



Citation: *Crandall v. Investment Industry Regulatory Organization of Canada*, 2019 NBFCS 7

PROVINCE OF NEW BRUNSWICK
FINANCIAL AND CONSUMER SERVICES TRIBUNAL
IN THE MATTER OF THE *SECURITIES ACT*, S.N.B. 2004, c S-5.5

Date : 2019-06-07
Docket : SE-001-2017

BETWEEN :

Robert Crandall,

Applicant,

-and-

Investment Industry Regulatory Organization of Canada,

Respondent.

DECISION

Restriction on publication: This Order has been anonymized to comply with the *Right to Information and Protection of Privacy Act*, S.N.B. 2009, c. R-10.6.

PANEL : Judith Keating, Q.C., Chair of the Tribunal
Raoul Boudreau, Vice-Chair of the Tribunal
Gerry Legere, Tribunal member

DATE OF HEARING: September 10-11, 2018

WRITTEN REASONS: June 7, 2019.

I. DECISION

1. The decisions of the IIROC panel identified as *Crandall (Re)*, 2016 IIROC 18 (Merits decision) and *Crandall (Re)*, 2016 IIROC 37 (Sanctions decision) are rescinded pursuant to section 44 of the *Securities Act*, S.N.B. 2004, c S-5-5 [*Securities Act*]. A stay of proceedings is ordered.

II. OVERVIEW

2. Mr. Crandall had been registered as an investment advisor since 1983, first with the *Investment Dealers Association of Canada* and then with the *Investment Industry Regulatory Organization of Canada (IIROC)*. From June 2006 to October 2011, he was employed as an investment advisor with *Wellington West*. In late 2011, *National Bank Financial (NBF)* acquired *Wellington West*. Mr. Crandall was employed with NBF from October 2011 to early July 2012.
3. Following a complaint, IIROC Staff began an investigation into Mr. Crandall's handling of the Complainant's accounts. IIROC Staff then began enforcement proceedings against Mr. Crandall, which culminated in hearings before an IIROC panel.
4. The IIROC panel found in its Merits decision dated May 26, 2016 that Mr. Crandall engaged in excessive trading and unauthorized discretionary trading in the accounts of the Complainant and made unsuitable recommendations for the accounts of the Complainant. In its October 3, 2016 Sanctions decision, the IIROC panel imposed various sanctions on Mr. Crandall including a fine of \$150,000 and a 5-year prohibition on re-registration with IIROC.
5. On January 23, 2017, Robert Crandall filed a Request for Hearing seeking a review by this Tribunal of the IIROC panel's decisions. Mr. Crandall raises several grounds for review in his Request for Hearing, including that he was denied access to documents in the IIROC proceedings. The documents Mr. Crandall maintains are necessary to his defence are his notepads, the Wellington West and NBF telephone message books and telephone message slips, his copy of trade tickets with his notes thereon, all correspondence with the Complainant, e-mails with the Complainant, and the log of incoming and outgoing mail. He has requested these documents for the period covered by IIROC Staff's allegations, being June 2006 to July 2012.
6. On October 13, 2017, this Tribunal issued a *Summons to Witness* to Mr. C, the manager of NBF, ordering him to attend a motion hearing and to produce the following documents: (1) the personal and work notes and notepads of Robert Crandall from 2006 to July 1, 2012; (2) the trade tickets pertaining to the Complainant's accounts with notes inscribed thereon by Robert Crandall from 2006 to July 1, 2012; (3) telephone notepads showing all incoming and outgoing phone calls between Robert Crandall and the Complainant from 2006 to July 1, 2012; (4) e-mails exchanged between Robert Crandall and the Complainant from 2006 to July 1, 2012; (5) a copy of all recorded incoming and outgoing mail between Robert Crandall and the Complainant or the Complainant's Holding Company from 2006 to July 1, 2012; and (6) all correspondence to the Complainant or the

Complainant's Holding Company regarding quarterly reviews from 2006 to July 1, 2012.

7. Mr. C, on behalf of NBF, appeared at a December 15, 2017 motion before the Tribunal. He did not produce any of the documents referred to in the Summons to Witness. He testified at the motion hearing that NBF did not find any documents. He also questioned the existence of the documents, and in particular the existence of Mr. Crandall's notepads.¹
8. On January 19, 2018, we severed Mr. Crandall's ground for review dealing with access to documents (disclosure) from the remaining grounds in his *Request for Hearing* and ordered that this ground for review would proceed to a hearing before any other grounds for review.
9. On February 8, 2018, the Tribunal issued a *Notice of Hearing* setting April 25-26 and 30, 2018 for the hearing of the disclosure issue. On April 10, 2018, counsel for IIROC requested an adjournment of the hearing advising that NBF had located additional potentially relevant documents. IIROC requested an adjournment to review these documents and make the appropriate disclosures. The Tribunal adjourned the review hearing to September 10-12, 2018.
10. This hearing and review deals solely with the ground for review dealing with access to documents and is being conducted pursuant to section 44 of the *Securities Act*.

III. ISSUES

11. The issues are the following :
 - A. What is the appropriate standard of review?
 - B. What level of procedural fairness is required in IIROC's enforcement proceedings?
 - C. Did the failure of IIROC Staff to provide Mr. Crandall with the documents he alleges were essential to his defence breach the duty of procedural fairness?
 - D. What is the appropriate remedy?

IV. ANALYSIS

A. Standard of Review

12. IIROC Staff contends that the Tribunal must adopt a consistent approach to the review of IIROC decisions because IIROC is a national organization that holds disciplinary hearings throughout Canada. According to IIROC Staff there is no principled basis upon which to afford a different standard of review to decisions made by IIROC in New Brunswick than that afforded to decisions made in other

¹ December 15, 2017 motion transcript – Exhibit R, Document R-7 at 11.

provinces in Canada. IIROC Staff argues that the application of different standards of review to IIROC decisions in different provinces would create issues of fairness and consistency. IIROC members throughout Canada should be able to expect a similar approach to IIROC disciplinary decisions at the hearing and review level.

13. Mr. Crandall has not provided a position on the standard of review.
14. We agree with IIROC Staff's contention that the Tribunal should adopt a consistent approach to the review of IIROC decisions.
15. The Ontario Securities Commission has consistently followed the reasoning in *Canada Malting Co.(Re)*, (1986) 9 OSCB 3565 at paragraphs 23-25 in determining the applicable standard of review for reviewing a self-regulatory organization's decisions. Based on that decision, a decision of a self-regulatory organization [SRO] such as IIROC is reviewed on a reasonableness standard of review, unless the applicant demonstrates one of the following five factors, justifying the application of a correctness standard and a hearing *de novo*:
 - a) The SRO has proceeded on an incorrect principle;
 - b) The SRO has erred in law;
 - c) The SRO has overlooked some material evidence;
 - d) New and compelling evidence is presented to the [tribunal] that was not presented to the SRO; or
 - e) The SRO's perception of the public interest conflicts with that of the [tribunal].
16. Securities commissions in British Columbia and Alberta have adopted a similar framework for the review of SRO decisions.²
17. In Québec, a similar approach is taken by the *Financial Markets Administrative Tribunal* and its predecessor the *Bureau de décision et de révision*. However, these tribunals recognize procedural fairness as an added sixth criterion. The recent decision of *Sultani c. Organisme canadien de réglementation du commerce des valeurs mobilières (OCRCVM)*, 2018 QCTMF 114, involved a review of a decision of an IIROC panel by the *Financial Markets Administrative Tribunal*. The applicants alleged errors of law and breaches of the duty of procedural fairness. The Tribunal held that no deference was owed to the IIROC panel in those circumstances and the Tribunal would conduct its own analysis according to the standard of correctness. That Tribunal adds that it would have been appropriate to proceed by way of a hearing *de novo*.
18. We prefer the approach taken by the *Financial Markets Administrative Tribunal*. We would add, however, that the *Supreme Court of Canada* states that the determination of whether an administrative decision-maker has adhered to procedural fairness requirements does not require an assessment of a standard of review. Rather, the exercise in which the reviewing body must engage is

² See *Lowe (Re)*, 2014 BCSECCOM 458; *Lamontagne, Re*, 2009 ABASC 490.

to assess the procedures and safeguards required in a particular situation and whether there was adherence with those procedures and safeguards.³ As stated by the *Federal Court of Appeal* in *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paragraph 56 : “procedural fairness is not sacrificed on the altar of deference”.

19. Turning now to the within matter, the sole issue in this hearing and review is whether the failure of IIROC Staff to provide Mr. Crandall with the requested documents was a breach of the duty of procedural fairness. Based on the above caselaw, we owe no deference to the IIROC panel. Given that the issue of procedural fairness could not be decided on the basis of the evidence contained in the *Record of the Decision-making Process*, we invited the parties to present additional evidence.

B. Level of Fairness Required

20. IIROC Staff submits that a high level of procedural fairness was required in the enforcement proceedings.
21. Mr. Crandall has not provided a position on this point.
22. As a starting point, public decision makers must act fairly in coming to decisions that affect the rights, privileges or interests of an individual.⁴ In *Baker v Canada*, Justice L’Heureux-Dubé highlights that the values underlying the duty of procedural fairness “relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision.”⁵
23. The content of the duty of procedural fairness is flexible and variable and is to be determined on a case by case basis according to the following non-exhaustive list of factors:
- (a) the nature of the decision being made and procedures followed in making it;
 - (b) the nature of the statutory scheme;
 - (c) the importance of the decision to the individual affected;
 - (d) the legitimate expectation of the individual challenging the decision; and
 - (e) the choices of procedure made by the agency.⁶
24. It is not necessary in these review proceedings to analyze whether the duty of procedural fairness

³ *Moreau-Bérubé v New Brunswick (Judicial Council)*, [2002] 1 SCR 249 at 74; *C.U.P.E. v Ontario (Minister of Labour)*, [2003] 1 SCR 539.

⁴ *Dunsmuir v New Brunswick*, 2008 SCC 9 at 79; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

⁵ *Baker*, *supra* note 4 at 28.

⁶ *Baker*, *supra* note 4, at 21.

exists and its nature. The caselaw stipulates that a high degree of procedural fairness is required in IIROC enforcement proceedings.⁷

25. We agree that a high degree of procedural fairness was required in the IIROC proceedings. As previously mentioned, IIROC is in agreement with this. These proceedings were conducted in a similar fashion to judicial proceedings, with the presentation of evidence through witnesses, cross-examination of witnesses and legal argument. In addition, the IIROC proceedings had important consequences for Mr. Crandall's ability to continue working in his chosen profession. Numerous courts have recognized that a high degree of procedural fairness is required when the right to continue in one's profession or employment is at stake in the context of disciplinary proceedings.⁸
26. The ultimate question remains whether Mr. Crandall knew the case he had to meet and had a full and fair chance to respond to the allegations.

C. Breach of the Duty of Procedural Fairness

27. We turn now to whether IIROC Staff had the obligation to provide Mr. Crandall with the documents he requested and, in the affirmative, whether the failure to do so was a breach of the duty of procedural fairness.
28. Mr. Crandall maintains that the following documents are essential to his defence and that IIROC had the obligation to obtain these documents and provide them to him:
 - (a) personal and work notes and notepads of Robert Crandall from 2006 to July 1, 2012;
 - (b) trade tickets pertaining to the Complainant or the Complainant's Holding Company with notes inscribed thereon by Robert Crandall from 2006 to July 1, 2012;
 - (c) telephone notepads showing all incoming and outgoing phone calls between Robert Crandall and the Complainant and the Complainant's Holding Company from 2006 to July 1, 2012;
 - (d) e-mails exchanged between Robert Crandall and the Complainant or the Complainant's Holding Company from 2006 to July 1, 2012;
 - (e) a copy of all recorded incoming and outgoing mail between Robert Crandall and the Complainant or the Complainant's Holding Company from 2006 to July 1, 2012; and

⁷ *Northern Securities Inc. et al.*, 2013 ONSEC 48; *Georgakopoulos (Re)*, 2008 IIROC 26.

⁸ *Kane v University of British Columbia*, [1980] 1 SCR 1105; *Sherwood v New Brunswick (Minister of Justice)*, [1985] NBJ No. 268; *Knight v Indian Head School Division No. 19* [1990] 1 SCR 653.

(f) all correspondence to the Complainant or the Complainant's Holding Company regarding quarterly reviews from 2006 to July 1, 2012.

29. IIROC Staff submits that Mr. Crandall was provided with *Stinchcombe* level disclosure before the merits hearing and that all information available to IIROC Staff was provided to him. IIROC Staff submits that Mr. Crandall knew the case he had to meet and had a full and fair chance to respond. They submit that Mr. Crandall has not provided the Tribunal with any explanation or analysis regarding the manner in which the alleged notes would or could have exonerated him in respect of the specific allegations made. IIROC Staff further contends that given the allegations and the evidence presented in respect of them, the alleged notes, if they existed, could not have changed the result. According to IIROC Staff, the fact that Mr. Crandall thinks the notepads could offer a defence is an indication that he continues to fail to appreciate the scope and nature of an investment advisor's duty to clients, and in particular elderly clients.

(i) Do the Documents Exist?

30. Given IIROC Staff's allegation that the notepads may not have existed at all, we begin our analysis with whether these documents existed at the time of the IIROC proceedings.
31. We start our analysis with two key pieces of evidence that are relevant to all documents requested by Mr. Crandall. When NBF acquired *Wellington West* in late 2011, it took over all of Wellington West's archived records.⁹ Mr. C, the manager of NBF for New Brunswick, admitted during the December 15, 2017 hearing of the motion that the acquisition of *Wellington West* by NBF may have had an impact on securing the documents requested by Mr. Crandall.¹⁰

Notepads

32. Mr. Crandall left NBF in early July 2012. He could not take any notepad or other client-related documentation with him when he left NBF as this is prohibited by IIROC Rules.¹¹
33. Mr. Crandall mentioned his notepads at least six times during the IIROC investigation and enforcement proceedings. He first requested his notes from *National Bank Financial* in July 2013.¹² At his January 17, 2014 interview by IIROC Staff, during IIROC's investigation, Mr. Crandall indicates that he kept notes on notepads and that these contained his discussions with all his clients.¹³ During the enforcement proceedings, he again mentions his notepads at the October 7, 2015 motion, in a November 4, 2015 correspondence to IIROC counsel requesting documents, at the December 10, 2015

⁹ Review transcript at 189.

¹⁰ December 15, 2017 motion transcript – Exhibit R, Document R-7 at 11.

¹¹ October 7, 2015 motion transcript – Record at 259, 325 and 378; Review transcript at 25-26 and 82.

¹² December 10, 2015 motion transcript - Record at 327.

