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IN THE MATTER OF THE *SECURITIES ACT*,
R.S.N.S. 1989, CHAPTER 418, AS AMENDED (the Act)

– AND –

IN THE MATTER OF SHIRLEY A. LOCKE (the Applicant)

DECISION
(Subsections 30(5) and (5A) and 6(3))

Hearing	January 14 and 15, 2021	
Decision:	June 24, 2021	
Panel:	Shirley P. Lee, QC	Chair
	Valerie Seager	Commissioner
	Heidi Walsh-Sampson	Commissioner
Submissions:	Kevin J. Kiley	Counsel for the Applicant
	Tom Keeler	
	Brian K. Awad, QC	
	Kathryn Andrews	Counsel for the Investment Industry Regulatory Organization of Canada
	April Engelberg	

TABLE OF CONTENTS

I. BACKGROUND

A. Introduction

[1] On January 14 and 15, 2021, a hearing was held before the Nova Scotia Securities Commission (the Commission) to consider an application made by the Applicant dated June 26, 2020, as amended (the Application) for a hearing and review (the Hearing and Review) of three decisions of a Hearing Panel (Nova Scotia District) (the IIROC Panel) of the Investment Industry Regulatory Organization of Canada (IIROC).

[2] The Application was heard pursuant to subsections 30(5) and (5A) and section 6 of the Act.

[3] The Applicant requested the Commission to exercise its authority to hold a hearing *de novo* to consider the Application, set aside the IIROC decisions, and issue an order dismissing the proceedings against the Applicant.

[4] Staff of IIROC (IIROC Staff) opposes the Application and submitted that it should be dismissed.

[5] For the Application, both parties provided written and oral submissions. After consideration of the record of the IIROC proceeding, the written submissions for the IIROC proceeding and the submissions for the Application, we find that the Applicant has established a basis to intervene in several of the IIROC decisions. Our reasons and decisions for the Application are set out in detail below.

B. The IIROC Decisions

[6] Under a Notice of Hearing and Amended Statement of Allegations dated July 3, 2019, amended December 18, 2019 (the Statement of Allegations), IIROC Staff made the following allegations:

(a) Between January 2010 and September 2014, the Applicant failed to use due diligence to learn and remain informed of the essential facts relative to clients GR, JF, F Limited and EH, contrary to IIROC Dealer Member Rule 1300.1(a) (Contravention 1);

(b) Between January 2010 and September 2014, the Applicant failed to use due diligence to ensure that recommendations made for clients GR, JF and F Limited were suitable for them, based on their investment objectives and risk tolerance, contrary to IIROC Dealer Member Rule 1300.1(q) (Contravention 2);

(c) Between January 2010 and September 2014, the Applicant effected trades in the accounts of clients EH and AH that were not within the bounds of

good business practice, contrary to IIROC Dealer Member Rule 1300.1(o) (Contravention 3);

(d) Between January 2010 and September 2014, the Applicant conducted unauthorized trades in the accounts of GR, JF and EH, contrary to IIROC Dealer Member Rule 29.1 (Contravention 4);

(e) Between January 2015 and December 2017, the Applicant failed to use due diligence to learn and remain informed of the essential facts relative to client LG, contrary to IIROC Dealer Member Rule 1300.1(a) (Contravention 5); and

(f) Between January 2015 and December 2017, the Applicant failed to use due diligence to ensure that recommendations made for client LG were suitable for her, based on her investment objectives and risk tolerance, contrary to IIROC Dealer Member Rule 1300.1(q) (Contravention 6).

[7] The IIROC Panel heard the matter from December 16 to 20, 2019, and from March 2 to 5, 2020 (the Merits Hearing). For the hearing, a substantial volume of evidence was introduced, including account statements, complaint letters, charts prepared by IIROC Staff, issuers' prospectuses and continuous disclosure documents, the Applicant's notes, emails, and an expert report. The IIROC Panel heard testimony from numerous parties, including the Applicant and her clients. Both parties filed written submissions following the Merits Hearing.

[8] On December 19, 2019, the IIROC Panel heard from Patricia Gerada (Gerada), the investigator for IIROC Staff. In her direct examination, Gerada made reference to charts prepared by IIROC Staff in respect of the risk rating for securities held in the relevant accounts.

[9] The Applicant objected to the admissibility of the charts and the evidence of Gerada with respect to the risks associated with the various securities. After hearing the submissions of the parties and considering the cases to which the parties referred, the IIROC Panel decided that it would hear the evidence of Gerada and admitted the exhibits.

[10] The IIROC Panel issued its Decision on the Merits dated May 28, 2020 (the Merits Decision). The IIROC Panel stated in its decision that it was satisfied upon the preponderance of *viva voce* and documentary evidence that IIROC Staff had met its burden of proof in respect to Contraventions 1, 2, 4, 5 and 6 in all respects. Regarding Contravention 3, the IIROC Panel found that IIROC Staff had met its burden of proof for client EH but not client AH.

[11] The IIROC Panel issued its reasons for its decision on the admissibility of Gerada's charts in the Decision on Respondent's Objection re Admissibility dated August 7, 2020 (the Admissibility Decision).

[12] After a penalty hearing on July 20, 2020 (the Penalty Hearing), the IIROC Panel issued its Penalty Decision dated August 8, 2020 (the Penalty Decision, and together with the Admissibility Decision and the Merits Decision, the IIROC Decisions) ordering penalties for the contraventions found in the Merits Decision.

[13] Pursuant to a motion filed by the Applicant, we issued a Decision on a Conditional Stay and an order both dated December 23, 2020 (the Conditional Stay Decision), granting a stay of the Penalty Decision until the disposition of the Hearing and Review subject to two conditions.

C. Errors Alleged by the Applicant

[14] The Applicant submitted the following issues for review in the Hearing and Review:

(a) the IIROC Panel erred in law and breached the rules of natural justice and fairness by allowing the admission of opinion evidence with respect to the risk rating of securities from a witness who was not duly qualified as an expert, and otherwise;

(b) the IIROC Panel erred in law, overlooked material evidence, and proceeded on an incorrect principle with respect to the alleged contraventions of Dealer Member Rules 1300.1(a), 1300.1(q) and 29.1, in circumstances involving an account held jointly between multiple persons, or between corporate account holders, and otherwise;

(c) the IIROC Panel erred in law, overlooked material evidence and proceeded on an incorrect principle in the application of Dealer Member Rule 29.1 with respect to allegations of unauthorized trading, in that the IIROC Panel applied an incorrect standard of proof, and otherwise;

(d) the IIROC Panel erred in law with respect to the applicable standard of proof and application of Dealer Member Rule 1300.1(o) in concluding that trades in the account of a single client were not within the bounds of good business practice, and otherwise;

(e) the IIROC Panel erred in law and overlooked material evidence in failing to consider or apply industry standards with respect to assessment of suitability, in compliance with Rule 1300.1(q), and otherwise; and

(f) the IIROC Panel erred in law and proceeded on an incorrect principle in determining the appropriate penalty to be applied, in all of the circumstances.

II. THE ISSUES

[15] In considering the Application, we address the following issues:

(a) what is the appropriate standard of review of an IIROC decision under subsections 30(5) and (5A) of the Act?

(b) has the Applicant established any grounds on which the Commission may intervene in the IIROC Decisions?

III. STANDARD OF PROOF AT IIROC PROCEEDINGS

[16] The Applicant submitted, and IIROC Staff concurred, that the standard of proof to be met by IIROC Staff in IIROC proceedings is the civil standard of a balance of probabilities. The IIROC Panel discussed the standard of proof at paragraph 7 of the Merits Decision as follows:

> 7 The proceeding was held in the normal course as provided for discipline hearings of this nature in accordance with the principles of natural justice. Witnesses were heard, cross examined, and exhibits received. The onus placed upon IIROC Staff was to prove their allegations on a balance of probabilities. The Panel was referred to *FH v McDougall*[1] for the principle that there is only one civil standard of proof at common law being on a balance of probabilities. In its deliberations the Panel must rely on "evidence that in its findings are sufficiently clear, convincing and cogent to satisfy the balance of probabilities test."

[17] The Applicant submitted that although the IIROC Panel identified the requirement for IIROC Staff to present clear, cogent and convincing evidence on a balance of probabilities, in many cases, the IIROC Panel focused excessively on choosing between conflicting versions of events, and in doing so, lost sight of the core requirement that IIROC Staff prove their allegations with sufficiently clear, cogent and convincing evidence on a balance of probabilities.

[18] This submission will be addressed below in the context of the issues for review raised by the Applicant.

IV. APPROPRIATE STANDARD OF REVIEW OF AN IIROC DECISION

A. Submissions of the Parties

[19] The Applicant submitted that subsections 30(5) and (5A) and section 6 of the Act provide the Commission with broad hearing and review powers which allow the Commission to review decisions of a self-regulatory organization (SRO) on a *de novo* basis, rather than solely by way of appeal. The Commission can exercise original jurisdiction and make its own decision based upon the evidentiary record before it. It should not give undue deference to the reasons for decision of an IIROC hearing panel exercising its jurisdiction as an administrative delegate.

[20] The Applicant submitted that the Commission should conduct a comprehensive *de novo* review of the IIROC Decisions in light of the factors set out *Canada Malting Co., Re* (1986), 9 OSCB 3565 (*Canada Malting*): in particular, whether the IIROC Panel erred in law, proceeded on an incorrect principle or overlooked material evidence.

[21] The Applicant submitted that comments made by the Ontario Securities Commission (OSC) in *Sammy (Re)*, 2017 ONSEC 21 (*Sammy*) support the conclusion that the Commission is not limited by the factors in *Canada Malting* and can substitute its opinion for that of the inferior tribunal in appropriate circumstances.

[22] In *Sammy,* the OSC asked the parties to make submissions regarding the standard of review to be applied by it in respect of an SRO decision in light of the Ontario Court of Appeal (Ont. CA) decision in *Johal v. Ontario (Board of Funeral Services),* 2012 ONCA 785 (*Johal*).

[23] IIROC Staff submitted that the correct approach regarding the standard of review of an SRO decision is well settled and is in accordance with *Canada Malting*. In particular:

(a) overseeing tribunals should give significant deference to IIROC decisions, in recognition of their specialized knowledge and expertise in regulating and disciplining IIROC members and engaging in securities regulation;

(b) although subsection 6(3) of the Act confers a broad discretion and original jurisdiction, where the basis for the application is a decision of a recognized SRO, such as IIROC, in practice Securities Commissions have taken a restrained approach to review;

(c) a hearing *de novo* of an SRO decision should only be conducted where the applicant meets the "heavy burden" of demonstrating that its case fits within at least one of the factors in *Canada Malting*; and

(d) neither *Sammy* nor *Johal* support the Applicant's submissions that the Commission is not limited by the *Canada Malting* factors.

B. The Law

[24] The Commission has the authority to review a decision, order, or ruling of an SRO, in this case IIROC, under subsections 30(5) and (5A) of the Act which provide as follows:

> 30(5) The Director or any person or company which is a registrant and directly affected by a decision, order or ruling of a self-regulatory organization is entitled to a hearing and review of the decision, order or ruling by the Commission to the same extent as if the decision, order or ruling had been a decision of the Director.

> 30(5A) Section 6 applies to the hearing and review of a decision, order or ruling under subsection (5) in the same manner as that Section applies to a hearing and review of a decision of the Director.

[25] Subsections 30(5) and (5A) of the Act are substantively the same as section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (OSA).

[26] Subsection 6(3) of the Act provides that, upon a hearing and review, the Commission may confirm the decision under review or make such other decision as the Commission considers proper.

[27] Subsection 6(3) of the Act is the same as subsection 8(3) of the OSA.

[28] In paragraphs 43 and 44 of the OSC decision *Investment Industry Regulatory Organization of Canada (Re) v. Julius Caesar Phillip Vitug*, (2010), 33 OSCB 3965 (*Vitug*), the OSC stated that although it exercises a form of original jurisdiction akin to a trial *de novo* in a section 21.7 hearing and review, previous cases have established that there is a high threshold to meet in demonstrating that an SRO decision should be overturned.

[29] In paragraph 48 of *Vitug*, the OSC stated:

> **48** Nonetheless, there are circumstances in which the Commission will intervene in an SRO decision. The test for determining whether the Commission should intervene is set out in *Canada Malting Co.* (1986), 9 O.S.C.B. 3565 ("*Canada Malting*"), where the Commission established that it will only interfere with the decision of an SRO on the following grounds:
>
> 1. the SRO has proceeded on an incorrect principle;
>
> 2. the SRO has erred in law;
>
> 3. the SRO has overlooked some material evidence;
>
> 4. new and compelling evidence is presented to the Commission that was not presented to the SRO; or
>
> 5. the SRO's perception of the public interest conflicts with that of [the] Commission.

[30] In paragraphs 53 and 54 of *Vitug*, the OSC stated:

> **53** The first ground for review set out in *Canada Malting* is whether the SRO proceeded on an incorrect principle. The test for whether an SRO proceeded on an incorrect principle is a narrow one. The SRO must have incorrectly interpreted a specific principle that it relied upon in its analysis.
>
> **54** Since *Canada Malting*, no clear distinction has been made between "proceeding on an incorrect principle" and erring in law. …

[31] Securities Commissions across Canada have considered the standard of review of decisions of SROs and stock exchanges, collectively referred to as SROs in this section, in numerous decisions, including the following:

(a) Nova Scotia-*Re Gregrory Burke*, Decision dated June 3, 2020, paras. 21 to 54;

(b) Ontario-*Vitug*, paras. 43 to 49; *HudBay Minerals Inc. (Re)*, 2009 LNONOSC 269, paras. 85 to 114; *Boulieris (Re)*, 2004 LNONOSC 56, paras. 26 to 32, aff'd [2005] O.J. No. 1984 (Ont. Div. Crt.), paras. 18, 19, 27 and 32; *Northern Securities Inc. (Re)*, 2013 LNONOSC 1023, paras. 36 to 61, aff'd 2015 ONSC 3641 (Ont. Div Crt) (*Northern Securities)*, paras. 3 to 9; *Julian Robert Ricci*, 2015 ONSEC 7 (*Ricci*), paras. 29 to 35;

(c) British Columbia- *Lowe (Re)*, 2014 BCSECCOM 458 (*Lowe*), paras. 49 to 52; and

(d) Alberta-*Hemostemix Inc. (Re)*, 2017 ABASC 14, paras. 55 to 67; *Re O'Brien*, 2020 ABASC 160 (*O'Brien*), paras. 25 to 47.

