determination made in an IIROC hearing is based on evidence that is "sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."[3] "The Rules of Procedure set out the rules that govern the conduct of IIROC's enforcement proceedings and regulatory review hearings to secure fair and efficient proceedings and just determinations."[4] They resemble a simplified version of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. IIROC's Rules provide that at the request of a party, a hearing panel may provide for any procedural matter that is not provided for in IIROC requirements or the Rules of Procedure by analogy to its rules, "or by reference to the rules of practice or procedure of another SRO or professional association or to the rules applicable to a securities regulatory authority." An IIROC panel's decision is also subject to review. In some respects, such as these, the process resembles judicial decision-making.

¶ 18 The IIROC Rules govern IIROC's procedures including hearings. Rule 8203(3) provides:

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

¶ 19 Rule 8203(3) gives a hearing panel the discretion to admit evidence that would not be admissible as evidence in a court. Nonetheless, the Respondent submits that the rules governing the reception of evidence in court apply here and, that for documentary evidence to be admissible, the principled exception to the hearsay rule must apply. In support of this submission, he relies on *Chang (Re)*, 2013 IIROC 48 at para. 22, which states:

> Rule 13 of IIROC's Rules of Practice and Procedure establishes that the unsworn evidence of a witness who is not available for cross examination should not generally be accepted in IIROC hearings. We recognize that we have the power under the Rules to make exceptions but there must be a substantial reason for doing so. Otherwise, Rule 13 becomes meaningless. It may be appropriate, for example, to allow hearsay evidence of unsworn statements where it meets the principled exception to the hearsay rule.

¶ 20 The Chang decision references Rule 13, a former version of the IIROC Rules.

Rule 13.3 stated:

> Subject to Rule 13.4 witnesses at a hearing shall provide oral testimony under oath or solemn affirmation.

Rule 13.4 stated:

> The Hearing Panel may allow the evidence of a witness or proof of a particular fact or document to be given by sworn statement, unless an adverse party reasonably requires the attendance of the witness at the hearing for cross-examination.

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[3] *Papp (Re)*, 2016 IIROC 41 at para. 12 citing *F.H. v. McDougall*, [2008] S.C.J. No. 54 at para. 40

[4] Rule 8401(1)

¶ 21 Inasmuch as Rule 13.3 followed the procedure for giving evidence in court, it was logical that the interpretation given to Rule 13.4 also suggested that exceptions to the hearsay rule adopt the approach of the courts, such as the principled exception to the hearsay rule. The current Rule 8423, which governs the conduct of a hearing on the merits has a subsection that is similar to the former Rule 13.4:

> 8423(10) A hearing panel may permit a party to present the evidence of a witness or proof of a particular fact or document by affidavit, unless another party reasonably requires the attendance of the witness at the hearing for cross-examination.

¶ 22 However, Rule 13.3, the default rule requiring that witnesses shall provide oral testimony under oath or affirmation, no longer exists. The mandatory requirement that a witness give oral evidence under oath or by way of solemn affirmation has been replaced by Rule 8203(4) which states: "A hearing panel may require testimony or other evidence to be given or proven under oath or affirmation." Rule 8203(3) which specifically permits the reception of documentary evidence whether or not under oath or affirmation and whether or not admissible as evidence in a court must be given effect. In light of the very clear direction brought about by Rule 8203(3), it would no longer be proper to read into the current rule 8423(10) the requirement that the principled exception to the hearsay rule in court apply as was done in *Chang (Re)*. Considered in context, *Chang (Re)* no longer has value as a precedent. To hold otherwise would be to ignore the clear, plain and unambiguous wording of Rule 8203(3). Other decisions have confirmed that hearsay evidence is admissible. See *Fridgant (Re)*, 2014 IIROC 47 at para. 14 where the hearsay evidence of clients of the Respondent was admitted; *Phillips &Watson (Re)*, 2013 IIROC 52 at para. 19 where, at the opening of the hearing, the hearing panel ruled that the hearing would proceed in the absence of the Respondents and that hearsay evidence would be admitted. That evidence consisted principally of documentary evidence prepared by the Respondents. More recently in *Jones (Re)*, 2020 IIROC 29 at paras. 37- 39, the panel held that Enforcement Staff's decision not to call as witnesses two clients of the Respondent but to prove its case by way of hearsay evidence did not affect the fairness of the hearing. In that case, the witnesses could not have spoken to the real issue in the case, which was the Respondent's obligation to advise and seek approval for his outside business activity.