¹³ January 17, 2015 interview transcript – Record at 3685-3720.

motion and again at the January 14, 2016 case conference.¹⁴ At the December 10, 2015 motion, Mr. Crandall described his notes as being lined similar to a Hilroy notepad.¹⁵

34. In these review proceedings, Mr. Crandall continues to maintain the existence of his notepads. He first mentions his notepads in his *Request for Hearing* filed on January 23, 2017, which commenced these review proceedings. He also testified at the 2018 review hearing that he took notes on notepads.¹⁶
35. Mr. Crandall has also been constant in the location of his notepads. He maintained in his November 4, 2015 letter, at the December 10, 2015 motion, at the January 14, 2016 Case conference, at the February 2016 merits hearing and at the September 2018 review hearing that his notepads were stored offsite at Iron Mountain storage.¹⁷
36. Witness B.P.'s testimony at the review hearing corroborates Mr. Crandall's contention that his notepads existed. She worked with Mr. Crandall from 2008 to 2013. She was his assistant and the branch administrator at *Wellington West* and his administrative assistant at NBF. Witness B.P. testified at the review hearing that Mr. Crandall took notes on a letter-sized lined notepad with glue at the top. She added that he kept his notepad on his desk and put it away nightly in a drawer.¹⁸
37. Witness B.P. testified that when NBF took over Wellington West, she was instructed to archive all outdated documents (anything that wasn't from the current year or the previous year) and send them to Iron Mountain for offsite storage. She boxed up Mr. Crandall's daily notepads and wrapped a large elastic around them to keep them together in case any pages separated. Mr. Crandall was the only advisor who provided notepads for storage.¹⁹
38. We found Witness B.P. forthright and credible. She has no vested interest in the outcome of the review proceedings and her employment relationship with Mr. Crandall ended five years ago. For these reasons, we attribute great weight to her testimony.
39. Witness S.D.'s evidence also corroborates Mr. Crandall's evidence. They worked together at Wellington West from 2002 to October 31, 2009. Witness S.D. testified at the merits hearing before the IIROC panel that Mr. Crandall kept very thorough hand-written notes. He reiterated this evidence at the review hearing.²⁰

¹⁴ October 7, 2015 motion transcript, Record at 259; December 10, 2015 motion record – Record at 285-287; December 10, 2015 motion transcript – Record at 321-369; January 14, 2016 case conference – Record at 377-378.

¹⁵ December 10, 2015 motion transcript – Record at 330.

¹⁶ Review transcript at 83.

¹⁷ November 4, 2015 letter – Record at 285-288; December 10, 2015 motion transcript – Record at 325-331; January 14, 2016 case conference – Record at 377; February 2016 merits hearing – Record at 4276; September 2018 review hearing transcript at 83.

¹⁸ Review transcript at 12-13 and 45.

¹⁹ *Ibid.* at 14-15 and 41.

²⁰ *Ibid.* at 57-61; Merits hearing – Record at 4514-4515.

40. In addition, it is a general practice for advisors to take notes regarding their trades. Witness S.D. testified at the review hearing that it was a general practice for advisors to take notes which would indicate the authority to trade and details of the trade such as the name of the security, the quantity and the day and time of the trade.²¹ Mr. C, the manager of NBF Moncton branch, testified that it was customary for advisors to keep notes of discussions with clients.²² This was also the evidence of Witness J.N., a senior legal counsel with NBF.²³
41. We note also that IIROC requested that NBF search for Mr. Crandall's notepads on January 30, 2014, and again on December 10, 2015 in the context of its investigation and enforcement proceedings. These searches did not uncover the notepads.²⁴
42. Following our December 15, 2017 motion hearing at which Mr.C produced no documents, IIROC again requested that NBF search for the notepads. Witness J.N., senior legal counsel at NBF, identified an additional 49 boxes at Iron Mountain storage which could potentially be related to these proceedings. The critical nature of this find will be discussed later in this decision in the section dealing with the sufficiency of efforts. Amongst these boxes were 42 boxes Witness B.P. had sent to storage in 2012. Witness J.N. and her team reviewed each page of the 49 boxes and did not find any notepads.²⁵ Mr. Chen, the IIROC investigator, and his team also reviewed the content of the 49 boxes with the same outcome.²⁶
43. Based on the supporting testimony of the witnesses BP and SD as well as the repeated requests and descriptions of the notepads claimed by Mr. Crandall, we find that Mr. Crandall had notepads and that these were placed in storage at Iron Mountain. There is no evidence to the contrary, other than the inability to locate the notepads. The continual identification of materials by NBF, post hearings, does nothing to support IIROC staff's position as to the non existence of the notepads.
44. The evidence establishes that Mr. Crandall's notepads were never disclosed to him and are now either lost or have been destroyed:
- NBF and IIROC have been unable to locate the notepads.
 - Witness B.P. testified at the review hearing that in 2012 she boxed up 42 boxes of material and sent them to Iron Mountain storage. To the best of her recollection, all of Mr. Crandall's notepads were placed in one box. Exhibit R-20 is the Iron Mountain list of these boxes.²⁷

²¹ Review transcript at 63.

²² December 15, 2017 motion transcript – Exhibit R, Document R-7 at 8; Review transcript at 128.

²³ Review transcript at 154-155.

²⁴ Exhibit R, Document R-6.

²⁵ Review transcript at 143-144.

²⁶ *Ibid.* at 159.

²⁷ *Ibid.* at 39-40.

- Five boxes on Exhibit R-20 are described as containing message books. According to Witness B.P., these boxes could have contained either Mr. Crandall's notepads or the telephone message books. Witness B.P. further testified that Mr. Crandall's notepads could have been placed in other boxes that were not described as containing message books.²⁸
- The last box on Exhibit R-20, box 650277629, is described as containing message books. That box was destroyed on December 31, 2016. This was seven months after the issuance of the Merits decision by the IIROC panel.
- Iron Mountain could not locate a list for boxes sent to storage before 2011.²⁹

Trade tickets

45. Mr. Crandall maintains that it was his practice to keep hard copies of trade tickets for trades in his clients' accounts and to make notes thereon regarding the trade. Mr. Crandall has mentioned needing his copy of the trade tickets for the Complainant's accounts at least three times in the IIROC proceedings: in a November 4, 2015 letter to IIROC, at the December 10, 2015 motion, and again at the February 2016 merits hearing.³⁰
46. In his November 4, 2015 letter to IIROC, Mr. Crandall indicates his copy of the trade tickets could be either onsite or offsite. A month later, at the December 10, 2015 motion, he maintains that his trade tickets from 2006 to 2012 were packed away into files and stored at Iron Mountain.³¹
47. There was no evidence from Witness B.P. nor Witness S.D. regarding the existence of the trade tickets. We also note that there is no evidence suggesting the trade tickets requested by Mr. Crandall did not exist.
48. We therefore find that the trade tickets with Mr. Crandall's notes thereon existed.
49. IIROC Staff asked NBF to produce trade tickets sold by Mr. Crandall in relation to the Complainant's accounts on four occasions in the IIROC proceedings: January 30, 2014, March 21, 2014, December 10, 2015 and December 17, 2015.³²
50. In a January 27, 2016 letter to IIROC, NBF explains that it conducted an additional search for the trade tickets in the Complainant's accounts in December 2015. NBF indicates that it had located the trade tickets. However, at the February 2016 merits hearing, Yu Chen testified that NBF provided only a few dozen printed trade tickets with respect to the Complainant's accounts. In addition, those trade

²⁸ *Ibid.* at 23-24 and 39-40.

²⁹ *Ibid.* at 149.

³⁰ December 10, 2015 motion record – Record at 285-288; December 10, 2015 motion transcript – Record at 325; Merits hearing – Record at 4463-4464.

³¹ December 10, 2015 motion record – Record at 285-287; December 10, 2015 motion transcript – Record at 325.

³² Exhibit R, Document R-6 at 271, 278, 290 and 292-294.

tickets had signatures on them, but no notes. (Record, pp. 4463-4464)

51. A careful review of IIROC's requests reveals that IIROC requested trade tickets in respect of the Complainant's accounts, with no mention of Mr. Crandall's handwritten notes. This became apparent at the December 10, 2015 motion before the IIROC panel when Mr. Crandall indicated that the trade tickets disclosed to him were those with his supervisor's initials thereon and not his copy of the trade tickets.³³
52. Mr. Chen testified at the 2018 review hearing that he can confirm "with a certain level of -- not 100, 99 percent -- 95 percent of confidence" that all of IIROC's requests for documents from NBF are detailed in Exhibit R, Document R-6.³⁴ From Exhibit R, we find that IIROC Staff never requested Mr. Crandall's copy of the trade tickets with his notes thereon during the IIROC proceedings.
53. We find further that Mr. Crandall's copies of the trade tickets with his notes thereon were not produced during the IIROC proceedings.
54. We turn now to whether Mr. Crandall's copy of the trade tickets were produced during these review proceedings.
55. Exhibit R-20, which was obtained from Iron Mountain after the Tribunal issued the Summons to Witness on October 13, 2017, lists the 42 boxes Witness B.P. sent to storage in 2012. There are five boxes identified as containing "Crandall trade tickets":
 - Box 650276934 with a date range of 5/1/2010 to 12/31/2010;
 - Box 650276935 with a date range of 1/1/2009 to 12/31/2009;
 - Box 650276946 with a date range of 1/1/2007 to 12/31/2007;
 - Box 650276959 with a date range of 1/1/2009 to 8/31/2009; and
 - Box 650276962 with a date range of 5/1/2008 to 12/31/2008.
56. These trade tickets cover the periods of January 1, 2007 to December 31, 2007, May 1, 2008 to December 31, 2009 and May 1, 2010 to December 31, 2010.
57. IIROC provided the trade tickets pertaining to the Complainant's accounts on May 17, 2018 as part of the additional disclosure uncovered in April 2018. In her letter, counsel for IIROC indicates that she is providing all trade tickets related to the Complainant's accounts. (Exhibit « A », Document A-2)
58. We did not receive any testimony at the review hearing regarding whether these trade tickets contained Mr. Crandall's handwritten notes. However, given the description of the boxes on Exhibit R-20, we find this is likely. We therefore find, on a balance of probabilities, that Mr. Crandall received the trade tickets pertaining to the Complainant's accounts with his handwritten notes written thereon

³³ December 10, 2015 motion transcript – Record at 351-352.

³⁴ Review transcript at 188.

for the periods of January 1, 2007 to December 31, 2007, May 1, 2008 to December 31, 2009 and May 1, 2010 to December 31, 2010.

59. We further find that Mr. Crandall has not received his copy of the trade tickets pertaining to the Complainant's accounts for the periods of July 2006 to December 31, 2006, January 1, 2008 to April 30, 2008, January 1, 2010 to April 30, 2010 and January 1, 2011 to June 30, 2012.

Telephone message books

60. Mr. Crandall requested the telephone logs and his telephone message slips on at least three occasions in the IIROC proceedings. He first mentions the missing telephone message pads at the October 7, 2015 motion. In his November 4, 2015 letter to IIROC counsel, he requests the telephone notepads showing incoming calls for the period of 2006 to July 1, 2012. Mr. Crandall indicates that IIROC rules required that these be maintained. At the December 10, 2015 motion, Mr. Crandall again indicates that he wants the phone logs which detail incoming phone calls. Mr. Crandall indicates that IIROC Staff has produced telephone bills which do not show incoming calls.³⁵
61. Witness B.P.'s evidence corroborates Mr. Crandall's evidence. She testified that she maintained a spiral bound telephone message log. This was the type of message book that generated carbon copies, which remained in the message book after the pink top slip was provided to the recipient of the message. She would only generate a telephone message slip when a call came in and the advisor was unavailable to take a call. Witness B.P. testified that Mr. Crandall was the only advisor to keep the pink message slips for filing.³⁶
62. Witness B.P. testified that after the takeover of *Wellington West* by NBF, she boxed up the Wellington West telephone message logs and Mr. Crandall's telephone message slips and sent them to storage. She did not place her message books and Mr. Crandall's message slips in the same box. She placed Mr. Crandall's telephone message slips in chronological order by year and elasticized them before putting them in boxes. These message slips were in relation to all of Mr. Crandall's clients, including the Complainant.³⁷
63. Mr. C testified at the December 15, 2017 motion hearing that he did not think NBF maintained telephone logs.³⁸ We find that he was not aware of the practice of the NBF Queen Street Branch, having only attended at the branch on a single occasion between the time it was taken over from *Wellington West* in late 2011 and Mr. Crandall's departure in July 2012. Mr. C further testified at the review hearing that he did not oversee Mr. Crandall's day-to-day activities.³⁹ There were many

³⁵ October 7, 2015 motion transcript – Record at 232 and 259; December 10, 2015 motion record – Record at 286; December 10, 2015 motion transcript – Record at 325.

³⁶ Review transcript at 14-16, 55 and 91-92.

³⁷ *Ibid.* at 14-15 and 54.

³⁸ December 15, 2017 motion transcript - Exhibit R, Document R-7 at 12.

³⁹ Review transcript at 100.

inconsistencies throughout Mr. C's evidence, namely in his December 8, 2017 Affidavit, his testimony at the December 15, 2017 motion hearing and his testimony at the September 2018 review hearing. We therefore find his evidence not reliable and afford it no weight.

64. As with the trade tickets, there is no evidence that IIROC requested the telephone message logs or message slips from NBF during their investigation or enforcement proceedings. There is no request for the telephone message logs in Exhibit R, Document R-6. We repeat that Mr. Chen testified at the review hearing that Document R-6 represents with "99 percent – 95 percent of confidence" the totality of IIROC's requests for documents from NBF.
65. However, there is incontrovertible evidence that the telephone message logs and telephone message slips existed during the IIROC proceedings. During IIROC and NBF's search for documents in the spring of 2018, Witness J.N. and Mr. Chen found telephone message books and pink telephone message slips in the 49 additional boxes of documents found in Iron Mountain storage.⁴⁰
66. Mr. Chen testified that of these 49 boxes, five boxes on Exhibit R-20 (the list of 42 boxes Witness B.P. sent to Iron Mountain storage in 2012), had descriptions indicating that they contained message books. He found eight message books in the first four boxes. He could not review the contents of the fifth box, box 650277629, as it had been destroyed.⁴¹
67. Mr. Chen also found multiple stacks of telephone message slips bundled together with an elastic in Box 41 on Exhibit R-20 (Box Number 650277628).⁴² This box was not described as containing telephone message books or telephone message slips.⁴³ This confirmed Witness B.P.'s testimony that she bound Mr. Crandall's message slips with an elastic and that she placed these in a separate box from her message books.⁴⁴
68. On May 17, 2018, IIROC provided Mr. Crandall with excerpts of the telephone message books and the telephone message slips pertaining to the Complainant.⁴⁵ Exhibit R, Document R-9 contains the message books and pink message slips located in 2018.
69. Mr. Crandall testified at the 2018 review hearing that there are missing message books as the message books disclosed do not cover the entire period of 2006 to 2012.⁴⁶ Witness B.P. also testified that the telephone message books and slips in Exhibit R, Document R-9 do not represent the totality of the telephone message slips pertaining to the Complainant.⁴⁷

⁴⁰ *Ibid.* at 143-144 and 168.