[32] In determining the appropriate standard of review in these decisions, the Securities Commissions were guided by the following:

(a) the applicant has the heavy burden of showing that its case fits squarely within at least one of the five *Canada Malting* grounds before the Securities Commission will intervene;

(b) deference is shown to factual determinations and decisions made by an SRO which are central to the SRO's specialized expertise to regulate and discipline its members for contraventions of the SRO's rules;

(c) where a factual finding is based on an assessment of the credibility of a witness, the SRO had the advantage of seeing the witness testify;

(d) it is only in rare circumstances that a Securities Commission will intervene in an SRO decision. Securities Commissions have taken a restrained approach to ensure that SROs have control and direction over their own processes and procedures;

(e) a Securities Commission generally will not substitute its own view of the evidence for that of an SRO merely because it may have reached a different decision on the facts;

(f) a Securities Commission's authority in a review of an SRO decision should not be used as a means to second-guess a reasonable decision made by the SRO; and

(g) the standard of review of an SRO decision is reasonableness. Was the SRO's decision reasonable in the context of the evidence, record and law before it and does the decision fall within a range of possible outcomes?

[33] In paragraph 35 of *Ricci*, the OSC stated that it "… accords even greater deference in matters of sanctions, and recognizes that IIROC hearing panels will have greater familiarity with IIROC's regulations and sanction guidelines than the Commission ...".

[34] In *Sammy*, Krishna Sammy, IIROC staff, and OSC staff all took the position in their written submissions that the standard set out in *Canada Malting* should remain undisturbed. The OSC did not consider the standard of review issue.

[35] *Johal (Re)*, [2011] O.L.A.T.D. No. 2 related to an appeal by Ms. Prabhjot Johal to the Licence Appeal Tribunal (the Tribunal) from a decision of the Discipline Committee of the Board of Funeral Services (the Discipline Committee). The appeal was made under section 18 of the *Funeral Directors and Establishments Act,* R.S.O. 1990, c. F.36 (the Funeral Act) which gave the Tribunal the power in subsection 14(9) of the Funeral Act to substitute its opinion for that of the Discipline Committee.

[36] The Tribunal focused on the specific wording in the Funeral Act and concluded in paragraph 62 of its decision that " ... (i)t is the Act which must dictate what role and authority the Tribunal has and, for all the factors considered above, the Tribunal concludes that the role of the Tribunal is to conduct a fresh hearing and arrive at an independent decision."

[37] In paragraph 18 of *Johal v. Ontario (Board of Funeral Services)*, [2011] O.J. No. 6226 (Ont. Div. Crt.), the Court agreed that the appeal before the Tribunal was a hearing *de novo*.

[38] In *Johal*, the Ont.CA, in paragraph 4 of its decision, stated that the language in subsections 18(2) and 14(9) of the Funeral Act, "…properly read, constitutes a statutory direction that appeal proceedings before the Tribunal are *de novo*. It also signals a legislative intention that no deference need be accorded by the Tribunal to decisions of the Discipline Committee."

[39] In *O'Brien*, the Alberta Securities Commission (ASC) considered an appeal by Michael O'Brien of IIROC disciplinary decisions rendered against him. Under paragraph 36(3)(a) of the *Securities Act*, RSA 2000 cS-4 (ASA), on an appeal, the ASC may "…make any decision that the person who heard the matter in the first instance could have made and substitute the [ASC's] decision for the decision of that person…".

[40] Mr. O'Brien cited the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII) and submitted that where there is a statutory right of appeal, as in section 73 of the ASA, unless the

statute specifies otherwise, the standard of review is the same as it would be for a court hearing an appeal from a lower court.

[41] After considering the previous approach taken by ASC panels hearing appeals under section 73 of the ASA, the ASC concluded at paragraph 47 of its decision as follows:

> [47] In summary, we concluded that IIROC decisions are owed deference unless one of the *Hemostemix* grounds warranting intervention obtains. In other words, a reasonableness standard applies unless there is a basis – including errors of law – for applying a correctness standard (*Hemostemix* at para. 59, citing *Dunsmuir* at para. 50). We note that this has been the approach taken by other Canadian jurisdictions as well; see *Investment Dealers Association of Canada v. Dass* (2008 BCCA 413 at para. 11); *Re Rudensky* (2019 ONSEC 24 at para. 32); and *Re Northern Securities Inc.* (2013 ONSEC 48 at paras. 49, 51).

C. Analysis and Conclusions

[42] IIROC is an SRO recognized by the Commission under section 30 of the Act. The Commission has the authority to review an IIROC decision under subsections 30(5) and (5A) of the Act.

[43] In determining the appropriate standard of review for an IIROC decision, we are guided by the decisions of other Securities Commissions discussed above which have all adopted the *Canada Malting* grounds. The OSC decisions are of particular relevance as the hearing and review regime under the OSA is substantively the same as the regime under the Act.

[44] In *Sammy*, the issue of the standard of review was not considered by the OSC.

[45] *Johal* is distinguishable on its facts and the statutory regime under the Funeral Act which is different in wording from the regime under the Act. The provision in the ASA governing the powers on an appeal of an SRO decision considered by the ASC in *O'Brien* is similar to that in the Funeral Act and yet the ASC determined that it should apply the *Canada Malting* grounds to appeals of SRO decisions.

[46] Based on the Securities Commissions decisions, we conclude that the appropriate standard of review of an IIROC decision under subsections 30(5) and (5A) of the Act is reasonableness. The role of the Commission in a hearing and review is not to provide a second opinion of an SRO decision. The Applicant has the heavy burden of showing that its case fits squarely within at least one of the *Canada Malting* grounds before the Commission will intervene. If the Commission determines that there are grounds to intervene, it can consider the matter on a *de novo* basis and determine under subsection 6(3) of the Act whether to confirm the decision or make such other decision that it considers proper.

V. ARE THERE GROUNDS TO INTERVENE IN THE ADMISSIBILITY DECISION?

A. Admission of Gerada's Charts

IIROC Panel Decision

[47] The Admissibility Decision reflects the decision that the IIROC Panel made on December 19, 2019, during the Merits Hearing, to admit Gerada's charts as evidence.

[48] In the Admissibility Decision, the IIROC Panel described the Applicant's objections to the admissibility of the charts in paragraph 2, IIROC Staff's submissions in paragraph 3 and the cases referred to by each of the parties in paragraph 4.

[49] In paragraph 5 of the Admissibility Decision, the IIROC Panel stated:

> 5. After hearing the submissions of counsel and considering the cases to which counsel referred, the Panel decided that it would hear the evidence of the investigator and admit the exhibit. It is the role of the Panel as finder of fact to make determinations of fact in respect to the evidence offered in a hearing. It is clearly in the expertise of the Panel to make its own determination of risk based upon what it has heard and the documentary evidence before it. The sources of the data are relevant considerations in determining what weight the Panel should give the evidence. The evidence of the investigator and the exhibit were not determinative of the issue before the Panel. The evidence may be of some assistance, but was evidence to be considered in its totality in making a determination whether or not certain securities were suitable for the clients.

Submissions

[50] The Applicant submitted that the IIROC Panel erred in law and breached the rules of natural justice and fairness by allowing and considering the opinion evidence of Gerada, who was not duly qualified as an expert, with respect to the risk ratings of securities. In doing so, the IIROC Panel failed to consider whether any of the established opinion evidence criteria in *R. v. Mohan*, [1994] 2 S.C.R. 9 (*Mohan*) were satisfied, but admitted the evidence in its totality.

[51] The Applicant submitted that the critical step of applying a risk rating based on underlying factual issuer documentation clearly constituted the exercise of Gerada's judgment in arriving at her opinion.

[52] The Applicant submitted that the IIROC Panel failed to accurately characterize the evidence presented to them and that the Commission should complete its own analysis of suitability of various securities in the client accounts.

[53] The Applicant submitted that there was no reasonable basis to conclude that Gerada's opinion with respect to the risk of a particular security was of any assistance to the IIROC Panel in reaching determinations with respect to the risk

rating of a particular security, and the completion of an analysis with respect to suitability.

[54] The Applicant noted that in paragraphs 28, 61, 94 and 150 of the Merits Decision, the IIROC Panel's comments relating to the risk of various securities corresponded with the evidence of Gerada.

[55] IIROC Staff submitted that Gerada provided factual evidence and not opinion evidence. The charts that she presented provided factual risk ratings of securities taken directly from issuers' documents such as prospectuses, consolidated financial statements, annual information forms and press releases.

[56] IIROC Staff submitted that putting factual information into charts does not make it opinion evidence and that categorizing information as a type of risk is not analysis.

Analysis and Conclusions

[57] The issue of the admissibility of Gerada's charts is discussed on pages 103 to 122 of the December 19, 2019, transcript of the Merits Hearing (the Dec. 19 Transcript). The charts were introduced during the direct examination of Gerada. The Applicant objected to the admission of the charts. Both parties provided oral submissions and each provided a case supporting its position. IIROC Staff relied on *Sammy* and the Applicant relied on *Re Debus*, 2019 IIROC 5 (*Debus*).

[58] At the Merits Hearing, the Applicant did not discuss or provide a copy of *Mohan* to the IIROC Panel for consideration with respect to this issue. The relevance of *Mohan* is unclear as there is no indication in the Admissibility Decision that the IIROC Panel considered Gerada's charts to be opinion evidence.

[59] After hearing the parties' submissions, the IIROC Panel Chair asked Gerada "…what was the source of what is reported in the column "ratings"?" and Gerada replied "(d)ocuments off SEDAR". Gerada then explained how she determined the ratings after reviewing the documents (pgs. 119 and 120 of the Dec. 19 Transcript).

[60] After taking a recess to consider the parties' submissions and review the cases, the IIROC Panel decided that it was the sole role of the IIROC Panel to make determinations regarding risk and suitability and that it was entitled to rely on any evidence put before it. It was not prepared to reject Gerada's documents as they may be of some assistance to the Panel in making those determinations (pgs. 121 and 122 of the Dec. 19 Transcript). This decision is reflected in paragraph 5. of the Admissibility Decision.

[61] The issuer documents that Gerada used as the source for the ratings in the charts she prepared were admitted as Exhibits 7a to 7k, forming part of the evidence considered by the IIROC Panel in making its decisions. These consisted of IIROC Compendium Volumes 7-A to 7-K.

[62] With respect to the Applicant's submissions relating to paragraphs 28, 61 and 94 of the Merits Decision, the IIROC Panel referenced the issuers' continuous disclosure documents, Volumes 7A to 7K, as well as the staff charts, in its analysis with respect to the risk ratings of securities in the various accounts. In paragraph 150 of the Merits Decision, there is no reference to any particular documents.

[63] We find that at the Merits Hearing, the IIROC Panel did not misinterpret the applicable law before it and that it provided adequate reasons for its decision after hearing submissions from both parties. Therefore, the IIROC Panel did not err in law or breach the rules of natural justice and fairness in admitting the Gerada charts and determining that the charts may be of assistance to it in its determination of the risk ratings of the securities. We find no basis upon which to intervene in the Admissibility Decision.

[64] We do note that the Gerada charts contain a few ratings for medium risk securities that are not supported by any issuer documents entered as exhibits. For example, in the "List of Securities Rated" chart for JF in Exhibit 1, IIROC Compendium Volume 1, tab 7, page 343, the ratings for National Bank of Canada and Royal Bank of Canada are "medium". These ratings may be opinion evidence as there are no supporting issuer documents for these two issuers in Exhibits 7a to 7k. However, it is clear from the Admissibility Decision and the Merits Decision that the IIROC Panel was cognizant that it was the Panel's responsibility to make determinations regarding risk and suitability and that it did so based on all of the evidence put before it.

B. Consideration of Leo Purcell Evidence

IIROC Panel Decision

[65] The IIROC Panel discussed the evidence provided by Leo Purcell (Purcell), an expert who appeared on behalf of the Applicant at the Merits Hearing, in paragraphs 151 to 156 of the Merits Decision.

[66] In paragraph 151 of the Merits Decision, the IIROC Panel noted that Purcell's *curriculum vitae* was tendered as Exhibit 18 and that Purcell's report dated February 14, 2020 (the Purcell Report) was tendered as Exhibit 19. It was also noted that Purcell testified as an expert witness without objection by IIROC Staff.

[67] In the Merits Decision, the IIROC Panel stated that:

(a) it considered the Purcell Report and Purcell's testimony in detail (paragraph 152);

(b) it gave the Purcell Report and Purcell's opinions such weight as it deemed reasonable. "However, it is the responsibility of and within the expertise of the Panel to make its own determination upon the evidence before it… The Panel does not find Mr. Purcell's report or evidence determinative of any of the issues before the Panel." (paragraph 154); and

(c) in applying the test in *Mohan* that the expert's testimony must be outside the experience and knowledge of the finder of fact, the expert should not usurp the role of the trier of fact (paragraph 155).