¶ 23 We wish to emphasize that the discretion in Rule 8203(3) is given to the hearing panel. Enforcement Staff ought not to proceed in the presentation of their case by way of unsworn documentary evidence without first asking the panel to exercise its discretion to admit evidence in this manner. We would also observe that the general principle articulated in Rule 8403(2) that "No proceeding, document or decision in a proceeding is invalid by reason of a defect or other irregularity in form" does not override the rules of natural justice.

¶ 24 To summarize, while Enforcement Staff are entitled to choose the method by which to present their case, it is for the Hearing Panel to decide whether to exercise its discretion to admit unsworn documentary evidence that would not be admissible in court, to accept evidence presented by affidavit unless cross-examination is reasonably required or to adopt a process requiring that the evidence be given under oath or affirmation. The choice of procedure by Enforcement Staff must be fair. Indeed, Rule 8403(1) states:

> 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.

¶ 25 As the Supreme Court held, fairness is contextual. The five factors in *Baker* provide guidance, and we now turn to the application of the remainder of the *Baker* factors albeit not in the order listed above. First, we take into consideration the legitimate expectations of the Respondent. Legitimate expectations of procedural protections may arise out of the conduct of the prosecution or enforcement authority. Here, Rule 8418 requires that before the commencement of a hearing on the merits, Enforcement Staff serve a list of the witnesses they intend to call to testify at the hearing as well as a summary of the evidence the witness is expected to give and a witness statement signed by the witness or a transcript of the witness's recorded statement. The Respondent does not suggest that Chris Foster was on any such list. Thus, we cannot say

Enforcement Staff's conduct engendered a legitimate expectation that Chris Foster would be called.

¶ 26 Another factor is consideration of IIROC's choice of procedure and, at para. 27, Justice L'Heureux-Dubé states that it deserves "important weight". We take this to be a reference to the body of jurisprudence, such as her decision in *R. v. Cook*, [1997] 1 SCR 1113 respecting the prosecution's discretionary authority as to the manner in which it presents its case. While the decision in *Cook* is from a criminal rather than regulatory context, it is of assistance in that it was concerned with the failure of the Crown to call the victim as a witness in an assault case. As Justice L'Heureux-Dubé noted, the main ground for objecting to the prosecution not calling a witness has historically been that of fairness.[5] She discussed three factors affecting fairness that not calling a witness could cause: 1) trial by ambush, 2) loss of the ability to cross-examine, and 3) in the event the defendant called the witness, the loss of the defendant's right to address the trier of fact last. Justice L'Heureux-Dubé held that the rules now governing Crown disclosure of all relevant information have extinguished any rationale compelling the Crown to call witnesses based on the need to bring all material facts forward.[6] She also held that the contemporaneous cross-examination of a witness is not necessary to guarantee a fair trial.[7] Other procedures that would allow the defendant to cross examine an important witness not called by the prosecution would be for the defence to call the witness as an adverse witness or, in the case of a hostile witness, to ask the court to exercise its discretion to call the witness. Similarly, if the defence were to lose the right to address the trier of fact last by calling a witness that the Crown failed to call, that would be a factor for the court to consider in deciding whether or not to call the witness on its own motion.[8]

¶ 27 In this case, it is obvious that Chris Foster is an important witness. While the Panel expressed the opinion in its reasons of November 4, 2021 at para. 21, that the omission of Enforcement Staff to call Chris Foster when presenting its case in chief was not the most efficient, concise manner of presenting its case, considered in context, the proceeding as a whole was not unfair to the Respondent.