⁴¹ *Ibid.* at 168-170.

⁴² *Ibid.* at 169 and 174 .

⁴³ Exhibit R-20.

⁴⁴ Review transcript at 14-15 and 54.

⁴⁵ Exhibit A, Document A-2.

⁴⁶ Review transcript at 92-93.

⁴⁷ *Ibid.* at 52-53.

70. We accept Mr. Crandall's and Witness B.P.'s evidence. We afford particular weight to the testimony of Witness B.P. as she was the keeper of the telephone message books.
71. We find that the descriptions of the four boxes containing message books do not cover the entire period of July 2006 to June 2012, the span of the IIROC allegations :
- Box 650276943 has a date range of January 1, 2007 to December 31, 2009;
 - Box 650276946 has a date range of January 1, 2007 to December 31, 2007;
 - Box 650277618 has a date range of January 1, 2009 to December 31, 2009; and
 - Box 650277619 has a date range of January 1, 2008 to December 31, 2008.⁴⁸
72. The periods of January 2006 to December 31, 2006 and January 1, 2010 to July 2012 are missing. Box 650277629, which was destroyed and contained message books, does not contain all the missing message books as it only covered the period of January 1, 2006 to December 31, 2006.⁴⁹
73. A final piece of evidence convinces us that there are missing message logs and telephone slips. As the spiral message books contain a carbon copy of the pink message slips provided to Mr. Crandall, they should contain all the individual slips in Exhibit R, Document R-9. This is not the case. There are two pink message slips from the Complainant that are not contained in the telephone message books in Document R-9: a July 15 slip⁵⁰ and a November 26 slip.⁵¹
74. We conclude that the missing message books and telephone message slips are either lost or have been destroyed.

E-mails between Mr. Crandall and the Complainant

75. Mr. Crandall requested copies of his correspondence with the Complainant on November 4, 2015 and again at the December 10, 2015 motion.
76. Witness B.P. testified at the review hearing that all e-mails were kept and archived annually according to the year. However, she did not provide any evidence indicating that Mr. Crandall and the Complainant corresponded by e-mail.⁵²
77. On August 28, 2013, in the course of their investigation, IIROC requested that NBF provide e-mail communications between Mr. Crandall and the Complainant. NBF responded on October 30, 2013 that there were no e-mail communications between Mr. Crandall and the Complainant.⁵³

⁴⁸ Exhibit R-20.

⁴⁹ *Ibid.*

⁵⁰ Exhibit R, Document R-2 at 4.

⁵¹ Exhibit R, Document R-9 at 46.

⁵² Review transcript at 13.

⁵³ Exhibit R, Document R-6 at 256 and 265.

78. The Complainant also testified at the IIROC merits hearing that she did not communicate with Mr. Crandall by e-mail.⁵⁴
79. On a balance of probabilities, we find there is insufficient evidence to conclude that e-mails between Mr. Crandall and the Complainant existed.

Record of incoming and outgoing mail

80. Mr. Crandall has requested the log of incoming and outgoing mail at least twice. In a November 4, 2015 correspondence, Mr. Crandall requests from IIROC copies of the mail logs for incoming and outgoing mail from *Wellington West* and *National Bank* from July 2006 to July 2012. He again requests the mail logs showing incoming and outgoing mail at the December 10, 2015 motion. He further indicates that these mail logs had to be conserved for seven years and that they are in storage.⁵⁵
81. Again, Mr. Crandall's evidence is corroborated by Witness B.P. She testified at the review hearing that she would log incoming and outgoing mail in her capacity as branch administrator.⁵⁶
82. We find that the mail logs existed.
83. IIROC Staff did not request the mail logs in the course of its investigation or enforcement proceedings. Counsel for IIROC staff indicated at the December 10, 2015 motion before the IIOC panel that what they had produced were correspondences between Mr. Crandall and the Complainant rather than the mail logs.⁵⁷ There is no evidence of such a request in the Record or the exhibits introduced into evidence at the review hearing.
84. Neither was there evidence presented at the December 15, 2017 motion hearing or at the 2018 review hearing before us regarding IIROC's or NBF's efforts to specifically locate the mail logs in response to the *Summons to Witness*. This includes the testimony of Yu Chen and Witness J.N. at the review hearing.
85. We find that IIROC has not provided any mail logs for the period of 2006 to July 12, 2012.
86. Given the above, we conclude that neither NBF nor IIROC searched for the mail logs. We can only conclude that they were lost or have been destroyed.

Correspondence between Mr. Crandall and the Complainant

⁵⁴ Merits hearing – Record at 4348.

⁵⁵ December 10, 2015 motion record – Record at 285-288; December 10, 2015 motion transcript – Record at 326 and 357.

⁵⁶ Review transcript at 13.

⁵⁷ December 10, 2015 motion – Record at 357.

87. On November 4, 2015, Mr. Crandall requested copies of all of the correspondence between himself and the Complainant and the Complainant's company. He reiterated this request at the December 10, 2015 motion.⁵⁸
88. Counsel for IIROC indicated at the December 10, 2015 motion that they had requested all correspondence between Mr. Crandall and the Complainant and that they had received disclosure from NBF and provided it to Mr. Crandall.⁵⁹ We find that IIROC Staff requested that NBF provide e-mail communications between Mr. Crandall and the Complainant.⁶⁰
89. In addition, as with the mail logs, there was no evidence presented in the December 15, 2017 motion hearing nor the hearing to suggest that IIROC has specifically requested the correspondence from NBF in response to the Tribunal's October 22, 2017 Summons to Witness.
90. However, in its May 17, 2018 letter providing additional disclosure to Mr. Crandall, IIROC indicates that it is including the entire client files for the Complainant and the Complainant's Company. Counsel for IIROC indicates in this letter that the documents provided with her letter are a subset of the 49 boxes of documents that NBF identified and retrieved from its archived file records on April 9, 2018.⁶¹ Presumably, these client files should contain the correspondence between Mr. Crandall and the Complainant. There was no contradictory evidence.
91. We therefore find, on a balance of probabilities, that Mr. Crandall received the correspondence between himself and the Complainant on May 17, 2018. However, we note that this production comes more than two years after the IIROC merits hearing. We also note that it was not produced in response to the Tribunal's October 13, 2017 Summons to Witness.

(ii) Are the Documents Relevant?

92. We turn now to the issue of relevancy of the documents requested by Mr. Crandall. Given our findings with respect to the existence of the documents, we limit our analysis to the notepads, the trade tickets, the telephone message books and the mail log.
93. Mr. Crandall maintains that the documents were necessary for his defence. He argues that with these documents, he would have been able to successfully defend the allegations.
94. IIROC submits that the documents would not have changed the decision of the IIROC hearing panel. Thus, they do not constitute "compelling new evidence" justifying the Tribunal's interference with the IIROC panel's decision as set out in *Canada Malting Co.(Re)*, (1986) 9 OSCB 3566.

⁵⁸ December 10, 2015 motion record – Record at 285-288; December 10, 2015 motion transcript – Record at 330.

⁵⁹ December 10, 2015 motion transcript – Record at 358.

⁶⁰ Exhibit R, Document R-6 at 256 and 261.

⁶¹ Exhibit A, Document A-12.

95. We begin our analysis by reiterating that the “compelling new evidence” is not the applicable factor in the within review. As discussed under the standard of review section of this decision, we prefer Quebec’s approach to reviews of IIROC decisions, which recognizes a breach of the duty of procedural fairness as a sixth factor justifying the intervention of the reviewing body. The sole issue in this review is whether there was a breach of the duty of procedural fairness in the IIROC proceedings. As stated by the *Supreme Court of Canada*, this does not require an assessment of the standard of review. The exercise in which we must engage is to assess the procedures and safeguards required in the IIROC proceedings and whether there was adherence to those procedures and safeguards.⁶²
96. This brings us to IIROC Rule 8417(1) which requires Enforcement Staff to disclose “*all documents and things in IIROC’s possession or control that are relevant to the proceeding, including documents or things that are relevant to the respondent’s ability to make full answer and defence.*”⁶³
97. In *Re Hirani*, 2018 IIROC 33, an IIROC panel considered rule 8417 in the context of a request for production of additional documents by the respondent. The panel cited the following excerpt of IIROC’s Enforcement Disclosure Policy which deals with determining relevancy:
- Information is relevant for disclosure purposes if there is a reasonable possibility that it may be useful to the Respondent in making full answer and defence. This includes not only information that the Enforcement Department intends to rely upon to prove its case, but also information relating to the credibility of witnesses, the nature of the department's investigative process or any other issue that may be relevant to the Respondent's defence. These disclosure standards applicable to IIROC and its Enforcement Department are set out in R. v. Stinchcombe, [1991] 3 S.C.R. 326, which have subsequently been applied to various administrative proceedings. [Disclosure Policy, para. 4.1(a)]*
98. The *Ontario Securities Commission* applies the same relevancy test in its enforcement proceedings.⁶⁴ In *Agueci, Re*, 2012 CarswellOnt 15722 at paragraph 29, a panel of the *Ontario Securities Commission* stated that the disclosure obligation “*is a matter of fundamental justice based on fairness to respondents to permit them to make full answer and defence to the allegations against them.*” The panel added that Enforcement Staff should apply a low threshold of relevance in deciding what to disclose as they do not know what positions the respondents may take in response to the allegations.
99. In *Biovail Corp, Re*, 2008 ONSEC 14, a panel of the *Ontario Securities Commission* elaborated on documents that are relevant to the respondent. The panel states that it is relevant material that can be used to rebut Staff’s case, to advance a defence, or to assist in making tactical decisions.
100. We are also mindful of then Justice McLachlin’s statements regarding the limits of relevance as

⁶² *Moreau-Bérubé*, *supra* note 3 at 74; *C.U.P.E.*, *supra* note 3.

⁶³ Exhibit R, Document R-15.

⁶⁴ See *Biovail Corp., Re*, 2008 ONSEC 14; *Agueci, Re*, 2012 CarswellOnt 15722.

discussed in *R v O'Connor*, [1995] 4 S.C.R. 411 at paragraph 194 and cited with approval in various IIROC enforcement proceedings:

[194] Perfect justice in the eyes of the accused might suggest that an accused person should be shown every scintilla of information which might possibly be useful to his defence. From the accused's perspective, the catalogue would include not only information touching on the events at issue, but anything that might conceivably be used in cross-examination to discredit or shake a Crown witness. When other perspectives are considered, however, the picture changes. The need for a system of justice which is workable, affordable and expeditious; the danger of diverting the jury from the true issues; and the privacy interests of those who find themselves caught up in the justice system - all these point to a more realistic standard of disclosure consistent with fundamental fairness. That, and nothing more, is what the law requires.

101. Applying the above principles, Mr. Crandall must demonstrate a reasonable possibility that the notepads, the trade tickets, the telephone message books and the mail log may be useful to his ability to : (1) rebut IIROC Staff's case; (2) advance a defence; (3) make tactical decisions; (4) attack the credibility of witnesses; (5) attack IIROC Staff's investigative process; or (6) advance any other issue that may be relevant to his defence.
102. Mr. Crandall bears the burden of demonstrating that there is a reasonable possibility that the documents may be useful to his ability to make full answer and defence.

Allegation of Excessive Trading

103. The Notice of Hearing issued by IIROC Staff on April 23, 2015 sets out the following excessive trading allegation against Mr. Crandall:

Count 1

Between July 2006 and June 2012, the Respondent engaged in excessive trading in the accounts of [the Complainant] which was not within the bounds of good business practices and was unsuitable for the Complainant, contrary to IIROC Dealer Member Rules 1300.l(o) and (q) (IDA Regulations 1300.1 (o) and (q) prior to June 1, 2008).⁶⁵

104. IIROC Staff also alleges in the Notice of Hearing that Mr. Crandall had the discretion to charge a reduced commission for some or all of the transactions, but chose not to do so. As a result, all of the profits achieved in the accounts were stripped out in the form of commissions, leaving the accounts in a net loss position during the relevant period of July 2006 to June 2012.⁶⁶

⁶⁵ Notice of Hearing, Record at 1-2.

⁶⁶ Notice of Hearing, Record at 1-2.

105. Excessive trading is also identified as churning : “... a practice where a registered representative exercising control of the volume and frequency of trades, trades that account excessively in view of the character of the account and the customer’s objective...”⁶⁷ The ultimate question is whether the trades were made to generate commissions, without regard to the client’s interest.⁶⁸
106. The IIROC panel found that Mr. Crandall effected 777 transactions in the accounts of the Complainant between July 2006 and June 2012 which resulted in all the profits achieved in the Complainant’s accounts being stripped out by way of commissions. The IIROC panel also found that no discussions took place between the Complainant and Mr. Crandall on the subject of commissions, nor did Mr. Crandall exercise his discretion regarding a reduced commission for some or all of the transactions. The IIROC panel concluded that Mr. Crandall effected these transactions with a motivation of generating commissions as opposed to operating within the bounds of good business practice.⁶⁹
107. Mr. Crandall maintains that he had discussions with the Complainant, including changing from a commission based account to a fee-based account. According to Mr. Crandall, his notepads contained a record of these conversations. He also maintains that his notepads and his copy of the trade tickets contained notes of conversations with the Complainant as well as specifics of the trade. Mr. Crandall submits further that these documents prove that he did not effect 777 transactions in the accounts of the Complainant between July 2006 and June 2012.
108. According to IIROC Staff, Mr. Crandall’s notes would not show that he discussed with the Complainant the impact of the commission structure on the returns achieved in her accounts. IIROC Staff argues that common sense dictates that if the Complainant had been properly informed, she would most assuredly have selected a fee structure that did not entirely deplete any gains achieved in her accounts.
109. Mr. Crandall maintained that his trade tickets with his notes thereon were his “personal recollection of the trade”.⁷⁰ This would likely include details as the quantity of the security. There is no evidence to contradict this. We therefore conclude there is a reasonable possibility that the trade tickets with notes thereon would have been useful to Mr. Crandall’s ability to make full answer and defence.
110. Turning now to the notepads, IIROC maintained at the merits hearing that Mr. Crandall testified at his January 17, 2014 interview by IIROC Staff that he could not recall ever having discussions with the Complainant about the amount or effect of the commissions charged.⁷¹ Given Mr. Crandall’s refusal to testify at the merits hearing without his documents, counsel for IIROC read the following excerpt

⁶⁷ *Ryder v Osler, Wills, Bickle Ltd.* (1985) 49 O.R. (2d) 609 at p. 620 as cited in *Re Graydon*, [1987] T.S.E.D.D. No. 20 at 10.