Submissions

[68] The Applicant submitted that the IIROC Panel failed to appropriately consider the properly qualified expert opinion of Purcell in evaluating the suitability of an investment transaction for a particular client and with respect to an investment portfolio as a whole. Notably, the IIROC Panel did not appear to consider whether divergences of up to ten percentage points from established investment objectives and risk tolerances were allowable in a suitability analysis.

[69] IIROC Staff submitted that Purcell's evidence had significant weaknesses and that the know your client (KYC) forms relied upon by Purcell in his expert report were inaccurate according to the clients' oral testimony at the Merits Hearing.

[70] IIROC Staff submitted that the IIROC Panel's decision not to rely on Purcell's testimony is not a reviewable error as the IIROC Panel is able to decide suitability without the need for expert evidence.

Analysis and Conclusions

[71] It is clear from the Merits Decision that the IIROC Panel considered the Purcell Report and Purcell's testimony in making its decision. In addition to having the Purcell Report and hearing Purcell's detailed testimony regarding his report on March 5, 2020, the IIROC Panel was provided with post-hearing written submissions from both parties. In its submissions, the Applicant submitted that the Purcell Report would be of significant assistance to the IIROC Panel in highlighting the relevant industry context and standards in its consideration of the suitability and KYC requirements.

[72] We find no evidence that the IIROC Panel proceeded on an incorrect principle, erred in law, or overlooked some material evidence in Its consideration of the Purcell evidence. As stated by the Ontario Superior Court of Justice (Divisional Court) in paragraph 33 of its decision in *Northern Securities*, "…IIROC, as a specialized tribunal, is best fixed to decide what it needs in order to decide a question squarely within the ambit of its technical expertise. …"

VI. ARE THERE GROUNDS TO INTERVENE IN THE MERITS DECISION?

A. Are there grounds to intervene in the decisions relating to Dealer Member Rules 1300.1(a) and 1300.1(q)?

1. General Law

[73] Dealer Member Rules 1300.1(a) and 1300.1(q) (Rules 1300.1(a) and (q)) read as follows:

> 1300.1 – Identity and Creditworthiness
>
> (a) Each Dealer Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted.
>
> 1300.1 – 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 customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance.

[74] The IIROC Panel discussed the general law relating to the KYC and suitability obligations in Rules 1300.1(a) and (q) in paragraphs 14 to 16 of the Merits Decision. They cited the ASC's discussion of the law on pages 10 and 14 of *Re Lamoureux*, (2001) ABSECM 813127 (*Lamoureux*). The discussion included a description of the three-stage analysis to be adopted in the assessment of suitability which is summarized as follows:

(a) the first stage involves the due diligence steps undertaken by the registrant to know the client and know the product;

(b) the second stage requires the registrant to determine whether specific trades or investments are suitable for that client, noting that suitability determinations will always be fact specific; and

(c) the third stage requires a determination as to whether a particular transaction has in fact been recommended to the client.

[75] Both parties referred to *Lamoureux* in their written submissions for the Hearing and Review.

[76] Paragraph 108 of *Myatovic, Re*, 2012 IIROC 47 (*Myatovic*) contains a discussion of the factors to consider in fulfilling the KYC obligation:

> 108 The Know-Your-Client Rule is one of the basic tenets that defines the relationship between a registered representative and his or her client. Concurrently with the opening of an account, a registered representative has the obligation to make diligent efforts to learn of and to record the financial and personal circumstances of the client. This research obligation includes a full understanding of the prospective client's entire financial circumstances, both existing and anticipated. It also includes an informed assessment of the prospective client's knowledge and experience with investing and capital markets. This informed assessment is essential to enable the registered representative to work with the prospective client to better define his or her investment objectives and risk tolerances. And this research obligation includes a reasonable inquiry into the prospective client's business and personal relationships to assist the registered representative to properly advise the prospective client with the future trading activity in the account.

2. JF

IIROC Panel Decision

[77] JF, a client of the Applicant for many years, was in her 90s between the material times of January 2010 to September 2014 (the First Material Period).

[78] With respect to the joint account held by JF and her daughters CR and LC, the IIROC Panel made the following findings in the Merits Decision:

(a) "... the KYCs do not in fact represent an objectively suitable portfolio for JF…" (para. 22);

(b) "... There is evidence that Ms. Locke did not diligently make efforts to truly learn and assess her client JF and completed a KYC that demonstrates a failure to know the client." (para. 24);

(c) "…(s)uitability should be assessed *vis a vis* the client JF and her stated desire for income, her age, financial resources and time horizon." (para. 27); and

(d) "... the KYCs prepared by Ms. Locke for JF's review and signature were not a good faith, diligent nor responsible statement of the client's risk tolerances and objectives. Therefore, they cannot be relied upon wholly or in part to justify the high-risk investments made in JF's account. The Panel is cognizant that some of the holdings in JF's account would be considered as suitable. The holdings of the securities set out above in the account of JF were not suitable for JF." (para. 31).

Submissions

[79] The Applicant submitted that the IIROC Panel erred in law in their application and interpretation of Rules 1300.1(a) and (q) and overlooked material evidence by evaluating the Applicant's compliance with the KYC and suitability obligations solely with respect to JF, who was only one of three joint account holders. As a registrant, the Applicant was required to consider every client associated with the joint account, and could not consider one client at the exclusion of others associated with the joint account.

[80] The Applicant submitted that the IIROC Panel heard no evidence from LC, and made no findings with respect to the account as a whole or the investment objectives and risk tolerance of CR, who acknowledged some involvement in the joint account.

[81] The Applicant submitted that:

(a) the transactions in the joint account frequently mirrored those in the accounts of CR and her husband GR since CR was involved in all the accounts; and

(b) the strategy for the joint account included growth for the daughters. As the daughters were joint account holders and beneficiaries under the account, they would receive the benefit of the growth when JF passed away.

[82] IIROC Staff submitted that the Applicant's submissions were not persuasive as the fact that LC and CR were joint account holders with JF did not change the purpose of the account which was for JF, a widow in her 90s at the material time, to have income to live on.

Analysis and Conclusions

[83] The Applicant's submissions to us with respect to the assessment of the KYC and suitability obligations for the joint account and the lack of evidence from LC were made to the IIROC Panel for the Merits Hearing and would have been considered by the IIROC Panel in making the Merits Decision.

[84] It is clear from the record of the proceedings for the Merits Hearing, including the written submissions of both parties (the Merits Record) that JF's account was a joint account with CR and LC.

[85] In the Merits Record, Exhibit 1 is IIROC Compendium Volume 1 which relates to JF. Tab 1, page 2, contains the Wellington West Capital Inc. (Wellington West) New Client Application Form (NCAF) showing JF, CR and LC as the joint account holders (the JF NCAF). It was signed by the three account holders on various dates in the spring of 2009. The account holder profile information on the first page of the JF NCAF is information relating to JF. On page 3 of the JF NCAF, investment knowledge is shown as limited and risk level is shown as 50% medium and 50% high to reflect the securities in the portfolio at that time.

[86] Page 6 of the JF NCAF contains a Joint Account Agreement. The Agreement describes the rights and obligations of the joint account holders. There is nothing in the Agreement that provides any guidance on how to assess the KYC for the joint account.

[87] There were no updates or changes to the KYC information for the JF joint account at any time during the First Material Period.

[88] There was some information in the evidence relating to LC. In Exhibit 1, starting at:

(a) page 17, there is a Wellington West NCAF for LC signed by her on February 20, 2004; and

(b) page 22, there is a Wellington West Second Party Account Supplement for the joint account signed by LC on April 7, 2009.

[89] In Exhibit 1, tab 4, starting at page 305, there are four National Bank Financial Inc. (NBF) Stanley suitability queries addressed to the Applicant relating to the JF joint account. They are dated April 9, 2012, April 30, 2013, July 18, 2013, and August 26, 2013. The first three queries refer to the 96 year old client. The August 26, 2013, query refers to the 97 year old client. The queries indicate that NBF considered JF to be the client.

[90] Exhibit 8a is IIROC Compendium Volume 8-A which contains the Applicant's notes. Tab 189, page 4680 is the Applicant's typed notes dated October 25, 2016 (the JF Notes) containing her comments in relation to the complaint made by LC on behalf of CR and JF. On the first page of those notes, it is stated that in relation to the joint accounts opened in 2004:

(a) "The assets invested in the Joint Accounts belonged to Mrs. F, but Ms. R and Ms. C were added as co-holders of the Joint Accounts for estate planning purposes only." (third paragraph); and

(b) "It is important to note that Mrs. F was not planning on necessarily leaving money to her daughters. Capital preservation was not the main objective of the Joint Accounts. It was clearly established that I was to take my instructions from Mrs. F. As Ms. R lived in Halifax, she was also involved in the management of the Joint Accounts." (fourth paragraph)

[91] On the second page of the JF Notes, after describing the events that led up to the signing of the JF NCAF, the Applicant states in the third full paragraph that her understanding was that "…Mrs. F was still not necessarily planning on leaving money to her daughters."

[92] Although JF added CR and LC to her account as joint account holders, the evidence indicates that her financial circumstances were independent of those of her daughters.

[93] The Respondent Compendium of Documents from the Applicant was entered as Exhibits 14 to 17. At tab 148, starting at page IIROC-016559 is a letter from the Ombudsman for Banking Services and Investments (OBSI) to JF, CR and LC dated September 26, 2016 (the OBSI Letter). The OBSI Letter related to a complaint against NBF, the successor to Wellington West, that the activity in the joint account was unsuitable in JF's circumstances. In the letter, OBSI advised that it found no basis to recommend that NBF pay compensation.

[94] In the OBSI Letter, OBSI made the following statements:

(a) "…when a joint account holder dies, the joint account would continue on for the remaining joint account holders until such time as the remaining holders determine appropriate. Therefore, the life of the joint account extends

beyond the life of any one of the individual account holders. *As the account in question is owned by three parties, the circumstances and age of Ms. F are <u>not the sole</u> factors in evaluating the suitability of the investments*." (fifth paragraph on page 2 of the letter); and

(b) "…As co-owners, Ms. C and Ms. R shared equally in the responsibility and accountability for all the investment activity. At any point, any party was authorized to inquire about the account. …" (first paragraph on page 3 of the letter).

[95] There is no information to explain the basis for the statements in the OBSI Letter. The author of the letter was not called to present the letter as evidence and provide testimony regarding its contents. The statements are not law or guiding principles.

[96] We find that the IIROC Panel's decision with respect to Rules 1300.1(a) and (q) as they applied to the JF joint account was reasonable based on the facts, evidence and law before it, notwithstanding the OBSI Letter. The IIROC Panel did not err in law in making this decision. We are satisfied that IIROC Staff proved their allegations, on a balance of probabilities, with clear, cogent and convincing evidence.

[97] We also find that the IIROC Panel did not overlook any material evidence in making its decision. There was evidence with respect to LC and a substantial amount of evidence with respect to CR before the IIROC Panel in making its decision.

[98] As stated by the OSC in paragraph 104 of V*itug*, "…(s)imply because findings are inconsistent with some evidence is not an indication that that evidence was overlooked. …"

3. GR

IIROC Panel Decision

[99] GR was a self-employed architect nearing retirement age who did not have a pension plan other than Old Age Security and CPP. He had an account with the Applicant since the 1990s. GR is CR's husband.

[100] With respect to the RRSP/RRIF accounts held by GR, the IIROC Panel made the following findings in the Merits Decision:

(a) "…It was the duty of Ms. Locke to actively explore (retirement) issues with the client and make a determination of the actual and objectively supportable uses for the investment funds." (para. 54);

(b) the update of GR's KYC in 2009 was "…evidence of Ms. Locke's propensity to mold the KYC to fit her investment strategy rather than to reflect the true nature of the client. …" (para. 57); and

(c) "...there were securities in the account of GR that, on the balance of probabilities in the circumstances and upon reasonable interpretation and application of all the evidence, render the trading on the whole as unsuitable for GR. …Ms. Locke cannot use the NCAF/ KYCs as a shield to protect and defend unsuitable trades where the documents do not accurately reflect the client's investment objectives, knowledge, resources and time horizon." (para. 62).

Submissions

[101] The Applicant submitted that the IIROC Panel erred in law in its application and interpretation of Rules 1300.1(a) and (q) and overlooked material evidence by failing to consider whether GR's investment objectives and risk tolerance were appropriately focused on growth in light of the evidence of a joint investment strategy between GR and his spouse CR, and their other joint sources of retirement income.

[102] The Applicant submitted that the IIROC Panel did not discuss or appear to consider the Applicant's evidence that under the investment strategy, comparatively conservative investments were held in the GR and CR joint accounts and in CR's personal account. GR and CR were aware that it was favorable for tax reasons to incur gains in GR's accounts.

[103] IIROC Staff submitted that there was no reviewable error regarding the IIROC Panel's finding that the Applicant failed to know GR. GR's evidence was clear, cogent and compelling and the IIROC Panel accepted his evidence over the Applicant's evidence.

[104] IIROC Staff submitted that during the First Material Period, the Applicant purchased a number of high risk securities in GR's RRIF account which were not suitable for him given his personal circumstances, true risk tolerance and goals for his RIF account.

Analysis and Conclusions

[105] The KYC obligation of a registrant includes a full understanding of a client's entire financial circumstances and a reasonable inquiry into the client's personal relationships (para. 108 of *Myatovic*).

[106] The Applicant was retained by CR and GR, who are both architects, around 1994 to act as their investment advisor. Over the years, CR and GR developed a close personal relationship with the Applicant as well as a business relationship.

[107] In the Applicant's testimony provided on March 2, 2020, she described the investment strategy of GR and CR. She explained that they looked at the accounts as a family on a global basis. In total, there were four to six accounts over the years. The conservative securities were contained in the GR and CR joint accounts. The GR RRSP account, which was later converted into a RRIF account,

contained the securities with capital appreciation potential. The “lion's share” of trading activity was in the GR RRSP account since there was no capital gains tax in this account (pgs. 208 to 211 of March 2, 2020 transcript).