¶ 28 The Respondent does not suggest that he was taken by surprise because Chris Foster was not called before he testified. Nor was he ambushed. The Respondent knew the case that would be presented against him from the documentary disclosure he received. If a party wishes to raise a procedural issue, such as the method Enforcement Staff proposes to adopt to prove its case, or object to a particular witness not being on the list to be called, a party may request a prehearing conference by serving and filing a notice at least 14 days before the proposed date for the prehearing conference.[9] At the prehearing conference, a hearing panel may consider any issue that may assist in a just and expeditious resolution of the proceeding.[10] The issues include issues relating to the admissibility of evidence and objections.[11] The hearing panel at a prehearing conference may, in accordance with Rule 8416(7)(vii) "exercise the authority conferred by section 8208 to require a person to attend and give evidence".

¶ 29 In this matter, disclosure and proceeding hearings were held on April 1, April 19, and May 17, 2021. The Respondent's request to have the proceedings dismissed or stayed was dismissed. The Respondent did not raise the issue of Enforcement Staff calling Chris Foster.

¶ 30 With respect to the Respondent not being able to cross-examine Chris Foster because Mr. Foster was not called at the hearing, IIROC Rules provide further remedy. Had objection been made when Enforcement Staff sought to introduce the unsworn documentary evidence of Chris Foster, the Panel could have exercised

[5] *R. v. Cook*, [1997] 1 SCR 1113 at para. 32
[6] *Ibid* at para. 37
[7] *Ibid* at para. 41
[8] *Ibid* at para. 42
[9] Rule 8416(1)
[10] Rule 8416(6)
[11] Rule 8416(6)(iv)

its discretion pursuant to Rule 8403(3)(iii), which states:

> 8403(3) Subject to a requirement in the Rules of Procedure, a hearing panel has authority to control the process of a proceeding before it and may exercise any of its powers on its own initiative or at the request of a party, including,
>
> (iii) admitting or requiring presentation of evidence on oath, affirmation or otherwise […].

¶ 31 The Panel is not aware of anything in the Rules of Procedure that would have prevented it from exercising its power to require Enforcement Staff to present Chris Foster's evidence on oath or affirmation pursuant to Rule 8403(3)(iii) instead of by way of unsworn documentary evidence. Had a timely objection by the Respondent been made to the reception of Chris Foster's unsworn documentary evidence, the Panel could have made an order that would have put him in a position to cross-examine Chris Foster.

¶ 32 We recognize that the Respondent was self-represented and that he may not have appreciated all the niceties of IIROC's Rules of Procedure. That said, had the Respondent simply told the Panel he wished to cross-examine Chris Foster or raised the complaint now made, at any stage of the proceeding, the Panel could also have exercised its power to require Chris Foster to attend in person and give oral sworn testimony pursuant to Rule 8421(1), which provides:

> 8421(1) At any stage of a proceeding, a party may request a hearing panel to exercise its authority under section 8208 to require a person to attend and give evidence or produce documents at a hearing.

¶ 33 Instead, over the many months that the hearing proceeded, as well as a lengthy adjournment granted to enable the Respondent to call witnesses, he did not ask that Chris Foster be required to attend and give evidence orally so that he could be cross-examined.

¶ 34 When Enforcement Staff attempted to call Chris Foster to give evidence at large by way of reply to the Respondent's evidence, the Respondent opposed the request. His objection was upheld on the basis that the unanticipated issue that arose from the Respondent's evidence was collateral for which no reply is permissible and because, in asking for permission to call Chris Foster at large, Enforcement Staff was attempting to split its case.[12] The Respondent also opposed a second request by Enforcement Staff to call Chris Foster as a witness in reply. In doing so the Respondent understood that he would not be cross-examining Chris Foster. The position the Respondent now advances is the very opposite of his position at the hearing. The Respondent's written submissions do not acknowledge his earlier objection and explain why he has changed his position.