⁶⁸ *Re Graydon*, *supra* note 67 at 18-19.

⁶⁹ Merits decision – Record at 4566.

⁷⁰ December 10, 2015 motion transcript – Record at 352.

⁷¹ Merits hearing transcript – Record at 3740.

of the interview transcript into the record as a purported admission by Mr. Crandall :

MS. MACKAWN: Then if we go over to page 61, the bottom of the page starting line 23. Question “Did you ever have any discussions with [the Complainant] about the commissions?” Over to page 62 “She never brought them up. I can’t recall ever, no.”⁷²

111. This statement provides an inaccurate portrait of Mr. Crandall’s testimony during his interview. Mr. Crandall was questioned earlier in the interview on the commission structure and why the accounts were set up as commission-based accounts. He testified:

THE WITNESS: That's the way she always operated accounts. I do recall approaching her on more than one occasion to go with a fee-based account but she decided that she'd rather go commission. Why? I don't know what her logic was behind that. It was up to her.

MR. CHEN: Do you recall when you had a conversation with the Complainant about that, you suggesting she should have fee-based accounts?

THE WITNESS: I believe it was when we first opened the account and she decided not to and then again a couple of years later. **Again, I don't have my notes for specific dates.**⁷³ (our emphasis)

112. In our view, this latter excerpt clearly establishes the relevance of Mr. Crandall’s notes to the excessive trading allegation.

113. We find, on the basis of the following evidence, that Mr. Crandall’s notes contained a daily log of his activities, including all telephone communications with his clients and details of the trades effected:

- Mr. Crandall indicated at the merits hearing before the IIROC panel that his notepads were a daily record of his communications with his clients and details of the trades effected. He reiterated at the review hearing that his notepads were a daily guide to his activities, including incoming and outgoing calls and buys and sells.⁷⁴
- Witness S.D. testified at the merits hearing and at the review hearing that Mr. Crandall recorded conversations with his clients on his notepads. He also recorded the authority to trade and details of the trade, including the name of the stock, the quantity, and the day and time.⁷⁵

⁷² *Ibid.* at 3740.

⁷³ January 17, 2014 interview transcript – Record at 3736-3737.

⁷⁴ Merits hearing transcript – Record at 4543-4545; Review transcript at 73.

⁷⁵ Merits hearing – Record at 4514-4515; Review transcript at 61-63.

- Witness B.P. also testified at the review hearing that Mr. Crandall’s notepads were a record of his daily activities. He would write the date at the top of the page and as he spoke to clients, he would make notes with regards to buys and sells. This included notes with stock symbols, important words that came up during a conversation with a client, and other information he wanted to remember.⁷⁶

114. In addition, Mr. Crandall testified at the review hearing that his notes demonstrate that he did not effect over 700 separate trades on behalf of the Complainant, as alleged by IIROC staff. Mr. Crandall maintains that in an electronic trading mechanism such as that operated by *Wellington West* and NBF, a sale of 1,000 shares of “XYZ Corporation” would be broken down for example as a sale of 100 shares 10 times.⁷⁷

115. Yu Chen prepared a table of the transactions in the Complainant’s accounts for the period of August 1, 2006 to May 31, 2012.⁷⁸ Our review of this table suggests that Mr. Crandall’s argument that a transaction got broken down into multiple entries may be possible. We are mindful that our role in this hearing is not to determine whether the IIROC panel erred in finding there were 777 transactions in the Complainant’s accounts from 2006 to 2012. Rather, our role is to determine whether there is a reasonable possibility that the documents requested by Mr. Crandall would have been useful to his ability to make full answer and defence to IIROC Staff’s excessive trading allegation. In Appendix A to this Decision, we have isolated, from the table prepared by Yu Chen, the instances of multiple “transactions” involving the same security, account and day. As set out in Appendix A to this Decision, there are 51 instances of multiple “transactions” involving the same security, account and day. There are an additional 68 instances of trades of the same security on the same day, but involving both the personal account and the Holding account.

116. We conclude that the test for relevancy is met with respect to the notepads. There is more than a reasonable possibility that the notepads are relevant to the allegation of excessive trading. The notes could clarify whether there were discussions regarding switching the Complainant’s account from a commission based account to a fee based account and the content of those discussions. The notepads would also contain evidence regarding the quantity of the security in a transaction.

Allegation of Unauthorized Discretionary Trading

117. The Notice of Hearing issued by IIROC Staff details the unauthorized discretionary trading allegation as follows:

Count 2

Between July 2006 and June 2012, the Respondent engaged in unauthorized discretionary trading in the accounts of [the Complainant], without the accounts first

⁷⁶ Review transcript at 12-13.

⁷⁷ *Ibid.* at 76-77.

⁷⁸ Compendium – Record at 1268-1280.

having been approved as discretionary accounts, contrary to Dealer Member Rule 1300.4 (IDA by-law 1300.4 prior to June 1, 2008).⁷⁹

118. IIROC Dealer Member Rule 1300.4 (IDA by-law 1300.4 prior to June 1, 2008) states, with respect to discretionary trading:

A Registered Representative may not exercise discretionary authority over a customer account unless:

(a) the Dealer Member has designated a Supervisor or Supervisors to be responsible for discretionary accounts;

(b) the customer has given prior written authorization in compliance with Rule 1300.5;

(c) a Supervisor designated under subsection (a) has approved the account as a discretionary account and recorded that approval;

(d) the Registered Representative authorized to effect discretionary trades for the account has actively dealt in, advised on or performed analysis for a period of two years with respect to all types of products which are to be traded on a discretionary basis; and

(e) the account is maintained at the Dealer Member of the Registered Representative.⁸⁰

119. Unauthorized discretionary trading occurs when a person, not authorized to exercise discretion, "effects a securities transaction for a client without obtaining from the client, in advance, specifics as to four elements of the transaction – quantity, security, price and timing."⁸¹ A client may provide a general direction and authorization in relation to the security to trade, but must provide specific instructions concerning quantity, price or timing.⁸²

120. The IIROC panel found Mr. Crandall had conducted unauthorized discretionary trading for the period of July 2006 to June 2012. Specifically, the panel concluded that Mr. Crandall did not communicate with the Complainant in respect of all the trades in the account and that he failed to obtain instructions from the Complainant as to the specifics of the four elements of the transaction for the majority of the trades.⁸³

⁷⁹ Notice of Hearing – Record at 1-2.

⁸⁰ Compendium – Record at 3822.

⁸¹ *Stewart, Re*, 2005 ABASC 91 at 49.

⁸² *Ibid.*

⁸³ Merits decision – Record at 4567-4568.

121. Mr. Crandall contends that his notepads, the telephone message books and pink telephone slips are relevant to the allegation of unauthorized discretionary trading as they show incoming calls from the Complainant, which are not captured on the telephone bills relied upon by IIROC Staff to prove this allegation.
122. IIROC Staff submits that the documentary evidence presented, and in particular the telephone records and trade tickets, established that for the period from December 2008 to December 2009, there were 218 trades conducted in the Complainant's accounts, but only a maximum total of 44 potential communications between the Complainant and Mr. Crandall.
123. We note that IIROC Staff based the unauthorized discretionary trading allegation almost entirely on the telephone bills which showed a lack of communications between Mr. Crandall and the Complainant. IIROC Staff's argument was that the telephone calls constituted potential authorities to trade.⁸⁴
124. IIROC Staff provided only the telephone bills for the period of December 2008 to December 2009. However, the allegation related to the period of July 2006 to June 2012. IIROC Staff did not introduce into evidence the telephone bills for the periods of July 2006 to November 2008 and January 2010 to June 2012. While we were not asked to determine the relevancy of these additional telephone bills, we have no difficulty concluding they were highly relevant to the allegation of unauthorized discretionary trading and should have been disclosed pursuant to IIROC Rule 8417. The evidence before us reveals that IIROC staff never requested these documents and consequently did not disclose them to Mr. Crandall.⁸⁵
125. We also accept Mr. Crandall's argument that the telephone bills show only calls from himself to the Complainant; they do not show incoming calls from the Complainant. Mr. Chen testified at the merits hearing that the telephone bills show incoming calls on the toll-free line. However, the telephone bills show only the area code from which these calls originated, as opposed to the caller's full telephone number. They do not show incoming calls, with any certainty, from the Complainant. Again, these telephone bills are only for the period of December 2008 to December 2009.⁸⁶
126. Mr. Crandall maintains the telephone message books show incoming calls from the Complainant. Based on the telephone message books found and produced in the spring of 2018, we agree. These showed 17 calls from the Complainant to Mr. Crandall.⁸⁷
127. Appendix B to this Decision provides a comparison, on the one hand, of the calls from the Complainant recorded in the telephone message books and, on the other hand, calls from Mr. Crandall to the

⁸⁴ Merits hearing – Record at 4397-4411.

⁸⁵ Exhibit R, Document R-6.

⁸⁶ Merits hearing transcript – Record at 4398 and 4402.

⁸⁷ Exhibit R, Document R-9.

Complainant and calls to the branch's toll-free line from the Montreal area as shown in the telephone bills. These calls do not all coincide. The telephone message logs show communications between the Complainant and Mr. Crandall that are not in the telephone bills produced by IIROC Staff and vice versa. These additional communications could mean additional authorizations to trade.

128. We conclude that the telephone message books are relevant. There is more than a reasonable possibility that they would have been useful to Mr. Crandall in responding to the unauthorized discretionary trading allegation.
129. We also find that the telephone message books do not contain a record of all incoming calls from the Complainant to Mr. Crandall. Witness B.P. testified that a message slip would only be generated for the calls that came in when Mr. Crandall was unavailable.⁸⁸
130. Mr. Crandall maintains his notepads contain a record of all the incoming calls he took from the Complainant.⁸⁹ Witness B.P. and Witness S.D. corroborate this evidence. They confirm that it was Mr. Crandall's practice to make notes regarding every conversation with a client on his notepad.⁹⁰ Witness B.P. further testified that the communications between Mr. Crandall and the Complainant were primarily by telephone.⁹¹ It is also entirely possible that in one telephone call, the Complainant and Mr. Crandall discussed more than one transaction. We find that if that was the case, this would be noted in Mr. Crandall's notepads.
131. At his January 17, 2014 interview, IIROC Staff questioned Mr. Crandall on specific trades that occurred in September 2010. Mr. Crandall responded: "Again, that's almost four years ago, guys. I have nothing to go by." When questioned on whether he could recall any trading ideas that were generated by the Complainant, Mr. Crandall responded: "**I don't have my notes**, guys. I can't recall. Sorry."⁹²
132. We find Mr. Crandall's notepads were the only record of incoming calls from the Complainant when Mr. Crandall was in the office. The notepads also contained details of those calls. As with the message books, we find the notepads contain evidence of additional communications between Mr. Crandall and the Complainant.
133. We find the notepads are relevant. Once again, there is more than a reasonable possibility that the notepads would have been useful to Mr. Crandall's ability to respond to the allegation of unauthorized discretionary trading.

Allegation of Unsuitable Recommendations

134. The Notice of Hearing issued by IIROC Staff sets out as follows the allegation of unsuitable

⁸⁸ Review transcript at 15-16.

⁸⁹ Merits hearing transcript – Record at 4543-4545; Review transcript at 11-13 and 81-83.

⁹⁰ Merits hearing transcript – Record at 4514-4515; Review transcript at 12-13 and 61-63.

⁹¹ Review transcript at 29-30.

⁹² January 17, 2014 interview transcript – Record at 3721 and 3745.

recommendations :

Count 3

Between July 2007 and October 2010, the Respondent made unsuitable recommendations for the accounts of [the Complainant], contrary to Dealer Member Rule 1300.1(q) (IDA by-law 1300.1(q) prior to June 1, 2008).⁹³

135. The unsuitable recommendations allegation comes under IIROC Dealer Member Rule 1300.1 (q), which reads:

Suitability determination required when recommendation provided

(q) Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such client based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level.⁹⁴

136. The IIROC panel found that there was an absence of an exchange of information between Mr. Crandall and the Complainant regarding both the 2006 New Client Application Form and the 2008 New Client Application Form setting out the Complainant's risk tolerance and increasing her risk tolerance for high risk securities from 30% to 50%. The IIROC panel accepted the Complainant's testimony that she did not review the 2008 NCAF with Mr. Crandall nor have any discussions on the proposed changes to the investment objectives and risk tolerance.⁹⁵
137. The IIROC panel questioned the increase in risk tolerance from the 2006 NCAF to the 2008 NCAF and found "this increase goes against a well established principle that risk tolerance is inversely proportional to the age of an investor".⁹⁶ The IIROC panel stated that in order to act contrary to this principle, Mr. Crandall should have very well documented proof that the Complainant was willingly going against the general consensus. According to the panel, Mr. Crandall did not meet this onus.
138. We reiterate that Mr. Crandall's notepads contained a record of communications with the Complainant. We also find that the notepads documented meetings with clients. Witness S.D. testified at the merits hearing before the IIROC panel that he often saw Mr. Crandall writing notes when he returned to the office from meetings.⁹⁷

⁹³ Notice of Hearing – Record at 1-2.

⁹⁴ Compendium - Record at 3821.

⁹⁵ Merits decision – Record at 4569.

⁹⁶ *Ibid.* at 4571.

⁹⁷ Merits hearing transcript – Record at 4514-4515.

139. We are satisfied that if Mr. Crandall had discussions with the Complainant regarding the 2006 New Client Application Form, the 2008 New Client Application Form and her risk tolerance, these would be documented in his notepads.
140. We conclude there is a reasonable possibility that the notepads would have been useful to Mr. Crandall in responding to the unsuitable recommendations allegation.