[108] Neither CR nor GR discussed their investment strategy in the testimony that they gave on December 16, 2019, at the Merits Hearing. Both CR and GR indicated that for GR’s RRIF account between 2010 and 2014, discussions relating to potential investments were primarily between the Applicant and CR. CR would then discuss the matter with GR to get his confirmation on any recommendations.

[109] In 2012, the Applicant referred CR and GR to a financial planner for discussion of a joint retirement income strategy. On June 27, 2012, CW, an investment advisor with NBF, sent to CR a copy of a financial plan prepared for CR and GR (the Financial Plan).

[110] The Merits Record contains evidence that GR's entire financial circumstances are interconnected with the financial circumstances of CR, such that a joint investment strategy would be a relevant factor.

[111] The Applicant's submissions to us relating to the assessment of the KYC and suitability obligations for GR’s accounts were made to the IIROC Panel for its consideration with respect to the Merits Hearing.

[112] In the Merits Decision, there is no discussion regarding the impact, if any, of the combined financial circumstances of GR and CR on the determination of the KYC and suitability for GR’s account. The IIROC Panel’s findings relate solely to GR and his financial circumstances with respect to his personal account.

[113] In our respectful view, the IIROC Panel erred in law and overlooked material evidence in not taking into consideration all of the accounts, financial circumstances, overall financial strategy and personal relationship of GR and CR in its decision relating to the GR account.

[114] The Applicant has demonstrated that its case with respect to the KYC and suitability of GR's account fits at least one of the *Canada Malting* factors. Therefore, we set aside the IIROC Panel’s decision and conduct a hearing *de novo* of this portion of the Merits Decision. Under subsection 6(3) of the Act, upon a hearing and review, the Commission may confirm the decision under review or make such other decision as the Commission considers proper.

[115] After considering all of the evidence, documents, cases and oral and written submissions provided to us by both parties for the Hearing and Review (the Review Record), and in particular the evidence relating to the overall financial circumstances and strategy of GR and CR, we find that the Applicant did not contravene Rules 1300.1(a) and (q) with respect to GR.

[116] On December 29, 2009, GR signed a Wellington West NCAF to convert his RRSP into a RRIF. The form indicated a growth target mix investment objective with a

risk level of 50% medium and 50% high. GR indicated that he was told that if he wanted to keep his existing portfolio at that time, he would have to accept the higher risk (para 56 of the Merits Decision).

[117] On October 29, 2012, GR signed a NBF NCAF for his RRIF account (the 2012 NBF NCAF) showing the same investment objectives and risk level as the 2009 Wellington West NCAF.

[118] Of note is a letter from NBF to GR dated November 13, 2017, relating to GR's complaint about his accounts (Respondent Compendium of Documents, Tab 3, p. IIROC 0146). On page 3 of the letter, NBF notes that prior to the signing of the 2012 NBF NCAF, the Financial Plan had been prepared which showed that investments from the accounts were not needed to generate the $75,000 per year for retirement sought by GR and CR.

[119] The information in the Financial Plan supports a conclusion that GR's and CR's overall investment strategy continued to apply to their financial circumstances from the time that GR signed the 2012 NBF NCAF.

4. F Limited

IIROC Panel Decision

[120] F Limited is a private company engaged in the forestry industry, specifically the cutting of firewood. Its shareholders and directors are GB, his wife NB, and their son JB. F Limited became a client of the Applicant's in September, 2011, to invest $25,000 of the company's $80,000 in liquid assets.

[121] With respect to the account held by F Limited, the IIROC Panel made the following findings in the Merits Decision:

(a) "…A corporation is a legal fiction, it has no intellect or knowledge beyond what its officers, directors or owners bring to it. In this case, the controlling persons of F Limited were GB and NB. The Panel finds that F Limited's investment horizon, risk tolerance and objectives are co-incidental to those of GB and NB. There is no degree of sophistication in capital markets for this corporate body." (para. 79);

(b) "…The Panel finds that by not providing clear and unequivocal warnings to neophyte investors that Ms. Locke failed in her duty to use due diligence "relative to every customer and to every order or account accepted".[50] " (para. 89);

(c) "…The KYC form does not provide a shield or free pass to purchase unsuitable securities not withstanding what is written on a KYC form. More is demanded of a registrant upon whom novice investors are placing their trust and receiving the reassurances that the registrant will look after the investor's money." (para. 90);

(d) "…The bulk of F Limited's securities holdings were not suitable, notwithstanding the growth, risk profile recorded by Ms. Locke on the account documentation. F Limited had only $ 80,000 in liquid assets, zero income and no investment history. It was in no way suited for an aggressive growth portfolio." (para. 94);

(e) "The Panel need not decide whether the relationship here is fiduciary but rather use these principles to illustrate the higher duty of care imposed upon Ms. Locke when dealing with clients that are truly novice or unsophisticated investors." (para. 97); and

(f) "Ms. Locke failed to use due diligence in making sure the investments made for F Limited were suitable. She did not exercise her statutory, professional or ethical obligation to the client F Limited." (para. 98).

Submissions

[122] The Applicant submitted that the IIROC Panel erred in law in their application and interpretation of Rules 1300.1(a) and (q) and overlooked material evidence by equating the investment horizon, risk tolerance and investment objectives of F Limited, a private corporation, with those of GB and NB, the two directors and shareholders who testified at the Merits Hearing, in the absence of any evidence from JB, the third director and shareholder.

[123] The Applicant submitted that the IIROC Panel failed to appropriately recognize the distinct and separate nature of F Limited's corporate identity from that of its shareholders, as reflected in the fact that the relevant account documentation only allowed for consideration of the investment objectives of F Limited, and did not provide for consideration of the investment objectives of individual shareholders in the Second Party Account Supplements (the Supplements).

[124] The Applicant submitted that the evidence of GB and NB supports the fact that clear and unequivocal warning regarding risk was provided and that GB and NB were aware that the risk of their investment was high.

[125] IIROC Staff submitted that the fact that they did not interview JB or that he did not give *viva voce* testimony is irrelevant. The evidence of two of the principals (GB and NB) was compelling and cogent as to their personal involvement in the running of their business. The IIROC Panel had the opportunity to assess the witnesses and to review the documents. The IIROC Panel made no error in finding that the controlling persons of F Limited were GB and NB, that the company's objectives were the same as those of GB and NB and that the Applicant failed in her duty to use due diligence relative to F Limited's account.

Analysis and Conclusions

[126] The Applicant's submission that IIROC Staff did not obtain evidence from JB was made to the IIROC Panel for the Merits Hearing and would have been considered by the IIROC Panel in making the Merits Decision.

[127] Exhibit 4 is IIROC Compendium Volume 4 which relates to F Limited. At Tab 24, starting at page 862, are the Wellington West documents relating to the opening of F Limited's account. GB, NB and JB all signed a NCAF on September 6 and 7, 2011, showing no past investment experience, limited investment knowledge, an aggressive growth target mix and a risk level of 100% high risk.

[128] Each of GB, NB and JB signed a Supplement on September 6, 2011. Each Supplement shows no past investment experience and contains personal information relating to each individual.

[129] At page 1052 of Exhibit 4 is the Corporate Account Ownership/Directorship Supplement signed by NB on behalf of F Limited on September 8, 2011. This document also contains personal information relating to GB, NB and JB.

[130] As these documents indicate, there was information relating to JB in the Merits Record. The Applicant did not provide submissions on how evidence from JB would have been relevant.

[131] The IIROC Panel's decision is consistent with the testimony provided by the Applicant in direct examination on March 3, 2020, regarding the completion of F Limited's NCAF. Specifically:

(a) "…when you open an account under a company name, it's the information that applies to the company that you put on there. …this is the company's information that you're taking down." (March 3, 2020, hearing transcript, pg. 90, lines 18 to 24); and

(b) with respect to the signing of the Supplements, "(s)o, the company is the account, but they recognize that the company on its own doesn't exist without the owners, so, each person that was part of the account had to sign off a second party supplement to that. …" (March 3, 2020, hearing transcript, pg. 94, lines 3 to 6).

[132] There is nothing in the testimony of the Applicant to indicate that she felt that additional information with respect to JB was required to open the account.

[133] There is nothing in the Merits Record specifically relating to the law or guiding principles for determination of the KYC and suitability for a corporate account that the IIROC Panel could have incorrectly interpreted.

[134] We find that the IIROC Panel's decision with respect to Rules 1300.1(a) and (q) as they applied to F Limited was reasonable based on the facts, evidence and law before it. The IIROC Panel did not err in law in making this decision. We are

satisfied that IIROC Staff proved their allegations, on a balance of probabilities, with clear, cogent and convincing evidence.

[135] We also find that the IIROC Panel did not overlook any material evidence in making its decision. There was evidence with respect to JB before the IIROC Panel in making its decision.

[136] With respect to the Applicant's submission that there is evidence that GB and NB were aware that the risk of their investment was high, IIROC's statements from paragraph 144 of *Gareau (Re)*, 2011 LNIIROC 53 are appropriate:

> **144**… where the indicators (age, sophistication, knowledge, risk tolerance, value of assets) point toward certain investments being unsuitable, the duty and obligation on a registrant to take positive steps is high. Those steps may include, but not be limited to, a full clear written risk assessment provided to the client, a possible reference to and assessment by the firm's compliance unit, a possible third party assessment, and clear and unambiguous written instructions provided by the clients. Indeed, in some situations the duty upon a registrant may be so high as to require him or her to withdraw services because a client's instructions are so destructive to their self-interest.

5. EH

IIROC Panel Decision

[137] EH was a retired pharmacist who sold his business in 2009/2010 and had $900,000 to invest with the Applicant. EH's instructions were to have $500,000 in safe securities and $400,000 in other securities. He was seeking a $4,000 per month income from his investments.

[138] With respect to the accounts held by EH, the IIROC Panel made the following findings in the Merits Decision:

(a) "EH in his testimony demonstrated that he did not have a full appreciation as to how the margin account would operate, acknowledging that the funds to pay the tax liability would come from National Bank Financial. …" (para. 106); and

(b) "Notwithstanding EH's admission that he might not have recalled all of the conversations Ms. Locke had in respect to the margin account, it is clear that EH was in a state of confusion and misapprehension as to what a margin account entailed, nor that the aggressive margin account was funded with what he expected to be his $500,000 in secure investments. The Panel finds that Ms. Locke was not diligent in becoming fully informed and remaining informed of EH's situation. If she had been, he could not have been in such a state of misapprehension nor in such an aggressive portfolio for the totality of his investable funds." (para. 107).

Submissions

[139] The Applicant submitted that the IIROC Panel erred in law in their application and interpretation of Rule 1300.1(a) and overlooked material evidence by concluding that the Applicant should have documented EH as seeking a portion of his investments in fixed income or similar securities in 2010. The evidence demonstrated that at the time of the first account opening on July 19, 2010, with Wellington West (the EH 2010 NCAF), EH was investing an immaterial limited amount of his overall net worth in a single high risk security owned by his close friend, client AH. The IIROC Panel failed to distinguish between the two separate accounts opened by EH. The Applicant complied with Rule 1300.1(a) in allowing EH to open this account and make this investment.

[140] The Applicant submitted that the IIROC Panel erred in law in their application and interpretation of Rule1300.1(a) and overlooked material evidence in concluding that the Applicant was not "…diligent in becoming fully informed and remaining informed of EH's situation" by reason of the fact that EH expressed a state of misapprehension regarding the operation of a margin account during the course of the Merits Hearing. The fact that EH expressed confusion about the operation of a margin account in 2020 was not probative of the efforts taken by the Applicant to explain margin to him in 2011 when the margin account was opened.

[141] The Applicant submitted that the IIROC Panel overlooked evidence that EH was referred to a third-party accountant (the Accountant) for the purpose of providing tax strategy advice regarding the use of margin.

[142] IIROC Staff submitted that EH's testimony as to both the timing and content of his discussions (or lack of them) with the Applicant in the summer of 2010 before he opened his first ever investment account and their discussions at the time she suggested that he open a margin account in early 2011, was clear, cogent and compelling. EH's testimony was not shaken in cross examination.

[143] IIROC Staff submitted that numerous elements of the EH 2010 NCAF did not reflect EH's actual circumstances. For example, EH was not seeking "aggressive growth target mix", as he was looking forward to the later stages of his life; he did not want 100% high risk investments; his net liquid assets were not actually $1.5 million as of July 2010; and fixed income indicates 0% despite his explicit desire to have $500,000 of his portfolio to generate income.

[144] IIROC Staff submitted that the aggressive growth target mix and 100% high risk tolerance shown in the Wellington West NCAF for the new margin account opened for EH on March 9, 2011, (the EH 2011 NCAF) did not reflect his actual circumstances nor his tolerance for risk.

Analysis and Conclusions

[145] The Applicant's first submission is that the IIROC Panel failed to distinguish between the two separate accounts opened by EH and that the Applicant complied with Rule 1300.1(a) in allowing EH to open the account under the EH 2010 NCAF

and make an investment in the securities of 01 Communique Laboratory Inc. (01 Communique).

[146] The submission relates to the last two sentences in paragraph 102 of the Merits Decision:

> 102 EH signed a Wellington West NCAF on 19 July 2010.[57] The NCAF provided no discretionary authority over the account. Under Past Investment History, it showed one year in stocks and twenty years in bonds and had good investment knowledge. The investment objectives and risk tolerance were described an aggressive growth and 100% high risk. The aggressive growth target mix provided for 5% cash and 95% equities and described as aggressive. Of note is that the fixed income and equivalent was 0%. This notwithstanding EH explicit desire to have $500,000 of his portfolio to generate income.