¶ 35 As stated earlier, the focus of the reasoning of Justice L'Heureux Dubé in *Cook* concerning the omission of the prosecution to call the victim of the assault is on fairness to the defendant. The Respondent's submission that he was denied procedural fairness because Enforcement Staff did not call Chris Foster ignores the requirement in *Baker* that a contextual approach be adopted. Adopting a contextual approach and applying the *Baker* factors to this case, the fact Enforcement Staff did not call Chris Foster to give oral evidence when presenting its case in chief was not unfair to the Respondent. The submission that the Respondent was denied procedural or natural justice fails.

## III. THE RESPONDENT'S ACTIVITY CONTRAVENED THE REQUIREMENTS OF RULE 18.14 THAT HE INFORM FOSTERS OF HIS OUTSIDE BUSINESS ACTIVITY AND OBTAIN APPROVAL

¶ 36 The Respondent's position is that he did inform Fosters of his outside activities. The witnesses called by the Respondent were not in a position to testify with respect to this issue, and therefore we will only refer to the Respondent's evidence.

¶ 37 In his email to IIROC dated April1, 2019, which was introduced into evidence by Enforcement Staff as

[12] Reasons for Decision, dated November 4, 2021

part of its evidence in chief, the Respondent wrote:

> When Chris Foster took over as CEO of Fosters, he never really understood my business […]. 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 [sic] Ceo's of companies […]
>
> I knew a successful CEO from QNext who gave me referrals to meet his network of many potential clients, many of whom he referred me to, and these referrals opened accounts with me at Fosters.
>
> This is what Chris Foster did not understand, he never got to know me or my business, and he assumed I was doing other things by reading into my emails. 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.

¶ 38 In testifying in chief, the Respondent also said that he told Chris Foster "that [he] was working with a few private companies, such as QNext and Sustainable Growth, in helping them connect with investors. QNext would give future IPO business to Fosters, and the CEO would refer clients to Fosters as well, the CEO of QNext."[13] In cross-examination, the Respondent said "[…] I had a conversation with Mr. Chris Foster about what I was doing" and "I talked to Chris Foster about QNext and Sustainable Growth directly."[14] The Respondent testified that to the best of his recollection, the conversations with Chris Foster took place in 2016.[15]

¶ 39 Previously, in September 2015, Fosters brokered a private placement in QNext. The Respondent received two modest commissions of $1,200 and $3,000 respectively in respect of this private placement. Following the private placement, the Respondent continued to be in regular contact with various representatives of QNext, including its President, Anthony DeCristofaro. QNext continued to have an account at Fosters as at 2018. However, no QNext shares were sold through Fosters from October 2015 onwards. There were, however, a number of private sales of QNext shares facilitated by the Respondent.

¶ 40 The evidence that the Respondent facilitated the completion of Subscription Agreements and Subscriber Certificates after the September 2015 private placement is overwhelming. See for example:

- an email from Lin Petruccelli at QNext to the Respondent on December 14, 2016 containing a subscription agreement dated November 7, 2016, and signed by Anthony DeCristofaro, President of QNext on November 14, 2016 for 1,234,567 shares in QNext at $0.81 a share (Exibit 2, Tab 104);
- an email from the Respondent to a client dated December 19, 2016 enclosing a subscription form for 31,000 Qnext shares at $0.81 each for proceeds of $25,110 (Exhibit 5, Tab1);
- an email from the Respondent dated September 22, 2017 enclosing a subscription form for QNext, stating "I can help you fill it out when we meet next week";
- an email chain containing an email to a client dated Nov 1, 2017 with the subject line "QNext shares will be transferred to you at .68 a share" and stating "The share transfer of $70,000 worth of QNext shares works out to 102941 shares at .68 a share" (Exhibit 2, Tab 208).