Complainant's Credibility and Mental Competence

141. Mr. Crandall questioned the Complainant's mental competence during the IIROC proceedings. The IIROC panel declined to order a full mental competency exam during the December 10, 2015 motion, but informed Mr. Crandall that he could question the Complainant during the merits hearing. Mr. Crandall argued at the February 2016 merits hearing that the Complainant was not the same woman he had known for the 20 years spanning their advisor-client relationship, during which he knew her as a savvy businesswoman.⁹⁸
142. The Complainant suffered a stroke sometime around September 2015 at 95 years of age. Approximately four months later, she testified at the IIROC merits hearing. She was not well enough to travel to New Brunswick for the merits hearing and attended by videoconference from her residence in Montreal. Mr. Larin, IIROC enforcement counsel, was present with her.⁹⁹
143. The Complainant passed away on September 12, 2016.
144. The Complainant's mental competence and credibility are not issues in these review proceedings; the issue is whether the documents Mr. Crandall requested during the IIROC proceedings would have helped him attack the Complainant's credibility or advance his allegation regarding the Complainant's mental competence.
145. The Complainant testified during her December 4, 2013 interview that she never spoke to Mr. Crandall about her account. According to the Complainant, Mr. Crandall never called her nor talked to her about her account between 2006 and 2012. She only spoke to him when she requested money for her business. She also spoke at length and in great detail about her Bombardier stocks and how she acquired them.¹⁰⁰
146. At the February 2016 merits hearing before the IIROC panel, the Complainant again stated that Mr. Crandall did not call her before he made a trade and that they very seldom discussed anything. She recalled speaking to Mr. Crandall about her Bombardier stock, but did not provide any further detail on how she acquired this stock. She could not recall signing her updated New Client Application Form

⁹⁸ Merits hearing – Record at 4543-4545.

⁹⁹ October 7, 2015 motion record – Record at 206; Merits hearing transcript – Record at 4335-4367.

¹⁰⁰ December 4, 2013 interview – Record at 3619-3637 and 3649-3654.

in November 2008.¹⁰¹

147. We note that important parts of the Complainant's testimony at the merits hearing were obtained through leading questions by IIROC counsel as evidenced by the merits hearing transcript.¹⁰² The Complainant was also unable to answer many questions on cross-examination.¹⁰³
148. Mr. Crandall alleges that he was in regular contact with the Complainant. Witness B.P. corroborated this evidence at the review hearing. She testified that she accepted calls from the Complainant and that the Complainant and Mr. Crandall spoke regularly.¹⁰⁴
149. We previously found that the telephone message logs and Mr. Crandall's notepads show incoming calls from the Complainant to Mr. Crandall. We also found that Mr. Crandall noted the details of his conversations in his notepads.
150. In Appendix C to this Decision, we compare the withdrawals from the Complainant's accounts between January 1, 2007 to December 31, 2009 (the period for which there are telephone bills and message books) against the telephone bills and telephone message slips. Several message slips do not have dates and it is therefore not possible to determine the exact date of these telephone messages and whether there is a corresponding withdrawal. In addition, there are telephone message slips that do not have corresponding withdrawals within a one month period. Such is the case in January and September.
151. We find that the telephone message books show that the Complainant contacted Mr. Crandall other than to obtain withdrawals. We can only speculate as to what the notepads would show.
152. We conclude that the telephone message books and notepads are relevant as there is more than a reasonable possibility that they would have been useful to testing the Complainant's credibility and mental competence at the merits hearing. Unfortunately, the passing of the Complainant makes this newly uncovered evidence irrelevant as it can no longer be used to test the Complainant's credibility and mental competence.

(iii) Sufficiency of Efforts

153. We turn now to whether IIROC made sufficient efforts to obtain the notepads, the telephone message books and Mr. Crandall's copy of the trade tickets.

Investigation

¹⁰¹ Merits hearing transcript – Record at 4344-4351.

¹⁰² *Ibid.* at 4339-4351.

¹⁰³ *Ibid.* at 4351-4362.

¹⁰⁴ Review transcript at 15.

154. For the purposes of procedural fairness, an administrative body's investigation is adequate where it satisfies two conditions: neutrality and thoroughness. A thorough investigation does not require that the investigator interview every person proposed by the complainant but that the investigator consider crucial evidence.¹⁰⁵
155. In *Tahmourpour v Canada (Solicitor General)*, 2005 FCA 113, the question before the court was whether the *Human Rights Commission* had been sufficiently thorough to be procedurally fair. The *Federal Court of Appeal* concluded that the Commission's investigator had breached the duty of procedural fairness by failing to consider and assess relevant data and that he had failed to interview relevant witnesses. The Court of Appeal set aside the investigator's decision to dismiss the human rights complaint.
156. We find the IIROC investigation failed to consider the following relevant data : (1) Mr. Crandall's notepads; (2) the telephone message books; and (3) the telephone bills from July 2006 to November 2008 and January 2010 to June 2012.
157. Mr. Crandall began requesting his notepads as early as January 17, 2014, when he submitted to an interview by IIROC enforcement staff.¹⁰⁶
158. On January 30, 2014, Mr. Chen requested that NBF produce a copy of any notebooks maintained by Mr. Crandall as a record of his communications with his clients.¹⁰⁷ NBF responded on February 14, 2014, that it could not identify any notebooks.¹⁰⁸ NBF did not mention what measures it had taken to locate the notebooks. Mr. Chen did not pursue the matter.
159. We reiterate that Mr. Chen testified at the review hearing that he can confirm "with a certain level of -- not 100, 99 percent -- 95 percent of confidence" that all of IIROC's requests for documents from NBF are detailed in Exhibit R, Document R-6.¹⁰⁹ We conclude that no further requests were made in the investigation for Mr. Crandall's notepads.
160. Mr. Crandall's notepads were crucial evidence given their relevance to the allegations and Mr. Crandall's ability to respond to the allegations. The importance of the notepads should have been obvious to IIROC. During the January 17, 2014 investigation, Mr. Crandall stated on numerous occasions that he needed his notes to answer the questions put to him. Given the importance of Mr. Crandall's notepads, IIROC should have done more to locate the notepads. They could have asked Mr. Crandall where his notes were located or pushed NBF to pursue its search.
161. The telephone records were also crucial evidence. Despite the fact that the allegations related to the period of June 2006 to July 2012, IIROC only obtained the telephone bills for the period of December

¹⁰⁵ *Slattery v Canada (Human Rights Commission)*, [1994] 2 FCR 574 at 69, aff'd (1996), 205 NR 383.

¹⁰⁶ January 17, 2014 – Record at 240 and 293.

¹⁰⁷ Exhibit "R", Document R-6 at 249.

¹⁰⁸ *Ibid.* at 273.

¹⁰⁹ Review transcript at 188.

2008 to December 2009. In addition, they did not request nor obtain the telephone message books which show additional incoming calls from the Complainant.

162. IIROC takes the position that it does not provide documents to respondents in the investigative phase.¹¹⁰
163. In addition, pursuant to IIROC's Rules, Mr. Crandall was obligated to leave all work-related materials behind when he left NBF.¹¹¹ As a result, when IIROC commenced its investigation and subsequent enforcement proceedings against Mr. Crandall, he was completely reliant on NBF and IIROC for obtaining his notepads, telephone message books and his copy of the trade tickets. In our view, the combination of these two factors imposes a greater duty on IIROC to obtain and preserve relevant documents for respondents. That did not happen.
164. We conclude that the investigation does not satisfy the criteria of thoroughness. IIROC failed to obtain highly relevant evidence identified by Mr. Crandall. IIROC Staff did not take sufficient measures to obtain relevant documents from NBF as detailed later in our decision. In addition, NBF was also under investigation in relation to the Complainant's accounts. We therefore conclude IIROC Staff breached the duty of procedural fairness in their investigation.
165. As stated in *The Duty of Fairness in the Investigative Stage of Administrative Proceedings*: "An investigation is oftentimes the foundation of an ultimate administrative decision. Cracks in the foundation can be salvaged in subsequent steps in the administrative process but there are instances where those cracks will be fatal to the outcome and render a decision invalid."¹¹² This is such a case. Here, the failure to obtain the notes in the investigative phase resulted in the notepads being lost or destroyed. In addition, a subset of the telephone message books has also been lost or destroyed.

Enforcement Proceedings

166. IIROC Staff began enforcement proceedings against Mr. Crandall on April 23, 2015.
167. The normal process when there is litigation or enforcement proceedings is to advise the relevant parties and archive company not to destroy documents.¹¹³ IIROC's Guide to Record Retention Requirements for Members recognizes two main factors which affect the retention period for records: (1) the possibility of legal actions brought by or against a Member; and (2) statutory requirements. The Guide recommends a retention period of seven years for documents which might be of assistance in a legal action against a Member.¹¹⁴

¹¹⁰ October 7, 2015 motion transcript – Record at 240.

¹¹¹ Review transcript at 82.

¹¹² Lucie LaBoissonnière, "The Duty of Fairness in the Investigative Stage of Administrative Proceedings" (2017) vol. 68 UNBLJ 357 at 360.

¹¹³ Review transcript at 155.

¹¹⁴ Exhibit R, Document R-17.

168. Witness J.N. confirmed at the review hearing that NBF had a retention policy of seven years, but that the branch archiving the items had the discretion to assign a shorter retention period. She indicated that investment advisors at NBF are encouraged to keep their notes in a safe format and in a manner that is readily accessible for a period of 7 years. She further testified that when there is litigation or administrative proceedings, the usual process is to advise the archive company to not proceed with destruction. She described this as the litigation hold process.¹¹⁵
169. Witness B.P. testified that part of her training as office administrator at *Wellington West* was to be aware of retention requirements. She testified that material relating to an account had to be retained for seven years from the date of closing of the account. She added that if there was a complaint or a legal proceeding, documents were retained until the matter was resolved.¹¹⁶
170. We find that the litigation hold process was not followed in the IIROC proceedings. IIROC staff did not advise NBF to place a litigation hold on the documents relating to the proceedings.¹¹⁷ We also find that NBF was aware of IIROC's investigation into Mr. Crandall as early as August 2013, before enforcement proceedings were commenced.¹¹⁸ While the failure to advise of the litigation hold may not have been the sole cause for the loss or destruction of relevant documents in the IIROC proceedings, it did play a contributing factor.
171. Mr. Crandall began requesting his documents in the enforcement proceedings as early as July 14, 2015. (July 14, 2015 Motions transcript - Record, p. 178) He again requested his documents at the October 7, 2015 motion. At that motion, Mr. Crandall indicated that there were missing documents in the disclosure, such as his notepads and the telephone message books. He indicated not having control over these documents because he no longer works for NBF or Wellington West and suggested that "[s]omebody has to go in on my behalf and get those for me."¹¹⁹
172. IIROC Counsel responded:

Mrs. MELISSA MacKEWN:

Yes, I just want to be clear that, I mean, you don't send a list of documents that you're requesting. So we sent you the disclosure; if you've got an issue with it, you bring a motion.

[...]

Mr. ROBERT CRANDALL:

Sorry for the wording, Melissa. I'm sorry for the wording, I'm just a layperson, so I'm sorry for such word.

¹¹⁵ Review transcript at 154-155.

¹¹⁶ *Ibid.* at 25 and 47.

¹¹⁷ *Ibid.* at 194.

¹¹⁸ December 15, 2017 motion transcript - Exhibit R, Document R-7 at 10.

¹¹⁹ October 7, 2015 transcript – Record at 259.

Mrs. MELISSA MacKEWN:

Yes, it's not a matter of semantics, it's just I wanted to make it clear to you that the process doesn't require us going out and gathering documents for you. I just wanted you to understand that.¹²⁰

173. On November 4, 2015, Mr. Crandall sent IIROC a letter setting out the documents he felt were necessary for his defence. This included his notepads, telephone message logs and his copy of the trade tickets.¹²¹
174. Counsel for IIROC responded to Mr. Crandall's letter on November 18, 2015 by indicating : "*Staff will not be seeking to obtain copies of these items at this time as they do not appear to be relevant to the matters that are the subject of the Notice of Hearing. Accordingly, Staff have met all applicable disclosure obligations...*"¹²²
175. Mr. Crandall again requested these documents at the December 10, 2015 motion. The IIROC panel directed IIROC Staff to look for Mr. Crandall's notepads and his copy of the trade tickets.¹²³ By letter dated December 10, 2015, counsel for IIROC requests that NBF produce copies of Mr. Crandall's notebooks or writing pads which are at Iron Mountain storage.¹²⁴ This in the only time that IIROC Staff requested documents for Mr. Crandall in the enforcement proceedings. IIROC Staff never requested the telephone message logs nor Mr. Crandall's copy of the trade tickets during the IIROC proceedings.
176. NBF did not locate the notepads. They did, however, locate an additional 104 pages relating to the Complainant's file as well as an additional five boxes containing materials from Mr. Crandall's investment advisory practice in general, of which approximately 100 additional pages were also found to be relevant by IIROC Staff. These documents were disclosed to Mr. Crandall on January 7, 2016 and January 18, 2016 – less than a month before his merits hearing.¹²⁵
177. In our view, it should have been apparent to IIROC Staff that NBF's record-keeping was sub-par. In fact, counsel for IIROC explained at the February 2016 merits hearing that *Wellington West* and NBF had a different system and that when NBF took over the archives of *Wellington West* when they bought the firm, they had difficulties finding documents. Counsel provides as examples that it took NBF nine months to provide IIROC with the supervision records of Mr. Crandall and it took them two or three months to provide the trade tickets for Mr. Crandall for the two accounts for a one-year period (December 2008 – December 2009).¹²⁶

¹²⁰ *Ibid.* at 256.

¹²¹ December 10, 2015 motion record – Record at 285-287.

¹²² *Ibid.* at 289-290.

¹²³ December 10, 2015 transcript – Record at 321-369.

¹²⁴ Exhibit R, Document R-6 at 290.

¹²⁵ Exhibit R, Document R-2; See also January 14, 2016 Case Conference – Record at 373-375.

¹²⁶ Merits hearing transcript – Record at 4459-4460.

178. The result was that Mr. Crandall attended the IIROC merits hearing without his notepads, his copy of the trade tickets and the telephone message logs, which we found were relevant to the allegations and his defence. Mr. Crandall in fact refused to provide evidence without his notes on the basis that his testimony might not be true.¹²⁷ The IIROC panel noted Mr. Crandall’s position in their merits decision.¹²⁸
179. IIROC Rule 8417(1) requires Enforcement Staff to disclose to a respondent “*all documents and things in IIROC’s possession or control that are relevant to the proceeding, including documents or things that are relevant to the respondent’s ability to make full answer and defence.*” In our view, this may require Staff in instances such as this one to make requests for documents on behalf of the respondent to ensure that a fair result is obtained.
180. In our view, the excerpts of the October 7, 2015 motion transcript and the November 18, 2015 letter are clear indications that IIROC Staff misinterpreted their disclosure obligations.
181. In *Re Hirani*, 2018 IIROC 33 at paragraph 14, an IIROC panel cites the following excerpt of IIROC’s Enforcement Disclosure Policy:

Underlying Rationale

The duty to disclose is fundamental to the principles of fairness and natural justice in administrative law proceedings.