[147] Based on the evidence, the EH 2010 NCAF did reflect EH's actual circumstances and tolerance for risk for the investment in securities of 01 Communique, except that net liquid assets were not actually $1.5 million. The information in the last two sentences of paragraph 102 of the Merits Decision was not relevant to the EH 2010 NCAF. However, this form was replaced about a year later with the EH 2011 NCAF.

[148] The IIROC Panel's finding that the Applicant was not diligent in becoming fully informed and remaining informed of EH's situation is in paragraph 107 of the Merits Decision which clearly relates only to the margin account that was set up under the EH 2011 NCAF.

[149] EH was clear in his testimony provided on December 18, 2019 (pgs. 16, 17, 65, 66 and 76 of the transcript), that $500,000 was to be invested in secure stock to generate $4000 in income with the remainder in high risk securities.

[150] This is generally consistent with the testimony provided by the Applicant on March 3, 2020 (pgs. 109 and 125 of the transcript). She stated that EH wanted to use half of the $900,000 to look for opportunities in the market and the other half for more conservative securities. She explained (pgs. 134 to 136 of March 3, 2020, transcript) that in the portfolio that she built for EH, $400,000 would be invested in three mutual funds to generate a return and that these funds were his core holdings.

[151] The EH 2011 NCAF indicated an aggressive growth target mix and 100% high risk tolerance and did not reflect the investments in the mutual funds, EH's actual circumstances and investment objectives nor his tolerance for risk as it related to the $500,000 to be invested in secure stock.

[152] Notwithstanding the IIROC Panel's comment in paragraph 102 of the Merits Decision, we find that the IIROC Panel did distinguish between the two separate accounts opened by EH.

[153] With respect to the Applicant's submission that the IIROC Panel erred in law and overlooked material evidence in concluding that EH expressed confusion about the operation of a margin account in 2020 at the Merits Hearing, we consider EH's testimony.

[154] In EH's testimony provided on December 18, 2019 (pgs. 24, 25, 33, 34 and 47 of the transcript), he stated that he couldn't remember if the Applicant explained margin to him or how a margin account worked at the time of the account opening in 2011. He also stated that at the time of the account opening in 2011, there was no discussion of monthly payments or the interest to be paid, the Applicant did not explain what a debit balance was, and he didn't understand the margin part of the account documents. EH's testimony relates to his understanding of the margin account in 2011, not 2020 as submitted by the Applicant.

[155] The IIROC Panel took this into consideration in its decision. In paragraph 107 of the Merits Decision, it states that "(n)otwithstanding EH's admission that he might not have recalled all of the conversations Ms. Locke had in respect to the margin account, it is clear that EH was in a state of confusion and misapprehension as to what a margin account entailed…".

[156] The Applicant submitted that the IIROC Panel overlooked evidence that EH was referred to the Accountant for the purpose of providing tax strategy advice regarding the use of margin.

[157] The Applicant provided testimony that with respect to the margin account, she described a margin call to EH and suggested that he talk to the Accountant about it and that she spoke to the Accountant about the benefit of an RRSP deduction and issues relating to alternative minimum tax (pgs. 150 to 153 of March 3, 2020, transcript).

[158] Although there is no mention in the Merits Decision that EH was referred to the Accountant, we find that there is no indication that the IIROC Panel overlooked this evidence.

[159] Any discussions that the Accountant may have had with EH did not diminish the responsibility the Applicant had in fulfilling the KYC obligations to fully discuss the negative risk factors of a margin account with EH and determine whether he understood those risks.

[160] As stated by IIROC in paragraph 149 of *Re Gareau* on concluding that an unsuitable recommendation was the extent of the utilization of margin accounts, "…(a)s the previous review of the judicial decisions and securities commission decisions indicate, there is a responsibility (on the registrant) to fully discuss with clients the negative risk factors and that responsibility increases as the risks increase."

[161] We find that the IIROC Panel's decision with respect to Rule 1300.1(a) as it applied to EH was reasonable based on the facts, evidence and law before it. The IIROC

Panel did not err in law or overlook material evidence in making this decision. We are satisfied that IIROC Staff proved their allegations, on a balance of probabilities, with clear, cogent and convincing evidence.

6. LG

IIROC Panel Decision

[162] LG was a retired person who had operated and subsequently sold a bed and breakfast business. She opened an account with the Applicant around 2007. The contraventions with respect to LG's accounts relate to the period from January 2015 to December 2017 (the Second Material Period).

[163] With respect to LG's account, the IIROC Panel made the following findings in the Merits Decision:

(a) "Ms. Locke, in her written submissions, states that she took notes of these conversations with LG. An examination of these notes provides no evidence or assistance to Ms. Locke that she met her obligations to truly know and accurately reflect the investor's objectives, goals and risk tolerance.[78] Rather, they focus on and acknowledgement of the commissions for each transaction in accordance with the dealer policy." (para. 143)

(b) "The Panel finds that Ms. Locke was not diligent in knowing and remaining informed of essential facts relative to LG. On the whole, the Panel prefers and accepts the evidence of LG. Ms. Locke provided broad statements that contradicted LG, but they are not backed up by notes intelligible to the Panel. The Panel does not believe, on all the probabilities, that Ms. Locke would have such detailed recall of events absent cogent and detailed contemporaneous notes." (para. 144);

(c) "…In her written submissions, Ms. Locke stated she had taken "clear notes of her interaction with client LG".[82] A review of Ms. Locke's notes in respect to client LG [83] were reviewed by the Panel. The notes, purportedly made contemporaneously, provide nothing that could objectively be interpreted as supporting Ms. Locke's testimony. There are several typed interpretations of the handwritten notes, which on their face could be more properly called a retrospective recollection or response to a complaint. The Panel does not attach weight to the typed documents." (para. 149); and

(d) "In consideration of LG's testimony, her age, extremely limited income and investment objectives of having funds for emergencies and funding part of her retirement, the Panel finds that the mix of speculative and medium risk securities were not suitable for LG. The investments were not wildly offside but beyond what a prudent portfolio would contain in the circumstances." (para. 150)

Submissions

[164] The Applicant submitted that the IIROC Panel erred in overlooking material evidence. It failed to make reference to all of the notes taken by the Applicant in relation to LG, including detailed notes relating to her discussions regarding the risk of various securities, and LG's acknowledgment of risk. These notes were initially handwritten on the order confirmation, and were later transcribed by the Applicant. In particular, the IIROC Panel referenced the Applicant's notes at Volume 8A, Tab 196 at pages 04710 to 04723 (Tab 196) (in footnote 78 of the Merits Decision) but failed to reference the notes contained at Volume 8A, Tab 207 at pages 04803 through 04805 (Tab 207).

[165] The Applicant submitted that, with respect to the evidence which the IIROC Panel did consider, the evidence provided was not clear, cogent and convincing, and did not support a conclusion that the Applicant at any time breached Rules 1300.1(a) and (q).

[166] IIROC Staff submitted that there are no reviewable errors with respect to the IIROC Panel's findings regarding LG. The IIROC Panel did not attach weight to the Applicant's notes. LG's testimony was clear and cogent and she was not shaken on the essential issues in cross examination.

Analysis and Conclusions

[167] Tab 196 contains a document entitled "Translation of hand writing: Order placed at IA Securities". There is no date on the document. On March 3, 2020, (pg. 58 of the transcript), the Applicant testified that the notes were translations of her handwritten notes when the orders were made prepared for Aligned Capital when LG's complaint was received.

[168] The Tab 196 notes related to trades in LG's account with Industrial Alliance Securities Inc. (Industrial Alliance). The document contains information relating to four trades, three on February 23, 2015, shortly after LG signed the NCAF with Industrial Alliance on November 21, 2014, and one on January 7, 2016. The three notes relating to the February 23, 2015, trades contain references to having reviewed risk and reward with the client.

[169] Tab 207 contains a document entitled "Translation of hand writing: Order placed at IA Securities" and also contains "Orders placed at Aligned Capital Partners". There is no date on the document. On March 3, 2020, (pgs. 72 to 73 of the transcript), the Applicant testified that the notes were translations of her handwritten notes when the orders were made prepared for Aligned Capital when LG's complaint was received. It was noted that the actual handwritten trade confirmations for the Aligned Capital trades don't appear to be located in the IIROC Compendium. The Applicant stated that she had sent everything that she had to Aligned Capital.

[170] Tab 207 contains notes relating to 14 trades from February 23, 2015, to July 23, 2018. The first four trades are the same as those in Tab 196 relating to Industrial Alliance. The remaining ten notes relate to trades for LG's account with Aligned Capital. A number of the notes refer to review of the risk with the client. LG had signed a NCAF with Aligned Capital on April 23, 2016, showing a risk tolerance of 50% medium, 30% medium high, and 20% high.

[171] For the Merits Hearing, in paragraph 135 of the Applicant's Written Submissions dated April 21, 2020 (the Locke Merits Submissions), the Applicant specifically references the notes of her interactions with LG contained at Tab 207. She states that the notes confirm her discussion of risk with LG and of the particulars regarding the recommended investments.

[172] The Merits Decision clearly reflects the IIROC Panel's consideration of the Applicant's notes:

(a) footnote 78 in paragraph 143 refers to Tab 196;

(b) paragraph 144 discusses the Applicant's notes without reference to any particular notes; and

(c) footnote 83 in paragraph 149 refers to "Vol. 8A Tabs **196 to 211**" (emphasis added).

[173] Footnote 83 in paragraph 149 of the Merits Decision, in particular, supports the conclusion that the IIROC Panel did consider and reference the notes in Tab 207. We find that the IIROC Panel did not overlook any material evidence in making its decision with respect to LG.

[174] We also find that the IIROC Panel's decision with respect to Rules 1300.1(a) and (q) as they applied to LG was reasonable based on the facts, evidence and law before it. The IIROC Panel did not err in law in making this decision. We are satisfied that IIROC Staff proved their allegations, on a balance of probabilities, with clear, convincing and cogent evidence.

B. **Are there grounds to intervene in the decisions relating to Dealer Member Rule 29.1?**

[175] Dealer Member Rule 29.1 (Rule 29.1) reads as follows:

> 29.1 Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.

> For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be complied with by the Dealer Member.

IIROC Panel Decision

[176] With respect to 77 trades in JF's joint account during the First Material Period, the IIROC Panel made the following findings in the Merits Decision:

(a) "JF in her testimony stated that she was rarely called by Ms. Locke when sales and purchases were made for her account. Her investment knowledge was poor and she relied upon Ms. Locke. JF was candid in stating that she could not recall all the details of those conversations she did have with Ms. Locke. However, JF was quite explicit in her recollection that Ms. Locke did not call before investments were made for her account. The Panel accepts her evidence in these regards. …" (para. 34);

(b) "…Allowing for the expected inability for either JF or CR to remember with specificity the content of a call from Ms. Locke on a particular day nor the exact content of those alleged calls, the Panel is satisfied that Ms. Locke did not call in advance of all of the trades in JF's account. This finding is based on the Panel's observation of JF, CR and Ms. Locke's demeanour, veracity and consistency." (para. 37);

(c) "The Panel examined the notes taken by Ms. Locke as entered evidence in Volumes 8A and 8B. The Panel finds them to be with few exceptions to be unintelligible, unreadable and of little value in advancing Ms. Locke's contention that all the trading was authorized. …" (para. 44); and

(d) "The Panel finds that Ms. Locke did conduct unauthorized trading in the account of JF and accepts JF's testimony in these regards." (para. 45)

[177] With respect to 124 trades in GR's RRIF account during the First Material Period, the IIROC Panel made the following findings in the Merits Decision:

(a) "The NCAF/KYCs for GR were completed by Ms. Locke in 2009 and 2012.[34] Both state that GR had not authorized anyone else to use discretion in the handling of the accounts. As such, instructions to trade could not come from anyone other than GR." (para. 68);

(b) "Both GR and CR testified that they were not contacted to provide instructions in most of the trading in GR's account. Allowing that Ms. Locke may have discussed some of the trades, the Panel finds that Ms. Locke did conduct unauthorized trades in the account of GR." (para. 75); and

(c) "The Panel does not accept Ms. Locke's broad assertion that she had instructions for each trade in GR's account. …Ms. Locke notes in Vol. 8A and 8B, so far as they are intelligible do not support her assertion nor did she in her evidence direct the Panel to notes for each trade if they had existed." (para. 76)

[178] With respect to 243 trades in EH's margin account during the First Material Period, the IIROC Panel made the following findings in the Merits Decision:

(a) "EH accounts were not discretionary. The issue is then did Ms. Locke obtain prior approval for each transaction made in EH's accounts?" (para. 119);

(b) "EH testified in direct and cross-examination that he did not receive a call from Ms. Locke nor anyone else in respect to each trade in his accounts. He did acknowledge that he did speak on occasion with Ms. Locke about a proposed transaction. In the relevant time period, there were 243 trades effected in EH's accounts. The Panel finds that EH would recall having spoken to Ms. Locke that frequently. Under cross-examination, EH emphatically denied having authorized the sale of his Crombie Reit position." (para. 120);

(c) "The Panel notes that an examination of Ms. Locke's notes provides occasional reference to EH without any decipherable detail that would enable a third-party reader to reasonably establish the nature of the content of the references. The notes of Ms. Locke do not add weight to any implication that she had obtained authorization for every trade in EH's accounts." (para. 124); and

(d) "The Panel finds that Ms. Locke did conduct unauthorized trades in the account of EH during the relevant periods." (para. 125)

Submissions

[179] The Applicant submitted that the IIROC Panel erred in law in their application and interpretation of Rule 29.1 by failing to apply the correct standard of proof with respect to the allegations of unauthorized trading in the accounts of JF, GR and EH. The IIROC Panel inappropriately allowed themselves to focus on the question of which competing set of facts they believed was more probable, rather than whether IIROC Staff met the evidentiary burden of proving their allegations on a balance of probabilities with clear, convincing and cogent evidence to establish that a particular unauthorized transaction did take place.