¶ 41 The same email chain contains an email dated Nov 2, 2017 from the Respondent to the client asking for a personal cheque to be made out to MB Management Inc. for the QNext shares. In cross-examination, the

[13] Hearing Transcript, August 19, 2021 at p. 5, lines 1-5
[14] Hearing Transcript, August 20, 2021 at pp. 28-29
[15] *Ibid* at p. 29, lines 18-19

Respondent explained that MB Management was a company that had "some relationship with QNext" that had invested in QNext and wanted to sell a certain amount of its QNext shares. The Respondent had a friend who wanted some of the shares and he "was the liaison in between". The Respondent testified that [T]hey ended up giving me that fee, which was…they considered it a referral fee, but it was just a thank you for giving me that opportunity to help them."[16]

¶ 42 Enforcement Counsel for IIROC then asked:

> Q. "Mr. DiCostanzo, the $5000, was this to be split with Fosters or just for you?"
>
> A. "No, that was…. that was given to me. Like I said, this was off Fosters, this was not part of Foster."[17]

¶ 43 When asked if he had used the term "off Foster", Mr. DiCostanzo said he did not say it was "off Foster".[18] He then said in reference to the cheque for $5,000:

> …[T]hey gave me this. They sent this to me without my knowledge after the fact in terms of bank related. So I had no idea I was going to receive this. It was deposited, like they wanted to know which account to send it to me and I didn't want them to send it to me….I said I don't want to receive anything. And what ended up happening is they ended up sending it and when they ended up sending it I had no way of…. they said we want to thank you for doing this for us, and I used those funds to help my father-in-law.[19]

¶ 44 The Respondent further testified that he did not want to receive a cheque. After initially denying that he deposited funds amounting to $5,000, the Respondent ended up testifying:

> …[T]hey were going to send me something and I said, no, I don't want to receive it. They ended up sending me an automatic direct deposit… I deposited the funds because I needed to help my father-in-law. I lost two uncles from the same cancer. That's all I have to say.[20]

¶ 45 The Respondent testified that he was not getting paid for the QNext private placements. Rather, "the benefit was clients that knew about Anthony and Qext, based on his track record alone, would benefit in the long run."[21]

¶ 46 The Respondent's evidence is contradicted by a separate email from Lin Petruccelli, copied to Anthony DeCristofaro, sent to the Respondent and dated December 21, 2017, which reads:

> Nello, what is the total amount you are bringing in tomorrow? This way I can prepare your "fee" cheque ahead of time so that Anthony doesn't have to be bothered with it. Thanks[22]

¶ 47 When cross-examined about this email, the Respondent replied that that there was no "fee" cheque and he never accepted any fees.[23]The email from Lin Petruccelli of December 21, 2017 was sent approximately a year after Petrucelli's email to the Respondent of December 14, 2016 confirming a November subscription agreement for shares at $0.81 a share. If the Respondent had been refusing to accept payment for his activities in regard to Qnext, an inference can be drawn that Petrucelli would have known this and would not be referring to a "fee" cheque.

¶ 48 In response to an inquiry from the Respondent to his assistant about an email he had been expecting, the assistant advises in an email dated September 28, 2017: "It might have gone to your sympatico (the

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[16] Hearing Transcript, August 20, 2021 at p. 15, line 8 to p. 16, line 8
[17] *Ibid* at p. 16 lines 10 - 14
[18] *Ibid* at p. 16, line 20
[19] *Ibid* at p. 17, lines 9 - 20
[20] *Ibid* at p. 20, lines 14-17 and p. 21, lines 1 - 3
[21] Hearing Transcript, August 19, 2021 at pp. 32-33, lines 23 - 24
[22] Hearing Transcript, August 20, 2021 at p. 21, lines 10 - 14
[23] *Ibid* at p. 21, lines 17 - 18

Respondent's personal email) address because you said you want to keep QNext email separate from Foster." In the absence of any explanation, the logical inference would be that keeping QNext emails separate from Fosters made it more difficult for Fosters to be aware of the Respondent's activity and to supervise it.