According to the Supreme Court of Canada, there are three underlying reasons in support of disclosure:

- 1. To ensure that justice is better served by eliminating the element of surprise;*
- 2. To ensure that the defending party knows the case to be met and is able to make full answer and defence; and*
- 3. To facilitate the early resolution of cases, thereby reducing delays.*

The duty to disclose is also consistent with the public interest mandate of the Corporation’s Enforcement Department. The Enforcement Department has a mandate to protect the investing public through the timely prosecution of Dealer Member firms and individual registrants. The Department’s role is not a private one where the ultimate goal is winning a case. The role of the Department is to obtain a fair result and to view the facts and proceedings with a fair and objective mind. Disclosing relevant information to the Respondent facilitates the Enforcement Department’s public interest mandate by resulting in a more fair proceeding. (Disclosure Policy, para. 2)

....

¹²⁷ *Ibid.* at 4554.

¹²⁸ Merits decision – Record at 4660-4671.

Information is relevant for disclosure purposes if there is a reasonable possibility that it may be useful to the Respondent in making full answer and defence. This includes not only information that the Enforcement Department intends to rely upon to prove its case, but also information relating to the credibility of witnesses, the nature of the department's investigative process or any other issue that may be relevant to the Respondent's defence. These disclosure standards applicable to IIROC and its Enforcement Department are set out in R. v. Stinchcombe, 1991 CanLII 45 (SCC), [1991] 3 S.C.R. 326, which have subsequently been applied to various administrative proceedings. [Disclosure Policy, para. 4.1(a)]

182. We repeat that in *Agueci, Re*, 2012 CarswellOnt 15722 at paragraph 29, a panel of the *Ontario Securities Commission* stated that the enforcement staff's disclosure obligation "is a matter of fundamental justice based on fairness to the respondents to permit them to make full answer and defence to the allegations against them."
183. We find IIROC Staff did not follow its Enforcement Disclosure Policy, rule 8417 nor the requirements of the common law in relation to disclosure. There is no evidence that IIROC Staff sought to obtain any explanations from Mr. Crandall regarding the relevancy of the requested documents. We find that IIROC Staff either did not assess or incorrectly assessed the relevancy of the requested documents.
184. We find that the notepads, telephone message books and trade tickets were in IIROC Staff's control because Dealer members, such as NBF, have the obligation to provide documents to IIROC in the course of an investigation pursuant to Dealer Member Rule 19.¹²⁹ In addition, IIROC Enforcement Staff had the authority pursuant to IIROC Rule 8103 to enter NBF's premises, with or without notice, to access records and documents they believe to be relevant to the investigation.¹³⁰ This would have been warranted particularly since NBF was also under investigation.
185. Given the circumstances of this case, we find that IIROC Staff did not take sufficient measures to obtain the relevant documents requested by Mr. Crandall. There were numerous indications that additional measures were warranted :
- NBF had difficulty locating documents in a timely manner;
 - NBF continuously found additional documents up until 2018 on the eve of the originally scheduled review hearing dates;
 - The Complainant had commenced civil litigation against NBF and Mr. Crandall such that documents may have been disclosed in those proceedings;
 - IIROC was investigating NBF for failure to adequately supervise Mr. Crandall in relation to the Complainant's accounts; and
 - Mr. Crandall's repeated indications that his documents were necessary for his defence and that he could not obtain them with IIROC's help.

¹²⁹ December 10, 2015 motion record - Record at 295.

¹³⁰ Exhibit R, Document R-15.

186. Finally, as is often the case with self-represented litigants, the prosecuting body has the task of separating the wheat from the chaff. In some instances, such as this one, this can be a difficult task. However, the prosecuting body cannot ignore the self-represented litigant's requests and must fairly analyze its disclosure obligations to ensure a fair process. In our view, IIROC Staff turned a deaf ear to Mr. Crandall's requests for his documents and exhibited a complete disregard for fundamental justice. Unfortunately, the IIROC panel simply went along. As a result, the unfairness of the investigative phase was perpetuated in the enforcement proceedings.

Requests in Tribunal Proceedings

187. On October 13, 2017, the Tribunal issued a Summons to Witness to Mr. C, the manager of NBF, ordering him to attend at a motion hearing on November 22, 2017 and to produce documents including Mr. Crandall's notepads, the telephone message books and Mr. Crandall's copies of the trade tickets, all for the period of 2006 to July 1, 2012.

188. Mr. C did not produce any documents in response to the Summons to Witness. In his Affidavit sworn December 8, 2017 in relation to the motion hearing Mr. C swears that he does "*not believe that NBF is in possession of any documents requested pursuant to the Summons to Witness or which otherwise relate to this matter in any respect which have not already been provided to IIROC as part their investigation of this matter.*"¹³¹ This clearly was not true.

189. After our December 15, 2017 motion hearing, IIROC, to its credit, again requested that NBF conduct another search for the documents requested by Mr. Crandall. However, the fact that this request was even made at this juncture in the proceeding is an indication that IIROC did entertain doubts as to NBF's prior efforts in locating documents.

190. Witness J.N., a senior legal counsel with NBF, testified at the review hearing regarding NBF's additional search for documents. She reviewed all correspondences exchanged between NBF and IIROC as she hadn't been involved in the file before. Based on this review, Witness J.N. believed that documents could be located in three locations: the Fredericton branch of *Wellington West* which became the NBF Queen Street branch, the Moncton branch of NBF, and Iron Mountain Storage.¹³²

191. Witness J.N. requested that Mr. C provide the entire Iron Mountain file. She received pages 98-171 of Document R-13 of Exhibit R. Based on her review of page 98, Witness J.N. determined that Witness B.P., Mr. Crandall's assistant, had sent 42 boxes from the NBF Queen Street branch to Iron Mountain in 2012.¹³³

192. Mr. C testified at the 2018 review hearing that he had reviewed their entire file regarding Iron Mountain several times when he conducted his search in relation to the Summons. On cross-

¹³¹ Exhibit R, Document R-6.

¹³² Review transcript at 132-134.

¹³³ *Ibid.* at 138-139.

examination at the review hearing, Mr. C admitted that he had page 98 from 2012 to present. He testified that when he looked at page 98 in conducting his search in relation to the Summons from the Tribunal, he did not identify it as being relevant as he thought it related to Moncton advisors.¹³⁴

193. Witness J.N. requested from Iron Mountain the register of all archived documents. Iron Mountain advised that they could not locate a list for anything sent to storage before 2011. They provided the Customer Inventory Report dated April 5, 2018 which details the documents sent to storage by NBF since 2011.¹³⁵ This two-page list identified 48 boxes sent to storage since 2011.¹³⁶
194. Of these 48 boxes, 42 were the boxes sent to storage by Witness B.P. in 2012 and 6 were boxes sent to storage by the NBF Moncton branch. Iron Mountain also advised that of the 42 boxes sent to storage by Witness B.P., 4 had been destroyed. Iron Mountain provided a detailed list of the 42 boxes that were archived by Witness B.P. in 2012.¹³⁷ The boxes that have been destroyed are indicated with the notation "DST".¹³⁸
195. Witness J.N. ordered all 48 boxes from Iron Mountain out of an abundance of caution. She also ordered a 49th box ("Box 16") which is described as containing Mr. Crandall's files.¹³⁹
196. Witness J.N. and her team reviewed the contents of all 49 boxes. They didn't find any notepads, but did locate some individual pages of a note pad as well as pink message books.¹⁴⁰
197. She testified that some of the boxes were damaged and she repaired them with tape. Witness J.N. further testified that she has no knowledge of the boxes being pulled from storage on a previous occasion. Witness J.N. was also uncertain whether the boxes stored at Iron Mountain were reviewed in the context of the civil litigation involving the Complainant, Mr. Crandall and NBF.¹⁴¹
198. After her team completed its review, Witness J.N. shipped all 49 boxes to Yu Chen at IIROC.¹⁴²
199. Mr. Chen testified that he and his team reviewed every page in the 49 boxes and that the review took nine business days. They flagged hand-written notes as well as any document mentioning the Complainant or the Complainant's company with post-its. Mr. Chen testified at the 2018 review hearing that of the 49 boxes, 11 boxes related to Mr. Crandall and his clients. They did not find any notepads. They did find notes on different media such as commission reports, trade tickets, sticky notes, a lined page from a notebook, and on Mr. Crandall's stationary with his name on the bottom.

¹³⁴ *Ibid.* at 111-116 and 124-125.

¹³⁵ Exhibit R, Document R-13 at 177-178.

¹³⁶ Review transcript at 149.

¹³⁷ Exhibit R-20.

¹³⁸ Review transcript at 138-140.

¹³⁹ Exhibit R, Document R-3 at 139; Review transcript at 142.

¹⁴⁰ Review transcript at 143-144.

¹⁴¹ *Ibid.* at 145- 151.

¹⁴² *Ibid.* at 135.

200. They also found telephone message books with red and black covers. They identified four boxes that contained eight message books. Exhibit R, Document R-9 is an example of the message books.¹⁴³
201. On May 17, 2018, counsel for IIROC sent the additional documents discovered in the 49 boxes to Mr. Crandall. They identified seven classes of documents, which they described as follows:
- a) All commission reports with Mr. Crandall's hand-written notes;
 - b) All other documents with Mr. Crandall's hand-written notes;
 - c) All trade tickets related to the Complainant and the Complainant's Holding Company;
 - d) All telephone message pads which refer to telephone calls between Mr. Crandall and the Complainant and telephone account statements;
 - e) The entire client file for the Complainant and the Complainant's Holding Company;
 - f) Documents that are not responsive to the Summons but which may be relevant to these proceedings; and
 - g) All commission reports identified which include Mr. Crandall's name. The documents included in Category 1 are a subset of Category 7.¹⁴⁴
202. We are satisfied that NBF and IIROC conducted a thorough search in the spring of 2018 in efforts to locate the documents requested by Mr. Crandall. Although IIROC describes these categories of documents as being fully satisfied by using the word "all", this was not the case as discussed in the portion of our decision dealing with the existence of the documents.

(iv) Conclusion on the Duty of Procedural Fairness

203. In *Perry v Northwest Territories*, 1998 CanLII 6983 (NWT SC), a judicial review of a decision of the Commissioner of the Northwest Territories, the Court was called upon to determine whether the failure to disclose certain documents to Mr. Perry constituted a breach of the duty of fairness. The Court found there was a breach of the duty of fairness as the documents that were withheld had an impact on Mr. Perry's ability to respond to the case against him.
204. We are also mindful that in the case of missing evidence, the impact on the fairness of the trial is best assessed during the trial itself.¹⁴⁵ In the within matter, the hearing before the IIROC panel has been held. We also conducted a review hearing into the disclosure issue at which the parties led additional evidence. We are therefore fully able to assess the impact of the missing evidence on the fairness of the IIROC proceedings.

¹⁴³ Ibid. at 159-161, 166-168 and 176.

¹⁴⁴ Exhibit A, Document A-2.

¹⁴⁵ *R v La*, [1997] 2 S.C.R. 680; *R v Bero* (2000), 137 O.A.C. 336 (Ont. C.A.); *Deutsche Bank Securities Limited v. Ontario Securities Commission*, 2012 ONSC 1576.

205. We have concluded that Mr. Crandall's copy of the trade tickets, the telephone message books and the notepads were relevant to the allegations as well as Mr. Crandall's defences. The telephone message books and notepads were particularly important to Mr. Crandall's ability to respond to the allegations of excessive trading and unauthorized discretionary trading as they showed additional communications between Mr. Crandall and the Complainant.
206. In *R v La*, [1997] 2 S.C.R. 680, Sopinka J. commented at paragraph 21 that "*as the relevance of evidence increases, so does the degree of care for its preservation that is expected of the police*". We see no distinction with IIROC enforcement proceedings. The missing documents, and in particular, the notepads and telephone message books, were highly relevant to the allegations and Mr. Crandall's defences. Consequently, we find the failure to provide these documents during the IIROC proceedings impeded Mr. Crandall's right to be heard and to respond to the allegations against him. This was a breach of the duty of procedural fairness.

(v) Obiter Comments

207. We feel it necessary to comment on two other disclosure issues that became apparent in reviewing the Record after the review hearing. Given that these issues were not the subject of the review hearing, our comments are purely in obiter.

Electronic Disclosure

208. During the IIROC proceedings, Mr. Crandall repeatedly requested paper copies of IIROC Staff's disclosure as he did not have a computer to view the electronic disclosure.
209. IIROC Staff provided its initial disclosure to Mr. Crandall on September 22 or 23, 2015. The disclosure was made up of approximately 12,000 documents.¹⁴⁶ It is not known how many pages were contained in these 12,000 documents. However, it was undoubtedly a much greater number due to the fact that IIROC Staff's Compendium used at the merits hearing was made up of 118 documents from the disclosure and contained 3,144 pages.¹⁴⁷
210. Mr. Crandall indicated on at least two occasions in the IIROC proceedings that he needed the disclosure in paper format. At the October 7, 2015 motion, he indicated that he did not have a computer to view the electronic disclosure and requested paper copies. He also indicated that he was unable to purchase a computer on credit as he did not have a credit card since his bankruptcy and it would be difficult to obtain financing.¹⁴⁸

211. IIROC Staff opposed Mr. Crandall's request for paper copies of the disclosure. Counsel stated

¹⁴⁶ October 7, 2015 motion transcript – Record at 236.

¹⁴⁷ Compendium – Record at 406-3550.

¹⁴⁸ October 7, 2015 motion transcript – Record at 234-239.

regarding Mr. Crandall's lack of a computer : *"I recognize he says he doesn't have a computer, but, frankly, that's going to be an ongoing problem that he's going to have to address if he wants to deal with this case."*¹⁴⁹

212. IIROC Staff indicated that they would be providing Mr. Crandall with a paper copy of their Compendium.¹⁵⁰
213. The IIROC panel suggested to Mr. Crandall that he find a computer and adjourned the merits hearing to allow him time to review the disclosure.¹⁵¹
214. At a December 10, 2015 motion dealing with Mr. Crandall's request for disclosure of certain documents, Mr. Crandall again requested paper copies of the disclosure as he did not have a computer.¹⁵² The IIROC panel refused to make such an order, but did urge IIROC Staff to provide its Compendium in paper format.
215. Mr. Crandall did not receive paper copies of IIROC Staff's initial disclosure before the merits hearing of February 1 and 2, 2016. He did receive a paper copy of IIROC Staff's Compendium, made up of a subset of 90 documents of the 12,000 making up the full disclosure. He also received paper copies of an additional 104 pages of documents disclosed on January 7, 2016 and an approximate 100 additional pages disclosed on about January 18, 2016.
216. Rule 8417(2) of IIROC's Rules of Practice and Procedure stipulates that Enforcement Staff can provide its disclosure in hard copy or electronic form :

*8417 (2) Enforcement Staff must provide copies to, in hard copy or electronic form, or permit a respondent to make copies of all documents and things specified in subsection 8417(1) as soon as is reasonably practicable after it makes disclosure and no later than forty days before the commencement of the hearing on the merits.*¹⁵³

217. The adequacy of disclosure is a contextual determination. What constitutes meaningful disclosure is to be determined according to the circumstances of each case. However, to be meaningful, disclosure must be in a format that will permit the respondent to make full answer and defence.¹⁵⁴
218. *R v. Therrien*, 2005 BCSC 592 recognizes that if an accused person is unable to access the information, then there has not been meaningful disclosure. This caselaw has been cited with approval in securities enforcement proceedings such as *Agueci, Re*, 2012 ONSCE 44, a decision of a panel of the Ontario Securities Commission. We see no distinction with IIROC securities enforcement proceedings.