[180] The Applicant submitted that this was best evidenced by the fact that the findings in the Merits Decision were limited to general findings of unauthorized trading, and failed to identify specific examples, or evidence in support, of unauthorized trading sufficient to establish a clear end cogent evidentiary basis for the IIROC Panel's decisions.

[181] The Applicant submitted that since IIROC Staff's allegations did not generally relate to any specific unauthorized transactions, the standard of proof was reversed as the onus was on the Applicant to affirmatively demonstrate that she had authority for each and every transaction in the clients' accounts. This was an error of law.

[182] This error was demonstrated in the Merits Decision where the IIROC Panel commented negatively on the fact that the records and notes taken by the Applicant were difficult to read and did not clearly indicate that authority was granted for specific transactions.

[183] IIROC Staff submitted that the IIROC Panel made no error in finding that the Applicant effected unauthorized trades in the accounts of JF, GR and EH. The IIROC Panel considered all of the evidence and accepted the clients' evidence where it conflicted with the Applicant's evidence. There was no change in the standard of proof. The IIROC Panel simply found the clients' evidence more credible in terms of this allegation.

[184] IIROC Staff submitted that it was able to prove the unauthorized trading contraventions by asking each client whether they discussed trades in advance or gave instructions to the Applicant during the time period in question. The clients provided clear, cogent and convincing evidence that the Applicant did not discuss all trades with them in advance of making the trades and that unauthorized trades took place in their accounts.

Analysis and Conclusions

[185] A contravention of Rule 29.1 as it relates to unauthorized trading is discussed by IIROC in paragraph 173 of *Suppal, Re*, 2013 IIROC 33 (*Suppal*):

> 173 In order for us to find that the Respondent breached IIROC Rule 29.1, it is necessary for us to determine whether the Respondent engaged in any unauthorized trades during the period in question, and if so, whether the manner in which the Respondent conducted such trading amounted to conduct that was unethical, unbecoming or detrimental to the public interest and/or whether such conduct reflected a character that is inconsistent with the high standards of ethics expected of a person in Mr. Suppal's position as an officer, Registered Representative and employee of a Dealer Member of IIROC.

[186] In paragraph 118 of the Merits Decision, the IIROC Panel stated the following:

> 118 Authorized trades are those that the client has been informed of the recommendation of the solicited trade in respect to the security and its attributes prior to giving informed consent for the transaction to proceed. In *Re Li*, the panel highlighted the essential elements of authorized trading:
>
> > "In *Re Wenzel*…the Alberta Securities Commission stated that when a person effects a securities transaction for a client without obtaining from the client, in advance, specifics as to the four elements of the

> transaction – quantity, security, price and timing – that person is exercising discretion." 65

[187] Both parties are in agreement on the four essential elements necessary for an authorized trade.

[188] The Applicant's submissions raise the issue of the nature of clear, convincing and cogent evidence necessary to support a finding of unauthorized trading: in particular, whether IIROC Staff had to prove specific instances of unauthorized trading. This issue was raised by the Applicant at the Merits Hearing and therefore would have been one of the issues to have been considered by the IIROC Panel.

[189] There is no discussion in the Merits Decision as to whether specific instances of unauthorized trading are required to support the IIROC Panel's findings of unauthorized trading by the Applicant in the accounts of JF, GR and EH.

[190] The Merits Decision contains no analysis on how the case law provided by the parties for the Merits Hearing was applied to the facts. The IIROC Panel's analysis focused on a consideration of the evidence provided by the Applicant and the three clients. The IIROC Panel accepted and preferred the clients' testimony that they did not recall the Applicant contacting them to obtain instructions for all or most of the trades in their accounts.

[191] In the cases provided by the parties to the IIROC Panel for the Merits Hearing, those in which the respondent admitted making unauthorized trades were not helpful in addressing the issue raised by the Applicant. There were several cases where IIROC Staff was required to prove its allegations of unauthorized trading or discretionary trading.

[192] In *Crandall (Re)*, 2016 LNIIROC 18, the IIROC hearing panel was satisfied that IIROC Staff had proven that the respondent engaged in unauthorized discretionary trading in the accounts of D.R. without the accounts first having been approved as discretionary accounts contrary to Dealer Member Rule 1300.4 (Rule 1300.4). The panel discussed the evidence in the following paragraphs of its decision in support of its findings that for the majority of the trades, the respondent failed to obtain from D.R. specifics as to the four elements of an authorized transaction:

> 86 It is explicit from the unchallenged documentary evidence, and from D.R.'s testimony that the Respondent did not obtain her consent for the vast majority of the transactions conducted in the Accounts during the Relevant Period.35
>
> 87 Two specific examples that corroborate this presumption were provided by the investigator.
>
> 88 In the first case, the investigator points to a period, from January 23 to April 24, 2009, while D.R. was in Cuba. During that period, the Respondent conducted 46 transactions in the Accounts on approximately 27 different trading days, with all but one of these orders being marked as solicited.

> 89 The evidence, from the investigator's documentary information (hotel records, phone charges, travel schedule, trade ticket...) is conclusive that D.R. and the Respondent did not communicate with each other on any of these trading days.[36]
>
> 90 In the second case, the investigator examined the trade data of the Accounts for the period of December 2008 to December 2009. Again the investigator gathered documentary information; phone records and trade tickets were obtained for that period so that the trades were compared to the phone calls from Mr. Crandall's branch or to Mr. Crandall's branch.
>
> 91 The evidence is to the effect that 218 trades were conducted during the period mentioned and that the maximum total potential communications between the Respondent and D.R. was 44.[37]
>
> 92 From our examination of this documentary evidence, the Panel can conclude that the Respondent did not communicate with D.R. in respect of all the trades in the Accounts.

[193] In *Li (Re)*, 2016 LNIIROC 7 (*Li*), the IIROC hearing panel found that the respondent had made unauthorized purchases and sales in the client YX's account contrary to Rule 29.1. YX referred to specific transactions made without his authorization (paras. 13 and 17 to 19 of the decision) and explained that he was not provided the name of the stock, the quantity to be traded, the time of the trading and the price at which the trade was to take place in advance of the trades.

[194] In *Li*, the IIROC hearing panel also found that the respondent had engaged in discretionary trading contrary to Rule 1300.4. In determining whether the respondent had confirmed the four elements of an authorized trade before he executed the trades, the IIROC hearing panel considered the following documentary evidence provided by IIROC Staff:

(a) a branch manager's report from the respondent's firm showing the particulars of 37 accounts for which the respondent made 181 sale orders marked "unsolicited" on the morning of October 4, 2011;

(b) a spreadsheet showing that the 181 transactions were made within a two-hour span, with an order every minute or less, on average; and

(c) copies of four questionnaires from the respondent's clients in which each client indicated that the respondent had not contacted them prior to making trades in their accounts on October 4, 2011.

[195] In *Debus*, the IIROC hearing panel found that the respondent had contravened Rules 29.1 and 1300.4 with respect to trades in the accounts of AP and PE. At paragraph 75 of its decision, the panel noted that although AP and PE had authorized the respondent to proceed with trades without consultation, this did not excuse him from undertaking such unauthorized or discretionary trades. The panel concluded that:

(a) several of the margin trades entered by the respondent for AP (see para. 91 of the decision) were unauthorized as some of the elements of the trades did not comply with the Sage App notes, which contained particulars of the client instructions for the trades, that the respondent provided to the firm; and

(b) on the basis of PE's evidence, for the most part, the respondent exercised his discretion in buying stock for PE's account.

[196] In the IIROC cases provided to the IIROC Panel for the Merits Hearing, findings of unauthorized trading were generally made based on documentary evidence in addition to oral testimony from the respondents and their clients. In *Li,* where there was no documentary evidence for YX, YX referred to specific transactions that were made without his authorization. In *Debus*, the finding of discretionary trading was made based on PE's evidence. However, the IIROC hearing panel in that decision had found that PE had authorized the respondent to proceed with trades without consultation.

[197] In the matter before us, the testimony of JF, CR, GR, and EH generally conflicted with the testimony of the Applicant that she did discuss all trades with her clients before placing orders. The allegations of unauthorized trading cover a period of 4.75 years. The only specific transaction is the sale by the Applicant of EH's Crombie REIT position on September 27, 2011 (the Crombie Sale), without discussion with or authorization from EH.

[198] The IIROC hearing panel in *Brodie (Re)*, 2013 LNIIROC 12, where the respondent conceded that he had exercised some discretion, discussed conflicting evidence in paragraph 60:

> 60 The testimony of Mr. W and that of the Respondent is conflicting on the degree of consultation before a trade in the account was made. Mr. W. testified that after a few months upon opening the account that he seldom heard from the Respondent. The Respondent, on the other hand, testified that he almost always contacted Mr. W. No written notes, emails, records of meetings, or other such documentation was presented to the panel to substantiate either position.

[199] IIROC Staff had provided to the IIROC Panel written notes of the Applicant and emails between the Applicant and CR which were entered as exhibits at the Merits Hearing and considered by the IIROC Panel (paras. 43, 44, 76, 123 and 124 of the Merits Decision). The IIROC Panel found the Applicant's notes to be of little value and that the notes did not add weight to the Applicant's submissions that she had obtained authorization of every trade in the three accounts.

[200] The Applicant submitted that the IIROC Panel's findings with respect to her notes reflected a reversal of the standard of proof as the onus was on the Applicant to affirmatively demonstrate that she had authority for each and every transaction in the clients' accounts. We do not find that the standard of proof was reversed. The Applicant's notes were provided as part of IIROC Staff's evidence. In paragraphs

32, 175 and 178 of the Locke Merits Submissions, the Applicant referred to her notes as support for her submissions that she received authorization for certain of the trades that she made.

[201] The Applicant also submitted that the IIROC Panel's critical comments with respect to her notes in the Merits Decision reflected an error of law as the IIROC Panel focused predominantly on considerations other than whether there was clear, convincing and cogent evidence to support a finding of unauthorized trading.

[202] In support of this submission, the Applicant referred to *Re Steinhoff*, 2011 BCSECCOM 147 (*Steinhoff*), in which the British Columbia Securities Commission (BCSC) stated the following at paragraph 20 of its decision:

> 20 The panel considered Steinhoff's credibility and, generally speaking, did not accept her evidence as truthful. It was of course appropriate for the panel to consider Steinhoff's credibility. However, the panel's conclusion that Steinhoff was not truthful, in combination with its belief that Steinhoff had "a highly developed sense of entitlement and station that at times verges on hubris" led the panel to err.

[203] We find that the IIROC Panel's comments relating to the Applicant and her notes relate only to credibility. There is no indication in the Merits Decision that the IIROC Panel made its findings against her based on considerations of her character or demeanor as was the case in *Steinhoff*.

[204] Unlike in the cases discussed above, no evidence, in particular documentary evidence, was provided by IIROC Staff to the IIROC Panel of specifics of at least some of the unauthorized transactions in the three accounts during the First Material Period. The IIROC Panel's decision was based on the acceptance of the oral testimony of JF, CR, GR and EH that they were not consulted on all trades in the three accounts together with specific information about the Crombie Sale from EH.

[205] With respect, we find that, based on the case law presented at the Merits Hearing, the IIROC Panel erred in law in concluding that there was clear, convincing and cogent evidence of unauthorized trading by the Applicant in the accounts of JF, GR and EH, except with respect to the Crombie Sale.

[206] The Applicant has demonstrated that its case fits at least one of the *Canada Malting* factors. Therefore, we set aside the IIROC Panel's decisions and conduct a hearing *de novo* of these portions of the Merits Decision.

[207] For the Hearing and Review, in addition to the Merits Record, we were provided with and had the benefit of reviewing the record for the Penalty Hearing (the Penalty Record). This included written submissions from both parties with supporting books of authorities. In the IIROC Staff's authorities, there were several cases relating to unauthorized trading that were not in the Merits Record in which decisions were made based on the testimony of the clients.

[208] In *Re Harding*, 2011 IIROC 65 (*Harding*), the IIROC hearing panel considered whether the respondent, who did not attend the hearing, made unauthorized transactions in the account of NB from February 2004 to December 2007, and thereby engaged in conduct unbecoming contrary to IDA By-law 29.1. The IIROC investigator's evidence established that there were hundreds of trades made by the respondent in NB's account over the four-year period. The panel stated at paragraph 33 of its decision that "(o)ur acceptance of NB's testimony that she was not consulted about them and did not authorize them is sufficient to find that the Respondent violated By-law 29.1." The panel then noted that there was strong corroboration of NB's evidence about unauthorized trades on seven specific occasions when she was away. This information was in an exhibit and copies of telephone records from the respondent's firm provided by IIROC Staff.

[209] In *Re Bodnarchuk*, 2018 IIROC 22 (*Bodnarchuk*), an IIROC hearing panel, with the respondent participating in the hearing, found that the respondent made discretionary trades in the accounts of two clients, contrary to Rule 1300.4 The following paragraphs in the decision are relevant for our consideration of whether there was unauthorized trading by the Applicant in the accounts of JF, GR and EH:

> 45 The sixth Count made against the Respondent is between August 2010 and April 2016, the Respondent was involved in discretionary trading in T.B.'s accounts without proper and documented permission. We do not for a moment think that the Respondent did not inform T.B. of which stocks were purchased, but the Respondent failed to obtain permission from T.B. prior to effecting the trade. Page 16, transcript I (1) book 2 ll:20-21:
>
> Question: "Did he speak to you each time he bought or sold stock for you?"
>
> Answer T.B. "No"
>
> 46 T.B. expressed a similar position in his oral testimony. He was credible, and his evidence was reliable. We accept his evidence.
>
> 47 The Respondent alleged he talked frequently to T.B. about his trades, and the status of his accounts. The Respondent failed to produce a log or written notes confirming any such conversations. Consequently, we accept the position of T.B. and find there was unauthorized trading by the Respondent.