¶ 49 The Respondent's explanation is that he had been having difficulty with his Fosters' email and he said: "I wanted to keep a copy for both emails, my home email and my Foster's email just in case something happened to the Foster's email again." However, the Respondent also stated he did not regularly copy his sympatico email for QNext matters.[24] Thus, the Respondent's explanation is self contradictory and conflicting.

¶ 50 The Respondent submits that Fosters were aware of his activity in relation to QNext because, while the back office was able to register share certificates in Qnext at the time of the private placement in 2015, in 2016, National Bank would not accept them. One of QNext's closest relatives bought shares in QNext and wanted to deposit their QNext shares at Fosters and have QNext certificates registered in their name.[25] An email exchange indicates that Trisha Bjorklund acknowledged that the QNext certificates could not be registered. Referring to an email from Trisha Bjorklund with comments on it, the Respondent testified at p. 21:

> If you read that one, in those comments it says in plain English, "cert for client Reeve can't be registered". So that's another example from Trisha Bjorklund who was the administrative assistant in the office who takes care of transfers and certificates that were received, she made a note that this client that invested could not deposit the certificate.

¶ 51 In his examination in chief, the Respondent explained:

> I went to Mr. Foster and told him I would be working with private companies like QNext and SGSCC, because I had no idea why they would not accept these certificates.

¶ 52 At no time did the Respondent testify that he specifically told Fosters of his continued and ongoing activity in obtaining share subscriptions in QNext for clients, that he facilitated the transfer of shares in QNext to the clients and that Fosters expressly approved of his activity. The Respondent denies receiving money for his efforts. The documentary evidence indicates he did. He did not disclose these amounts to Fosters, and thus Fosters could not have approved of the Respondent receiving the money. Quite apart from all the other evidence, the Respondent's receipt of this money is a transgression of the rule.

¶ 53 The Respondent wishes us to infer that Fosters approved of him selling shares of QNext off the books and records of Fosters because Fosters could no longer deposit QNext shares. However, on December 21, 2016, the Respondent received the following email from Trisha Bjorklund:

> The following message came from the back office on September 27th. Pursuant to the reception of the above-mentioned security in your client account, we require the certificate to be reregistered under NBCN INC ITF CLIENT NAME and we have not been able to locate the company or its transfer agent. Consequently, would you kindly obtain additional information about this company from the client?
>
> The back office reached out to us, and Karen then reached out to you, and in turn we assumed that you contacted the clients to obtain more information. Presumably you're close to the company, could you please contact them and find out why they haven't responded to NBCN's request to have the certificates re-registered?

¶ 54 Enforcement Staff submits that "This email does not confirm that QNext shares could not be registered on the books and records of Fosters. It sets out what needs to occur for that to happen." We agree with this submission.

[24] Hearing Transcript, August 19, 2021 at pp. 38 - 39
[25] *Ibid* at p. 14

¶ 55 In relation to SGSCC, the Respondent arranged for his wife to have a referral agreement dated February 16, 2018 with Meadowbank Asset Management, an Exempt Market Dealer, in which she would receive a 5% referral fee for referring investments. A corporate client of Fosters made a $250,000 investment in SGSCC through Meadowbank Asset Management. The Respondent wrote an email to Meadowbank stating in reference to the subscription form: "[P]lease scan me a copy of the completed subscription for my client." The use of the words "my client" is an indication that the Respondent facilitated an investment in Meadowbank for one of his clients. On February 26, 2018, the Respondent sent an email to the CEO of Meadowbank with the subject line "Invoice for Referral Form", which attached an invoice. In cross-examination, the Respondent stated that the only reason he sent the invoice from the Fosters office was because he did not have a printer at home.

¶ 56 The Respondent's wife received a commission of $12,500 from Meadowbank Asset Management for facilitating this investment. The Respondent did not dispute that his wife received the commission and simply stated: "I was not aware that both of us could not receive any referral fees at all."