¹⁴⁹ *Ibid.* at 241.

¹⁵⁰ *Ibid.*

¹⁵¹ *Ibid.* at 250 and 283.

¹⁵² December 10, 2015 motion transcript – Record at 324 and 330.

¹⁵³ Exhibit R, Document R-15.

¹⁵⁴ *Holtby, Re*, 2011 ABASC 622; *Ciccione, Re*, 2012 CarswellOnt 13666.

219. IIROC Staff has a certain discretion in determining the format of its disclosure and is not required to provide disclosure in a particular format merely because it is more convenient for or preferred by a respondent. The test remains, irrespective of the format of disclosure, whether it is reasonably accessible to the respondent in the circumstances of the case.¹⁵⁵
220. Access to computers and other equipment necessary to access electronic disclosure must be taken into account in determining whether there was meaningful disclosure.¹⁵⁶
221. We are not aware of any caselaw that indicates that a self-represented respondent in enforcement proceedings must bear the cost of obtaining disclosure. Rather, the caselaw is clear that the prosecuting body bears the cost of providing meaningful disclosure to an accused or respondent. For example, in the criminal context, it is recognized that the cost of providing disclosure does not take priority over the right of the accused to full disclosure. In order to comply with its disclosure obligations, there have been instances where the Crown made computers available to the accused to allow the accused to have access to the electronic disclosure.¹⁵⁷
222. IIROC is a pan-Canadian organization. They had at least two options to ensure Mr. Crandall received meaningful disclosure. First, IIROC could have provided Mr. Crandall with a “recycled” computer it had on hand or even a new computer to allow Mr. Crandall to access the electronic disclosure. A “recycled” computer would have entailed little or no cost. Buying a new computer would have also been an economical means of providing Mr. Crandall access to the electronic disclosure. Second, IIROC could have provided Mr. Crandall with paper copies of its disclosure.
223. We are not suggesting that IIROC Staff will have the obligation in every case to provide disclosure in paper format or to provide a computer to the respondent. Rather, that was what was required in the particular circumstances of this case. As stated in *R v. Grant*, 2003 MBQB 237 at paragraph 37, “*if the purpose of disclosure is to enable the accused to prepare their defence, what is the difference between withholding information and disclosing it in a form that the accused cannot access?*” The answer is simple: there is no difference.

Timing of the Disclosure

224. IIROC Staff commenced its enforcement proceedings against Robert Crandall on April 23, 2015 by the filing of its Notice of Hearing.
225. Mr. Crandall began requesting IIROC Staff’s disclosure as early as May 2015.¹⁵⁸

¹⁵⁵ *Holtby*, *supra* note 154.

¹⁵⁶ *R v. Grant*, 2003 MBQB 237.

¹⁵⁷ *R v. Greer*, 2006 BCSC 1894.

¹⁵⁸ July 14, 2015 motion record – Record at 29.

226. On May 22, 2015, a first appearance was held before the IIROC panel. Counsel for IIROC Staff indicates that disclosure had not yet been made to Mr. Crandall because he refused to provide an undertaking to not use the disclosure for any purpose other than the defence of the proceeding or to provide it to counsel. The IIROC panel instructed counsel to file a formal motion.¹⁵⁹ Despite the delays that would be caused by a motion, the IIROC panel set the merits hearing dates for October 20-22, 2015.
227. On June 30, 2015 IIROC Staff filed its motion relating to the disclosure issue. The motion was heard on July 14, 2015. In its September 2, 2015 decision, the IIROC panel ordered IIROC Staff to make full disclosure to Mr. Crandall. The panel also directed Mr. Crandall to make no use of the disclosure for any purpose other than the defence of the proceeding or to provide copies of the disclosure to his lawyer.¹⁶⁰
228. On September 22 or 23, 2015, counsel for IIROC sent Mr. Crandall an electronic copy of IIROC Staff's disclosure. The disclosure was made up of approximately 12,000 documents.¹⁶¹
229. On October 6, 2015, IIROC Staff sent Mr. Crandall an electronic copy of their Compendium, which at that time contained the 90 documents that IIROC Staff intended to rely upon at the merits hearing.¹⁶²
230. Mr. Crandall filed a motion seeking an adjournment of the merits hearing given the voluminous nature of the disclosure and the fact that he did not have a computer to review the disclosure. He indicated he would need 6 to 9 months to review the documents.¹⁶³
231. At the October 7, 2015 motion hearing, counsel for IIROC informed the panel that they would be providing Mr. Crandall with a paper copy of their Compendium.¹⁶⁴
232. The IIROC panel suggested to Mr. Crandall that he find a computer and granted a four-month extension to allow Mr. Crandall time to review the disclosure. The merits hearing was rescheduled to February 1-3, 2016.¹⁶⁵
233. Mr. Crandall filed a motion in late November requesting the disclosure of the documents he claimed were relevant to his defence. This motion was heard on December 10, 2015. At the motion hearing, the panel chair asked counsel for IIROC whether the Compendium had been sent to Mr. Crandall in paper format. Counsel indicated that they had not yet provided the Compendium given that the hearing was adjourned until February 1st. The panel instructed counsel to provide it in the next couple of weeks and suggested the beginning of January. The panel indicated that this would provide Mr.

¹⁵⁹ *Ibid.* at 36-50.

¹⁶⁰ September 2, 2015 Decision – Record at 197.

¹⁶¹ October 7, 2015 motion transcript, Record at 236.

¹⁶² *Ibid.*

¹⁶³ *Ibid.* at 234-239.

¹⁶⁴ *Ibid.* at 241.

¹⁶⁵ *Ibid.* at 250; October 7, 2015 Decision – Record at 283.

Crandall enough time to prepare for the merits hearing set to begin on February 1, 2016.¹⁶⁶

234. At a January 14, 2016 Case Conference, counsel for IIROC indicated they had located an additional 104 pages of disclosure relating to the administration of the Complainant's accounts. This was provided to Mr. Crandall electronically on either January 6 or 7, 2016 and paper copies were sent to him on January 7, 2016. Counsel also indicated that five additional boxes of documents were located at the Fredericton branch of NBF which purportedly contained the personal files that Mr. Crandall boxed up when he left his employment with NBF. IIROC Staff was reviewing the contents of these boxes for relevancy and estimated that an additional 100 pages would be provided to Mr. Crandall by January 18, 2016.¹⁶⁷
235. In securities regulatory or disciplinary proceedings, "*full, fair and **timely** disclosure is key to ensuring procedural fairness to respondents in regulatory enforcement proceedings.*"¹⁶⁸ This is required as IIROC disciplinary proceedings can have serious consequences for respondents and particularly those whose career and livelihood may be affected by a decision.¹⁶⁹
236. That is precisely the circumstances of Mr. Crandall. Amongst other sanctions, the IIROC panel banned Mr. Crandall for a period of five years from re-registration with IIROC. This ban prevents Mr. Crandall from working as an investment advisor.
237. We appreciate that there were difficulties surrounding disclosure because Mr. Crandall refused to provide an undertaking not to utilize the disclosure for any purpose other than the defence of the proceeding. This cannot be used as a justification for allowing Mr. Crandall insufficient time to review the disclosure and prepare for the hearing. Mr. Crandall was a self-represented litigant. It is clear from the Record that Mr. Crandall did not want to sign the undertaking because he did not understand its legal ramifications.¹⁷⁰
238. We question whether IIROC Staff's motion was even necessary given rule 8420(3) of IIROC's Rules of Practice and Procedure entitled "Deemed Undertaking" :

*A party and its counsel or agent are deemed to undertake not to disclose or use information for any purposes other than those of the proceeding in which the information was obtained, without the consent of the party who disclosed or provided the information or information on the basis of which the information was obtained.*¹⁷¹

239. The IIROC panel issued its decision regarding disclosure on September 2, 2015. IIROC Staff did not provide its disclosure to Mr. Crandall until September 22 or 23, 2015. This delay of 20 days, given the

¹⁶⁶ December 10, 2015 motion transcript – Record at 334-336.

¹⁶⁷ January 14, 2016 Case conference – Record at 373-375.

¹⁶⁸ *Re Market Regulation Services Inc.* (2008), 31 O.S.C.B. 5441.

¹⁶⁹ *Sutton (Re)*, 2018 ONSEC 42 at para 76; *Northern Securities Inc.*, *supra* note 7 at 71; *Georgakopoulos (Re)*, *supra* note 7.

¹⁷⁰ July 14, 2015 motion record – Record at 33; July 14, 2015 motion transcript – Record at 181-184.

¹⁷¹ Exhibit R, Document R-15.

volume of the disclosure, is unacceptable. Given that IIROC Staff filed its motion regarding disclosure on June 30, 2015, they should have had this disclosure assembled and ready to send immediately after the motion decision.

240. In addition, the electronic disclosure was provided only 27 days before the initially scheduled merits hearing (October 20-22, 2015). This did not respect the requirements of rule 8417(2) which requires that disclosure be produced “as soon as reasonably practicable and no later than forty days before the commencement of the hearing on the merits”.¹⁷² This delay of 27 days was grossly insufficient to allow Mr. Crandall to prepare for the merits hearing given the voluminous nature of the disclosure.
241. The minimum timeframe for production of disclosure of at least 40 days before the start of the hearing is a recognition of the requirement of the common law that disclosure be timely. In our view, what constitutes timely disclosure depends on the circumstances of the case, such as the volume of the disclosure and whether the respondent is represented by legal counsel or is self-represented.
242. In the within matter, we repeat that IIROC’s disclosure was made up of approximately 12,000 documents, the total number of pages of which was much greater than 12,000 pages. Reviewing this volume of disclosure would take a considerable amount of time.
243. While the IIROC panel adjourned the hearing dates to February 1 and 2, 2016 to allow Mr. Crandall more time to review the disclosure and prepare for the hearing, Mr. Crandall did not have a computer to view the electronic disclosure.
244. The timing of the disclosure, combined with the format of the disclosure, allowed IIROC Staff to gain an unfair advantage. While we appreciate that enforcement proceedings should proceed expeditiously, fairness should not be sacrificed. All respondents must be afforded a full and fair chance to respond to allegations.¹⁷³ As stated in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 79: “procedural fairness is a cornerstone of modern Canadian administrative law”. Its importance cannot be understated. In *Supermarchés Jean Labrecque Inc. v Québec (Tribunal du travail)*, [1987] 2 S.C.R. 219 at paragraphs 146 and 148, Justice L’Heureux-Dubé recognizes that the right to know the case and reply “is so very fundamental in our law” and “goes back to the origins of our democratic institutions and is part of our most cherished legal heritage”.

D. REMEDY

245. IIROC submits that if there was a breach of the duty of fairness, the Tribunal can cure any breach as its review process has been sufficiently robust and independent to fully respond to any issues raised in respect of the alleged notes.
246. Mr. Crandall did not provide arguments on this issue.

¹⁷² *Ibid.*

¹⁷³ *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at 56; *Parenteau v Badger*, 2016 FC 535 at 49.

247. The usual consequence of a breach of the duty of procedural fairness is to render a decision invalid. This was set out by the *Supreme Court of Canada* in *Cardinal v Director of Kent Institution*, [1985] 2 S.C.R. 643 at paragraph 23, where it found that the right to a fair hearing is “*an independent, unqualified right which finds its essential justification in the sense of procedural justice which any person affected by an administrative decision is entitled to have.*”
248. Given our conclusions above, the merits decision and sanctions decision of the IIROC panel are rendered invalid by the breach of the duty of procedural fairness.
249. We turn now to whether this Tribunal can cure this breach. It is now accepted that certain errors can be cured on appeal. As the majority of the Court of Appeal found in *Khan v Ottawa (University of)* (1997), 34 O.R. (3d) 535 at para 41:
- 41 Curing errors made at first instance depends on the seriousness of the initial error, the procedures followed by the appellate body, the powers of the appellate body, the way these powers were exercised and the weight the appellate body attributes to the initial decision. The closer the appeal is to a complete reconsideration, with fair procedures, by a body that does not attribute significance to the initial decision, the more likely the defects will be cured.*
250. The decision of *Taiga Works Wilderness Equipment Ltd. v British Columbia (Director of Employment Standards)*, 2010 BCCA 97 of the British Columbia Court of Appeal recognizes the same principle. At paragraph 11 of the decision, the Court of Appeal recognized five similar factors for determining whether the curative capacity of the appeal ensures that the proceedings reach an acceptable level of fairness: (i) the gravity of the error committed at first instance, (ii) the likelihood that the prejudicial effects of the error may also have permeated the rehearing, (iii) the seriousness of the consequences for the individual, (iv) the width of the powers of the appellate body and (v) whether the appellate decision is reached only on the basis of the material before the original tribunal or by way of rehearing *de novo*.
251. The *Taiga* decision has been followed numerous times. In *Schmidt v Canada (Attorney General)*, 2011 FC 356, at paragraph 17, the Federal Court states that: “*the underlying concern is whether the subsequent process for review affords to the affected party a full and independent consideration of the case without being contaminated by the unfairness of what occurred below.*”
252. Turning now to the facts of this case, we find it is unnecessary to analyze the entirety of the factors set out in either the *Khan* or *Taiga Works* decisions. We are unable in these review proceedings to cure the defects of the IIROC proceedings. This is due to the loss or destruction of the notepads and portions of the telephone message books and trade tickets. This is further complicated by the fact that the Complainant is deceased and cannot be challenged on the newly uncovered documents.