[210] In contested hearings where there will be conflicting evidence between a registrant and their clients, it could be crucial for IIROC Staff to provide documentary evidence to support allegations of unauthorized trading. However, based upon *Harding* and *Bodnarchuk*, it is clear that an IIROC hearing panel can accept and conclude that the oral testimony of a client provides clear, convincing and cogent evidence of unauthorized trading.

[211] After considering the Review Record and the application of the law in *Harding* and *Bodnarchuk*, we adopt and confirm the IIROC Panel's decisions that the Applicant conducted unauthorized trades in the accounts of JF, GR and EH contrary to Rule 29.1.

C. **Are there grounds to intervene in the decision relating to Dealer Member Rule 1300.1(o)?**

[212] Dealer Member Rule 1300.1(o) (Rule 1300.1(o)) reads as follows:

> 1300.1 – Business Conduct
>
> (o) Each Dealer Member shall use due diligence to ensure that the acceptance of any order for any account is within the bounds of good business practice.

IIROC Panel Decision

[213] With respect to the margin account held by EH, the IIROC Panel made the following findings in the Merits Decision:

(a) "Having found that Ms. Locke had failed in her obligation to EH in respect to knowing and remaining informed as to the truth of his investment criteria, the issue here is whether the operation of the margin account was within the bounds of "good business practices". Unfortunately, this is not a defined term. A review of cases shows that it is broadly interpreted as being conduct not in the public interest or what is not in the interest of the client in all the circumstances." (para. 110);

(b) "Where the client is a novice investor and is entrusting the majority of his or her investable assets to the registrant, there is a duty and obligation to act in their best interest. … An examination of the margin account statements shows significant trading in highly speculative securities. The Panel considered the withdrawals made on the margin account to pay CRA and for the $50,000 withdrawn for a family loan. This trading reflects a flagrant disregard for EH's explicit requirement of receiving $4,000 monthly income from his $500,000, riskier investment were to be, in EH's expectations, limited to $400,000." (para. 111); and

(c) "The Panel accepts the evidence of EH in so far as it relates to the operation of the margin account and his understanding of how a margin account works. On the balance of probabilities, it has been established that the margin amount was managed on behalf of EH in a manner that was not within the bounds of good business practices." (para. 115)

Submissions

[214] The Applicant submitted that the IIROC Panel erred in law and applied what amounted to a modified assessment of suitability in determining that the operation of the margin account held by EH was not within the bounds of good business practice. In applying Rule 1300.1(o) as broadly as was applied by the IIROC Panel, the scope of the Rule was expanded to include concerns which ought properly to be considered under Rule 1300.1(q). No such allegation was made by IIROC Staff in relation to EH's account.

[215] The Applicant submitted that the IIROC Panel erred in law by formulating Rule 1300.1(o) as prohibiting conduct "not in the interest of the client in all of the circumstances", and subsequently finding that trading in margin which took place was not in the interest of EH solely for the reason that they felt he did not have sufficient understanding of the risks of operating a margin account.

[216] The Applicant submitted that there was no evidence before the IIROC Panel which suggested that the usage of margin in EH's account was in any way offside of market or firm requirements as demonstrated in prior IIROC decisions relating to Rule 1300.1(o).

[217] The Applicant submitted that the proper application of Rule1300.1(o) to the facts supports the conclusion that no violation had been established on clear, cogent and convincing evidence on a balance of probabilities.

[218] IIROC Staff submitted that none of the Applicant's cited authorities suggest that free riding or churning are the only types of activities that constitute transactions outside the bounds of good business practice.

[219] IIROC Staff submitted that the following is clear, convincing and cogent evidence that transactions made in EH's margin account were outside the bounds of good business practice:

(a) there was always a six-figure debit balance at month end in EH's margin account from May 31, 2011, to September 30, 2014, which was not appropriate for an individual in EH's circumstances;

(b) the margin as a percentage of the market value in EH's margin account ranged between 26% and 45% between October 31, 2011, and September 30, 2014 which indicates inappropriate management of his account;

(c) EH said that the idea to open this type of account came from the Applicant and that she did not explain to EH what a debit balance was. The Applicant did not give EH any suggestions about reducing the debit balance, nor did she suggest less frequent trading; and

(d) additional purchases were made on margin in this account after October 12, 2011, which is the date of the last lump sum withdrawal.

Analysis and Conclusions

[220] In paragraph 110 of the Merits Decision, the IIROC Panel refers to a review of cases to determine the interpretation of "good business practices". There is no analysis on how the case law was specifically applied to the facts. The IIROC Panel's analysis focused primarily on the evidence provided by the Applicant and EH regarding the Applicant's explanations of risk in the margin account to EH and whether EH had a full appreciation of those risks.

[221] In *Re Darrigo*, 2014 IIROC 48 (*Darrigo*), an IIROC hearing panel (the Darrigo Panel) considered IIROC Staff's allegation that between October 2009 and January 2011, Paul Christopher Darrigo effected mutual fund transactions that triggered unnecessary deferred sales charges to his clients and undue commissions to himself, contrary to Rule 1300.1(o).

[222] The Darrigo Panel stated the following at paragraph 14 of its decision:

> 14 The essence of Rule 1300.1(o) is that orders must be "within the bounds of good business practice." Therefore, IIROC must prove that mutual fund transactions effected by the Respondent between October 2009 and January 2011
>
> i. triggered "unnecessary" deferred sales charges to his clients;
>
> ii. triggered "undue" commissions to himself; and
>
> iii. such transactions were contrary to "good business practice."

[223] As evidence in support of IIROC Staff's allegations, the IIROC investigator in *Darrigo* prepared a chart summarizing a number of transactions in selected clients accounts based on the deferred sales charge fees that were incurred by those clients. The Darrigo Panel considered examples of these transactions that were outside the bounds of good business practice in paragraphs 24 to 29 of *Darrigo*.

[224] The Darrigo Panel set out its decision in paragraph 30 3. of *Darrigo* as follows:

> 30 After carefully reviewing the IIROC Chart, the testimony of Noguera and the clients, DD and RC and reading the IIROC interviews of the Respondent, the Panel has decided that IIROC has successfully established the allegation that the Respondent's conduct was in breach of IIROC Dealer Member Rule 1300.1(o). Our reasons are summarized as follows:…
>
> 3. Having decided that **the transactions in question** resulted in "unnecessary" fees and "undue" commissions, the only remaining question is whether this amounted to being outside the bounds of good business practice. Since it was the Respondent's responsibility to look out for the best interest of his clients, whatever else "good business practice" may entail, at a minimum it must include putting the clients' interests before those of the representative. Therefore, it is the Panel's decision that transactions recommended by the Respondent which cause unnecessary fees to the clients and undue commissions to the Respondent, are outside the bounds of good business practice. (emphasis added)

[225] In *Nassif, Re*, 2017 IIROC 49, an IIROC panel accepted a settlement agreement in which the respondent admitted in paragraph 6. 1. of the agreement that "(b)etween September 2010 and December 2011, the Respondent failed to use due diligence to ensure that the acceptance of orders in his account, and in those of his wife and son, was within the bounds of good business practice contrary to IIROC Rule 1300.1(o)." The facts in the agreement referred to the respondent's execution of trades in the specified margin accounts that did not respect the margin

rate prescribed by regulation. The respondent made no effort to ensure adequate settlement of the trades, engaging in the practice commonly known as “free-riding”.

[226] In *Arapis, Re*, 2011 IIROC 37, an IIROC panel accepted a settlement agreement in which the respondent admitted in paragraph 7 b) of the agreement that “(b)etween May 14, 2008 and October 31, 2008, the Respondent effected one hundred and eleven (111) option transactions in twenty three (23) client accounts which were outside of the accounts' approved option level, thereby failing to use due diligence to ensure that the acceptance of any order for any account is within the bounds of good business practice, contrary to Dealer Member rule 1300.1(o).”

[227] The wording in Rule 1300.1(o) is whether the acceptance of “any order in any account is within the bounds of good business practice”. In the IIROC decisions discussed above, the focus was on particular orders and transactions. Following *Darrigo*, there is a two-step analysis. The Darrigo Panel first examined the nature and consequences of the transactions in question. It then asked itself whether those transactions were outside the bounds of good business practice, noting that good busines practice may entail, at a minimum, putting the clients’ interests before those of the representative.

[228] In paragraph 115 of the Merits Decision, the IIROC Panel found that the operation and management of EH’s margin account was not within the bounds of good business practice. There is nothing in the Merits Decision to explain how the two-step analysis from *Darrigo* was applied to particular transactions in the margin account.

[229] In our respectful view, the IIROC Panel erred in law in focussing on whether the operation and management of EH’s margin account, rather than the particular transactions in the margin account, were within the bounds of good business practice as set out in the case law.

[230] The Applicant has demonstrated that its case fits at least one of the *Canada Malting* factors. Therefore, we set aside the IIROC Panel’s decision and conduct a hearing *de novo* of this portion of the Merits Decision.

[231] Following the analysis in *Darrigo*, the first step is to determine the nature and consequences of the transactions at issue. IIROC Staff submitted in paragraph 4 of IIROC Staff’s Written Submissions re Merits dated April 7, 2020 (the IIROC Merits Submissions), that there were various transactions outside the bounds of good business practice in EH’s margin account that involved excessive use of margin. No particulars of any transactions were provided in the Merits Record.

[232] In paragraphs 66 to 71 of the IIROC Merits Submissions, IIROC Staff set out several issues with EH’s margin account between May 2011 and September 2014 in support of its submissions. These issues are the same as the submissions made by IIROC Staff at the Hearing and Review as set out above.

[233] At paragraph 71 of the IIROC Merits Submissions, IIROC Staff also submitted that "…many of the securities purchased in EH's margin account during the 2011 to 2014 time period were high risk securities such as 01 Communique, Tower Hill, Arctic Glacier, Americas Petrogas, Lakeshore Gold, Sterling Resources, Tag Oil and Vringo. These transactions were not appropriate for client EH given his personal circumstances and lack of investment knowledge and experience." In support of this submission, IIROC Staff referenced IIROC Compendium Vol 9A, which was entered as Exhibit 9a (Exhibit 9a), tab 224, pp. 5369 to 5701.

[234] Tab 224 of Exhibit 9a contains portfolio statements with detailed information about the transactions in EH's accounts. The first statement is a Wellington West portfolio statement for EH's six accounts as of March 31, 2011. The last statement is a NBF portfolio statement for EH's three accounts as of September 30, 2014. In reviewing these statements, it is not clear at what point transactions, and in particular which transactions, might have become inappropriate for EH, particularly since he was willing to accept a higher level of risk with his portfolio on any amount above $500,000.

[235] Emails from NBF to the Applicant in IIROC Compendium Volume 11, which was entered as Exhibit 11, provide an indication that around July, 2013, the level of margin in EH's account did not respect NBF's margin requirements. Requests by NBF to the Applicant to cover margin calls in EH's account are contained in emails dated July 10, 2013 (tab 265), January 15, 2014 (tab 269), February 4, 2014 (tab 270), May 13, 2014 (tab 272) and August 6, 2014 (tab 273). Accepting that transactions from July, 2013, to the end of September, 2014, may have raised margin concerns with NBF, the evidence does not contain particulars of the transactions that were of concern.

[236] IIROC Staff submitted that the transactions were outside the bounds of good business practice as they involved excessive use of margin in EH's account and were inappropriate for EH. This leads us into the second step of the *Darrigo* analysis.

[237] Assuming that we were satisfied that we could proceed without evidence of any particular transactions that raised concerns, the question before us is whether, at a minimum, the Applicant failed to put EH's interests before her interests. The Merits Record does not contain evidence to explain how the excessive use of margin lead to some form of benefit to the Applicant from the transactions that would be considered outside the bounds of good business practice consistent with the cases provided by the parties.

[238] Similar facts were considered in *Latta (Re)*, [2004] I.D.A.C.D. No. 31, in which the Investment Dealers Association of Canada (IDA) found that the respondent failed to ensure that the use of the client's margin accounts was appropriate and in keeping with her investment objectives and personal circumstances. The client's investment knowledge was fair and the resulting debit margin position raised a grave concern that the client was not receiving investment advice that was

appropriate in the circumstances. The IDA found that the client never fully understood the use of margin on her accounts and was never kept fully informed by the respondent as her debit margin increased over time. The IDA found that the respondent had violated IDA Regulation 1300.1(c) which required due diligence to ensure that recommendations made for any account be appropriate for the client and in keeping with their investment objectives. There was no IDA staff allegation that the respondent had violated IDA Regulation 1300.1(b) that "…the acceptance of any order for any account is within the bounds of good business practice".

[239] After considering the Review Record, we find that the Applicant did not contravene Rule 1300.1(o) with respect to EH's margin account.