¶ 57 Fosters' Annual Enforcement Staff Questionnaire required the Respondent to disclose all "outside business" even if previously disclosed to Fosters. In answer to the question "Are you involved in any outside business or employment other than your position with Fosters?", the Respondent answered "No". His explanation was: "My understanding of outside business activity was doing business outside the brokerage industry."[26]

¶ 58 However, the Questionnaire also contained a section labeled "General Policies Applicable to all Registered Enforcement Staff" that contained the following notice:

> **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.
>
> […]

¶ 59 The wording of this statement would put a reasonable person on notice that facilitating a subscription agreement for shares in QNext and receiving remuneration or money required approval from the firm.

¶ 60 The Questionnaire signed by the Respondent also refers to a Procedures Manual and states:

> **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 reviewed and am familiar with those sections of the manual that apply to my job/duties at Fosters.

¶ 61 Portions of the Fosters Policies and Procedures Manual were admitted into evidence.

¶ 62 Section 2.6 of the manual states:

> **Gifts and Gratuities**
>
> Employees of Fosters including members of their immediate families may not, directly or indirectly, take, accept or receive bonuses*, fees, commissions …or any other similar form of consideration from any person, business or association with which Fosters does or seeks to do business.* [Emphasis added]

¶ 63 Section 2.7 of the Policy and Procedures manual defines business activities outside of Fosters or outside business activity and states that "It includes any business or employment other than your position

[26] *Ibid* at p. 37, lines 1 - 4

with Fosters…whether you are paid or not."

¶ 64 Above the signature line on the Questionnaire is a statement:

> I confirm that I have access on my computer to the most recent Fosters Policy and Procedures Manual (dated June 2015). Additionally, I have reviewed and am familiar with those sections of the manual that apply to my job/duties at Fosters.

¶ 65 Despite his attestation, the Respondent denied that he had access to the Policies and Procedures Manual on his computer. If that is so, he ought not to have signed the Questionnaire as he did without taking steps to obtain and familiarize himself with it. He is not excused from his obligation because he made a false declaration.

¶ 66 The evidence of the Respondent that Fosters approved of his activities in relation to QNext and SGSCC is also contradicted by Fosters' documentary evidence that when Fosters became aware that the Respondent or his wife had received money for facilitating subscriptions in the two companies, he was terminated.

¶ 67 Finally, it makes no sense that Fosters would forego the loss of their share of commissions from private placements resulting from the Respondent's activity or approve his spending a significant amount of his time in promoting these two companies simply in the hope that at some nebulous point in the future they would obtain fees from an initial public offering of shares in the two companies.

¶ 68 To summarize, the fact that Chris Foster may have known in a general sense that the Respondent hoped to "work with" the two companies with a view to bringing in an IPO to Fosters does not reasonably lead to the conclusion that their conversation was the functional equivalent of the required knowledge much less approval under the Rule. See *Tassone (Re)*, 2018 IIROC 46 at paras. 22-29 in which the panel held that while Tassone's manager may have known something in a general sense of the Respondent's involvement in an investment, there was no persuasive evidence that they knew anything of substance about it and he had not obtained the firm's approval. Accordingly, he was found to be in breach of the Rule.

## IV. CONCLUSION

¶ 69 For the reasons given, we conclude that Enforcement Staff has proven that the Respondent contravened Dealer Member Rule 18.14 as alleged in the Statement of Allegations.

¶ 70 We remit this matter to the IIROC National Hearing Officer to schedule a sanctions hearing. If no agreement to sanctions is reached within two weeks of the date of this decision, IIROC Enforcement Staff shall deliver Sanction Submissions within one week thereafter and Mr. DiCostanzo shall deliver his Responding Submissions within one week thereafter. If this timetable is not feasible, either party may request the National Hearing Officer to arrange a telephone conference with the Panel to consider amendments to the timetable.

Dated at Toronto, Ontario this 18 day of May 2022.

Karen Weiler

Steven Garmaise

Stuart Livingston