253. A stay of proceedings is an extraordinary remedy that is granted only in cases in which the loss of evidence amounts to an abuse of process or creates a prejudice that cannot be cured except by a stay.¹⁷⁴
254. In *R. v Carosella*, [1997] 1 SCR 80, the *Supreme Court of Canada* was asked to consider the destruction of documents by a third party and whether this affected the accused's ability to make full answer and defence such that a stay of proceedings was warranted. The notes had been destroyed pursuant to the third party's policy. The Court found the destroyed notes were relevant to the accused's ability to make full answer and defence. The majority recognized that a stay of proceedings was warranted as there was a reasonable possibility that the information contained in the notes was logically probative to the issue of the credibility of the complainant.
255. Regardless of whatever robust review powers this Tribunal might have, what is at stake here is the prejudice to Mr. Crandall. His right to make full answer and defence has been irreparably damaged by the loss or destruction of his notepads, the telephone message books and his copy of the trade tickets. We already found that these documents could have affected the outcome of the IIROC proceedings. This prejudice cannot be remedied by ordering a new hearing as the documents cannot be retrieved. This prejudice cannot be cured other than by a stay of proceedings.

V. DISPOSITION

256. The merits decision and sanctions decision of the IIROC panel are rescinded pursuant to section 44 of the *Securities Act* and a stay of proceedings is ordered.

DATED at the City of Saint John this 7th day of June, 2019.

Judith Keating, Q.C.

Judith Keating, Q.C.
Chair of the Tribunal

Raoul Boudreau

Raoul Boudreau
Vice-Chair of the Tribunal

Gerry Legere

Gerry Legere
Tribunal Member

¹⁷⁴ *R. v La*, *supra* note 145; *R. v Bero*, *supra* note 145; *Deutsche Bank Securities Limited*, *supra* note 145.

APPENDIX A

Multiple Transactions of the Same Security on the Same Day and Same Account

(Compendium- Record, pp. 1268-1280)

	Security	Transaction Date	Account	Quantity
1.	GOLDCORP INC.	11/15/2006	Personal	600
	GOLDCORP INC.	11/15/2006	Personal	400
2.	YAMANA GOLD INC.	11/15/2006	Personal	200
	YAMANA GOLD INC.	11/15/2006	Personal	800
3.	FIRST NARROWS RES CORP	1/22/2007	Personal	-1000
	FIRST NARROWS RES CORP	1/22/2007	Personal	-29000
4.	DENISON MINES CORP-NEW	3/12/2007	Personal	100
	DENISON MINES CORP-NEW	3/12/2007	Personal	1900
5.	PARAMOUNT ENERGY TST T/U	4/13/2007	Holding Co.	1700
	PARAMOUNT ENERGY TST T/U	4/13/2007	Holding Co.	300
6.	YAMANA GOLD INC.	8/10/2007	Personal	1000
	YAMANA GOLD INC.	8/10/2007	Personal	500
7.	GOLDCORP INC.	9/28/2007	Personal	-1000
	GOLDCORP INC.	9/28/2007	Personal	-2000
8.	MANTIS MINERALS CORP-NEW	10/15/2007	Personal	-17500
	MANTIS MINERALS CORP-NEW	10/15/2007	Personal	-13500
9.	CANADIAN OIL SAND T/U-NEW	10/31/2007	Personal	-300
	CANADIAN OIL SAND T/U-NEW	10/31/2007	Personal	-1700
10.	HANWEI ENERGY SVCS CORP	12/7/2007	Personal	2000
	HANWEI ENERGY SVCS CORP	12/7/2007	Personal	3000
11.	HB S&P/TSX GLB GLD BEAR+A	3/19/2008	Personal	-2000
	HB S&P/TSX GLB GLD BEAR+A	3/19/2008	Personal	-3000
12.	CANADIAN OIL SAND T/U	8/22/2008	Personal	-200
	CANADIAN OIL SAND T/U	8/22/2008	Personal	-300
13.	HB S&P/TSX 60 BEAR+A ETF	11/20/2008	Personal	1500
	HB S&P/TSX 60 BEAR+A ETF	11/20/2008	Personal	-1500
14.	HB S&P/TSX 60 BEAR+A ETF	11/20/2008	Holding Co.	1000
	HB S&P/TSX 60 BEAR+A ETF	11/20/2008	Holding Co.	-1000
15.	CANADIAN OIL SAND T/U	12/1/2008	Holding Co.	-200
	CANADIAN OIL SAND T/U	12/1/2008	Holding Co.	-300
16.	HB S&P/TSX 60 BEAR+A ETF	3/20/2009	Holding Co.	200
	HB S&P/TSX 60 BEAR+A ETF	3/20/2009	Holding Co.	300
17.	HB S&P/TSX 60 BEAR+A ETF	5/12/2009	Personal	600
	HB S&P/TSX 60 BEAR+A ETF	5/12/2009	Personal	200
18.	GAMMON GOLD INC.	6/11/2009	Personal	100
	GAMMON GOLD INC.	6/11/2009	Personal	1900
19.	OSISKO MINING CORP.	6/19/2009	Personal	400
	OSISKO MINING CORP.	6/19/2009	Personal	1600
20.	GAMMON GOLD INC.	7/6/2009	Personal	-100
	GAMMON GOLD INC.	7/6/2009	Personal	-1900
21.	SUPERIOR PLUS CORP	7/16/2009	Personal	100
	SUPERIOR PLUS CORP	7/16/2009	Personal	1900

	Security	Transaction Date	Account	Quantity
22.	CANADIAN OIL SAND T/U	7/28/2009	Personal	200
	CANADIAN OIL SAND T/U	7/28/2009	Personal	300
23.	OSISKO MINING CORP.	8/11/2009	Personal	-300
	OSISKO MINING CORP.	8/11/2009	Personal	-300
	OSISKO MINING CORP.	8/11/2009	Personal	-700
	OSISKO MINING CORP.	8/11/2009	Personal	-100
	OSISKO MINING CORP.	8/11/2009	Personal	-600
24.	PENGROWTH ENERGY T/U	10/21/2009	Personal	500
	PENGROWTH ENERGY T/U	10/21/2009	Personal	200
	PENGROWTH ENERGY T/U	10/21/2009	Personal	100
	PENGROWTH ENERGY T/U	10/21/2009	Personal	700
25.	TRANSCANADA CORP	10/29/2009	Personal	300
	TRANSCANADA CORP	10/29/2009	Personal	700
26.	BONAVISTA ENERGY TRST T/U	12/30/2009	Personal	-300
	BONAVISTA ENERGY TRST T/U	12/30/2009	Personal	-500
27.	KINROSS GOLD CORP	1/15/2010	Personal	-400
	KINROSS GOLD CORP	1/15/2010	Personal	-600
28.	FORTIS INC	2/19/2010	Personal	400
	FORTIS INC	2/19/2010	Personal	300
29.	BANQUE DE NOUVELLE ECOSSE	3/5/2010	Personal	200
	BANQUE DE NOUVELLE ECOSSE	3/5/2010	Personal	100
30.	FORTIS INC	3/9/2010	Personal	-500
	FORTIS INC	3/9/2010	Personal	-500
31.	CANADIAN OIL SAND T/U	5/31/2010	Personal	100
	CANADIAN OIL SAND T/U	5/31/2010	Personal	100
	CANADIAN OIL SAND T/U	5/31/2010	Personal	300
32.	SUPERIOR PLUS CORP	6/11/2010	Personal	400
	SUPERIOR PLUS CORP	6/11/2010	Personal	100
33.	JUST ENERGY INCM FND T/U	7/12/2010	Personal	200
	JUST ENERGY INCM FND T/U	7/12/2010	Personal	700
34.	TIM HORTONS INC	8/12/2010	Personal	500
	TIM HORTONS INC	8/12/2010	Personal	-500
35.	KIRKLAND LAKE GOLD INC	8/31/2010	Personal	100
	KIRKLAND LAKE GOLD INC	8/31/2010	Personal	400
36.	NAL OIL & GAS T/U	9/3/2010	Personal	700
	NAL OIL & GAS T/U	9/3/2010	Personal	300
37.	DAYLIGHT ENERGY LTD	11/22/2010	Personal	200
	DAYLIGHT ENERGY LTD	11/22/2010	Personal	800
38.	DAYLIGHT ENERGY LTD	3/24/2011	Personal	-400
	DAYLIGHT ENERGY LTD	3/24/2011	Personal	-600
39.	FAIRCOURT GOLD INCOME -A	3/28/2011	Personal	-1300
	FAIRCOURT GOLD INCOME -A	3/28/2011	Personal	-1200
40.	CATHEDRAL ENERGY SVCS LTD	4/15/2011	Personal	200
	CATHEDRAL ENERGY SVCS LTD	4/15/2011	Personal	300
41.	DAYLIGHT ENERGY LTD	4/19/2011	Personal	400
	DAYLIGHT ENERGY LTD	4/19/2011	Personal	100
42.	CERVUS EQUIPMENT CORP	5/17/2011	Personal	-300

	Security	Transaction Date	Account	Quantity
	CERVUS EQUIPMENT CORP	5/17/2011	Personal	-500
43.	DAYLIGHT ENERGY LTD	5/18/2011	Personal	200
	DAYLIGHT ENERGY LTD	5/18/2011	Personal	800
44.	PRECIOUS METALS & MNG T/U	10/11/2011	Personal	200
	PRECIOUS METALS & MNG T/U	10/11/2011	Personal	1600
	PRECIOUS METALS & MNG T/U	10/11/2011	Personal	200
45.	PRECIOUS METALS & MNG T/U	10/18/2011	Personal	-300
	PRECIOUS METALS & MNG T/U	10/18/2011	Personal	-1700
46.	CML HEALTHCARE INC	10/19/2011	Personal	500
	CML HEALTHCARE INC	10/19/2011	Personal	500
	CML HEALTHCARE INC	10/19/2011	Personal	200
	CML HEALTHCARE INC	10/19/2011	Personal	800
47.	OSISKO MINING CORP	11/11/2011	Personal	300
	OSISKO MINING CORP	11/11/2011	Personal	200
48.	ENCANA CORP	11/30/2011	Personal	-100
	ENCANA CORP	11/30/2011	Personal	-900
49.	PRECIOUS METALS & MNG T/U	12/8/2011	Personal	500
	PRECIOUS METALS & MNG T/U	12/8/2011	Personal	500
50.	OSISKO MINING CORP	12/30/2011	Personal	100
	OSISKO MINING CORP	12/30/2011	Personal	100
	OSISKO MINING CORP	12/30/2011	Personal	300
51.	PRECIOUS METALS & MNG T/U	1/25/2012	Personal	100
	PRECIOUS METALS & MNG T/U	1/25/2012	Personal	900

APPENDIX B

Comparison of telephone message books with telephone bills

Month of Calls	Telephone slips for calls from the Complainant (Exhibit R, R-9)	Telephone bills (Record, pp. 2370 – 2372)
January	January 17, 2007	Jan. 19, 2009 (1 call from Wellington West)
	Jan. 19 (no year)	
	Jan. 21 (no year)	
February		Feb. 2009 (1 potential call from Complainant)
March		March 2009 (1 potential call from Complainant)
April	April 28 (no year)	April 2009 (1 potential call from Complainant)
May	May 29 (no year)	May 29, 2009 (1 call from Wellington West, 2 potential calls from Complainant)
June	June 19 (no year)	June 25, 2009 (3 calls from Wellington West and 4 potential calls from Complainant)
	June 25, 2:25 p.m. (no year)	
July	July 4, 2006	July 2009 (2 potential calls from Complainant)
	July 25, 2008	
	July 15 (no year) (Exhibit "R", R-2, p. 4)	
August		Aug. 6, 2009 (2 calls from Wellington West and 3 potential calls from Complainant)
September	Sept. 8 (no year)	Sept. 8, 2009 (1 call from Wellington West, 1 potential call from Complainant)
	Sept. 12 (no year)	
October	Oct. 4 (no year)	Oct. 19, 2009 (1 call from Wellington West, 1 potential call from Complainant)
November	Nov. 6 (no year)	Nov. 26, 2009 (1 call from Wellington West, 1 potential call from Complainant)
	Nov. 26 (no year)	
December	Dec. 2 (no year)	Dec. 1, 2009 (3 calls from Wellington West)
	Dec. 19 (no year)	Dec. 2, 2008 (1 call from Wellington West)
		Dec. 12, 2008 (2 calls from Wellington West)
		Dec. 18, 2008 (2 calls from Wellington West)
		Dec. 19, 2008 (2 calls from Wellington West)
		Dec. 2008 (6 potential calls from Complainant)

APPENDIX C

Comparison of Telephone Records with Withdrawals

Month of Calls	Telephone slips (Exhibit R, R-9) Calls to the toll-free line (Record, pp. 2301-2370 and 3412-3550)	Potential Corresponding Withdrawals (Portfolio Statements for Accounts - Record, pp. 529-1072)
January	January 17, 2007 slip	Withdrawal on January 17, 2007
	January 19 slip	No withdrawal within one month
	January 21 slip	No withdrawal within almost a month
February	February 2009 – call to the toll-free line	Withdrawal on February 18, 2009
March	March 2009 – call to the toll-free line	No withdrawals in March 2009
April	April 28 slip	Withdrawal on April 28, 2008
	April 28 slip	Withdrawal on April 29, 2008
	April 2009 – call to the toll-free line	Withdrawal on April 29, 2009
May	No record of a call	Withdrawal on May 3, 2007
	No record of a call	Withdrawal on May 1, 2008
	May 2009 - 2 calls to the toll-free line	Withdrawal on May 4, 2009
June	May 29 slip	Withdrawal on June 1, 2007
	No record of a call	Withdrawal on June 10, 2008
	No record of a call	Withdrawal on June 16, 2008
	June 19 slip	No corresponding withdrawal
	June 25 slip	Withdrawal on June 26, 2009
	June 2009 – 4 calls to the toll-free line	Withdrawal on June 26, 2009
July	July 4, 2006 slip	No corresponding withdrawal
	July 15 slip (Exhibit R, Doc. R-2, p. 4)	No corresponding withdrawal
	No record of a call	Withdrawal on July 2, 2008
	July 25, 2008 slip	2 Withdrawals on July 25, 2008
	July 2009 – 2 calls to the toll-free line	No withdrawals in July 2009
August	August 2009 – 3 calls to the toll-free line	Withdrawal on August 6, 2009
		Withdrawal on August 11, 2009
September	September 8 slip	No withdrawals in September 2007-2009
	September 12 slip	
	September 2009 – 1 call to the toll-free line	
October	October 4 slip	No corresponding withdrawal
	October 2009 – 1 call to the toll-free line	Withdrawal on October 19, 2009
November	November 6 slip	No corresponding withdrawal
	November 26 slip	Withdrawal on November 26, 2008
	November 2009 – 1 call to the toll-free line	Withdrawal on November 27, 2009
December	December 2 slip	No corresponding withdrawal
	December 19 slip	No corresponding withdrawal
	December 2008 – 6 calls to the toll-free line	Withdrawal on December 11, 2008 Withdrawal on December 17, 2008