VII. ARE THERE GROUNDS TO INTERVENE IN THE PENALTY DECISION?

IIROC Panel Decision

[240] The IIROC Panel made the following findings in the Penalty Decision:

(a) "Ms. Locke, during the relevant period, was a very experienced registrant who had held senior supervisory positions for several dealers. Her misconduct occurred over several years and demonstrated a blatant disregard for her professional regulatory and ethical obligations to her clients, dealer and the industry. Given her position and experience, it is essential to provide sufficient general deterrence that like minded and situated registrants be deterred from such conduct. To do less would be to condone and excuse such misconduct." (para. 16);

(b) "The Panel in its penalty deliberations has considered all the submissions and precedents presented by counsel and applied them considering the facts established in the proceedings. The Panel is mindful of the obligations to reach a fair and balanced disposition that serves the objectives of protection of the investing public, the maintenance of fair and efficient capital markets, and the public interest generally. Both counsel referred to the Sanction Guidelines published by IIROC. The Panel bore those Guidelines in mind in reaching its determination but, was particularly mindful to the facts in Ms. Locke's case:

> …The guidelines do not prescribe specific results but set out factors that panels should take into account in determining penalties...
>
> …Sanctions should be based on the circumstances of the particular misconduct of the Respondent with an aim at general deterrence.[11]

Notwithstanding the adverse findings of the Panel as to Ms. Locke's professional misfeasance failure of regulatory obligations and duty to her clients; no findings were made of malice or malfeasance." (para. 19); and

(c) "Considering all the evidence, precedents and submissions, the Panel had determined and orders the following penalties:

1.) A fine of $25,000 in respect to Contraventions 1 and 5 inclusive

2.) A fine of $25,000 in respect to Contraventions 2 and 6 inclusive

3.) A fine of $20,000 in respect to Contravention 3

4.) A fine of $20,000 in respect to Contravention 4

5.) Costs in the amount of $30,000

6.) A nine-month suspension commencing July 20, 2020

7.) Six months of close supervision upon re-registration including trade approvals

8.) Re-write and pass the Conduct and Practices examination within six months of re-registration." (para. 20)

Submissions

[241] The Applicant submitted that the IIROC Panel erred in law and proceeded on an incorrect principle in determining the appropriate penalty to be applied. The IIROC Panel did not adequately reflect established sentencing principles in the Penalty Decision, by reason of the fact that significant penalties were imposed for what amounted to overlapping allegations of misconduct in relation to Rules 1300.1(a), (q) and (o), each of which were similar and interrelated in nature, and which resulted in a lack of proportionality commensurate with the allegations made.

[242] The Applicant submitted that the IIROC Panel erred in overemphasizing the need for a significant denunciatory penalty and suspension for the purpose of general and specific deterrence, and failed to consider whether a more carefully structured penalty could reasonably allow the Applicant to continue to pursue her career in a safe and responsible manner, while continuing to protect the public.

[243] The Applicant submitted that the imposition of a suspension for nine-months together with significant fines for each violation of the IIROC rules amounted to a significant and excessive penalty, which did not recognize the fact that the Applicant was a registrant of more than 40 years with no record of discipline prior to this matter.

[244] IIROC Staff submitted that the Applicant has failed to demonstrate any error under the *Canada Malting* test that would justify the Commission's interference with the Penalty Decision. The IIROC Panel carefully considered the *viva voce* and documentary evidence, the IIROC Sanction Guidelines (the Guidelines) and other relevant case law.

[245] IIROC Staff submitted that in cases where there has been serious misconduct findings, removal from the capital markets "wholly or partially, permanently or temporarily" is often the most effective way to ensure that a sanction is both preventative and protective. A suspension balances specific deterrence, general deterrence and the public interest.

[246] IIROC Staff submitted that the fines imposed were a measured, proportionate response to the misconduct which demonstrated a pattern of activity over a lengthy period of time regarding multiple clients for Rules 1300.1(a), 1300.1(q) and 29.1.

Analysis and Conclusions

[247] In determining whether the IIROC Panel erred in law and proceeded on an incorrect principle, we must examine how it interpreted the law before it.

[248] The parties provided the Guidelines and a large number of cases to the IIROC Panel for the Penalty Hearing. In paragraphs 14, 19 and 20 of the Penalty Decision, the IIROC Panel stated that it considered the precedent cases and the Guidelines in determining general and specific deterrence and the appropriate penalties to be imposed. There is no discussion of any specific cases in the Penalty Decision.

[249] Other than in paragraph 16 of the Penalty Decision, there is no specific discussion of the principles and key factors in the Guidelines which were considered to be relevant by the IIROC Panel.

[250] From our review of the record for the IIROC Decisions, we consider the following to be relevant key factors from the Guidelines:

(a) the Applicant had no previous disciplinary record;

(b) there were multiple serious contraventions over a lengthy period of time involving several clients at three member firms;

(c) there were unsophisticated, vulnerable, trusting clients, in particular JF and F Limited;

(d) the clients suffered unrealized losses in their accounts; and

(e) there were significant debit balances in EH's margin account.

[251] Recognizing that each case involves unique facts, and aggravating and mitigating factors that may not be present in this case, there were several decisions that

would have been considered by the IIROC Panel in which the IIROC hearing panels considered the same, or similar, contraventions as in this case. Those panels considered and applied the principles and key factors in the Guidelines and similar cases and arrived at penalties within the range of the penalties in the Penalty Decision.

[252] In *Re Debus*, 2019 IIROC 18, the contraventions related to unsuitable recommendations, unauthorized trades, discretionary trading and off-book transactions. Key factors taken into consideration were multiple breaches relating to three clients over a long period of time, harm to the clients and markets, breach of trust and deceit. The sanctions imposed included a global fine of $65,000 and a nine-month suspension.

[253] In *Bodnarchuk (Re)*, 2018 IIROC 34, the contraventions related to failure to know the client, unsuitable recommendations, discretionary trading and failure to disclose outside activities. Key factors taken into consideration were no prior record for the respondent who did not profit from the misdeeds, two clients over a lengthy period of time at several firms, loss of money by the clients and the respondent's acknowledgment of a breach of duty to the clients. The sanctions imposed included a global fine of $100,000 and an 18-month suspension.

[254] In *Wood (Re)*, 2017 IIROC 18, the contraventions related to failure to know the client and unsuitable recommendations for one client. Key factors taken into consideration were the respondent's lack of experience with high risk securities, no previous disciplinary history and inability to pay. The sanctions imposed included a global fine of $40,000 and a six-month suspension.

[255] In *Brodie (Re)*, 2013 IIROC 39, the contraventions related to unsuitable recommendations for two clients over an approximate four-year period, discretionary trading and compensating client losses. The sanctions imposed included a global fine of $60,000 and a six-month suspension.

[256] In *Gareau (Re)*, 2011 IIROC 72, the contraventions related to inaccurate recording of client information on NCAFs and unsuitable recommendations for four clients and selling a security against the client's express wishes. Key factors were significant economic and emotional harm to unsophisticated, trusting and vulnerable clients; lack of fraud, deception or negligence; no prior securities disciplinary record; and acceptance of responsibility and remorse by the respondent. The sanctions included a global fine of $100,000 and a one-year suspension.

[257] We find that the sanctions in the Penalty Decision were reasonable based on the facts, evidence and law before it. The Penalty Decision reflected the principles and key factors in the Guidelines and in previous cases of a similar nature. The IIROC Panel did not err in law or proceed on an incorrect principle in determining the appropriate penalties to be applied.

[258] The Applicant submitted that the IIROC Panel failed to consider whether a more carefully structured penalty could have allowed the Applicant to continue to pursue her career in a safe and responsible manner. No specific details of what this penalty might be were found in the Applicant's submissions for the Penalty Hearing.

[259] At the Penalty Hearing, and In the Applicant's written submissions for the Penalty Hearing dated July 13, 2020, in paragraphs 7, 24, 38 and 42, the Applicant acknowledged that a suspension was appropriate in light of the factual findings in the Merits Decision but submitted that the suspension should be for six months rather than the two years proposed by IIROC Staff.

[260] At the Penalty Hearing, the Applicant called Christopher J. Enright, the President and Ultimate Designated Person of Aligned Capital, as a witness. He explained the client supervision structure at Aligned Capital, how Aligned Capital would address continuity of the Applicant's accounts if she was suspended and the process for the Applicant's return after a suspension (pgs. 30 to 32 of the July 20, 2020, transcript for the Penalty Hearing (the Penalty Transcript)). Although the IIROC Panel did not refer specifically to this evidence in their decision, there is no indication that the evidence was not considered by the IIROC Panel in making its decision.

[261] With respect to the Applicant's submission that the imposition of a suspension for nine-months is a significant and excessive penalty, which has dramatic consequences on the ability to earn an income and resume practice, the Applicant referred to *Steinhoff, Re*, 2014 BCSECCOM 23 (*Steinhoff*).

[262] In *Steinhoff*, the BCSC set aside an IIROC hearing panel's imposition of a one-year suspension for contraventions relating to unauthorized discretionary trading, unsuitable investment recommendations and knowingly making false statements to her employer. In its decision, the BCSC noted that this was an isolated event, referring to it as a single mistake, there was no pattern of misconduct, there was one set of clients and one set of recommendations, and Ms. Steinhoff had a 25 year distinguished career. In paragraph 29 of its decision, the BCSC stated that a suspension was not warranted in the circumstances and was grossly disproportionate to the seriousness of Steinhoff's misconduct.

[263] We did not find *Steinhoff* to be particularly relevant as the facts relating to her contraventions are quite different from the facts and the key factors in this case. The IIROC Panel did note in the first sentence of paragraph 16 of the Penalty Decision that the Applicant was a very experienced registrant and there is no indication in the decision that she had a record of discipline prior to this matter.

Variation of Penalty Decision to Reflect our Findings on the Merits Decision

[264] We found no errors in the Penalty Decision. However, since we found several errors in the Merits Decision, we must intervene in the Penalty Decision to vary certain of the penalties to take into account the contraventions that we set aside.

[265] We are of the view that consideration of the Review Record is sufficient to enable us to make our decision as the law relating to sanctions applied by IIIROC hearing panels is very similar to the law applied by the Commission in enforcement proceedings under the Act.

[266] We will consider each of the penalties ordered by the IIROC Panel in paragraph 20 of the Penalty Decision.

[267] A fine of $25,000 was ordered for Contraventions 1 and 5 which relate to JF, GR, F Limited, EH and LG. This amounts to a fine of $5000 with respect to each client. Since we set aside the finding relating to Contravention 1 for GR, we reduce the fine for Contraventions 1 and 5 to $20,000.

[268] A fine of $25,000 was ordered for Contraventions 2 and 6 which relate to JF, GR, F Limited, and LG. This amounts to a fine of $6250 with respect to each client. Since we set aside the finding relating to Contravention 2 for GR, we reduce the fine for Contraventions 2 and 6 to $18,750.

[269] We set aside the fine of $20,000 for Contravention 3 as we found that the Applicant did not contravene Rule 1300.1(o).

[270] We confirm the fine of $20,000 for Contravention 4 as we confirmed the IIROC Panel's findings with respect to this matter.

[271] Costs in the amount of $30,000 were ordered. Under IIROC's former Rule 20.49(2), costs shall not be assessed where a hearing panel has not made a finding against a respondent for failure to comply with the provisions of any IIROC Rule or Ruling.

[272] At the Penalty Hearing, IIROC Staff advised that it had reduced the bill of costs to $40,000 as they were not successful with respect to client AH in Contravention 3 and they withdrew client RC during the Merits Hearing from Contravention 4 (pgs. 21 and 22 of the Penalty Transcript). To reflect the contraventions that we set aside, costs are reduced to $25,000.

[273] A nine-month suspension commencing July 20, 2020, was ordered. Based upon the case law and principles in the Review Record, and in particular the cases referred to above, we find that it is appropriate and in the public interest to impose a suspension of six months, commencing seven days from the date of the order to be issued. The relevant key factors from the Guidelines that we identified continue to be applicable even though we set aside several findings of contraventions.

[274] The Applicant's registration has already been suspended for just over three months. IIROC Staff advised that the Applicant's registration was suspended on September 17, 2020, and reinstated with conditions on December 23, 2020, subsequent to the issuance of the Conditional Stay Decision. This period of suspension is to be taken into account in determining the remaining period of time that the Applicant's registration is to be suspended.

[275] Six months of close supervision upon re-registration, including trade approvals, was ordered. We confirm this order.

[276] The Applicant was ordered to re-write and pass the Conduct and Practices examination within six months of re-registration. The Applicant has been registered since 1979 with no prior disciplinary record. We set aside this order and note and apply the comments of the BCSC in paragraph 13 of *Steinhoff*:

> 13… The Conduct and Practices Handbook Course is an entry-level, self-study course that devotes only a small portion of its content to the issue of suitability. It is unlikely that Steinhoff would learn anything useful from this source. The issue here is not so much whether she understands the suitability requirement but that she failed to apply it appropriately when advising the Ks.

[277] After considering the protective and preventive purposes of regulatory orders, the relevant key factors relating to the Applicant, and the Review Record, we find that it would be appropriate to vary the orders in section 20 of the Penalty Decision to reflect our decisions above on the appropriate penalties.

VIII. CONCLUSION

[278] Pursuant to subsection 6(3) of the Act, we are making an order:

(a) confirming the Admissibility Decision;

(b) setting aside the IIROC Panel's decisions in the Merits Decision with respect to:

i. Contraventions 1 and 2 relative to GR; and

ii. Contravention 3;

(c) confirming all other aspects of the Merits Decision; and

(d) setting aside all the penalties ordered in paragraph 20 of the Penalty Decision and substituting the following:

i. a fine of $20,000 for Contraventions 1 and 5;

ii. a fine of $18,750 for Contraventions 2 and 6;

iii. a fine of $20,000 for Contravention 4;

iv. costs in the amount of $25,000;

v. a six-month suspension, commencing seven days from the date of the order, with credit to be provided for the suspension of the Applicant's registration from September 17, 2020, to December 23, 2020; and

vi. six months of close supervision upon re-registration, including trade approvals.

[279] This proceeding is concluded.

DATED at Halifax, Nova Scotia, this 24th day of June, 2021.

NOVA SCOTIA SECURITIES COMMISSION

(signed) *"Shirley Lee"*
Shirley P. Lee, QC
Chair

(signed) *"Valerie Seager"*
Valerie Seager
Commissioner

(signed) *"Heidi Walsh-Sampson"*
Heidi Walsh-Sampson
Commissioner