Re Yaskiw

IN THE MATTER OF:

The Dealer Member Rules of the Investment Industry Regulatory Organization of Canada

and

Jamie Peter Yaskiw

2016 IIROC 53

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

Heard: October 18-20, 2016 in Calgary, Alberta
Decision: December 5th, 2016

Hearing Panel:
Shelley L. Miller, Q.C.,Chair, Kathleen Jost and Don Milligan
Appearances:
David McLellan, Senior Counsel for IIROC
Jamie Peter Yaskiw, Appearing in Person

DECISION AND REASONS

INTRODUCTION

¶ 1 This hearing proceeded in accordance with a Notice of Hearing that alleged 3 contraventions and included a Statement of Particulars ("SOP") consisting of 59 paragraphs. Counts 1, 2 and 3 against the Respondent, Mr. Yaskiw, ("Yaskiw") were:

a. Between approximately January, 2012 and June, 2014, the Respondent failed to use due diligence to learn and remained informed of the essential facts relative to four (4), clients contrary to Dealer Member Rule 1300.1(a);

b. Between approximately January, 2012 and June, 2014, the Respondent failed to use due diligence to ensure that recommendations were suitable for four (4), clients contrary to Dealer Member Rule 1300.1(q);

c. Between approximately January 2012 and June 2014, the Respondent engaged in discretionary trading with respect to the accounts of four (4), clients contrary to Dealer Member Rule 1300.4.

¶ 2 During the evidence presented on behalf of IIROC, Enforcement Counsel advised the Panel that no evidence would be presented in respect of the fourth client referenced in the allegations.

¶ 3 IIROC Dealer Member Rules 1300.1(a), 1300.1 (q) and 1300.4 state as follows:

> 1300.1(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(q) Each Dealer Member, when recommending it to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable

for such client based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level.

1300.4 A Registered Representative may not exercise discretionary authority over a customer account unless:

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

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

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

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

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

¶ 4 At the outset of the hearing this Panel received IIROC's binders of documents including various email communications, transaction account statements and recorded statements of the Respondent.

¶ 5 At the hearing IIROC presented *viva voce* evidence of an IIROC investigator, one Daniel Choy, ("Choy"), and three witnesses, identified for the purposes of this decision and reasons as LK, JK, and SA. A summary of the evidence of these witnesses is set out below.

Testimony of Choy

¶ 6 Choy outlined his previous experience as a police constable, as an investigator for the government of Alberta and for the Alberta Securities Commission ("ASC"). He had been engaged as an investigator at IIROC since September 2015 and explained that his role was to collect information pertaining to investigations.

Clients – LK and JK

(i) Failure to Know Your Client

¶ 7 As part of his investigation into the allegations, Choy explained that he had analyzed the trading in the accounts of LK and JK, and SA, clients of the Respondent at the material times, interviewed the clients and the Respondent, examined various emails between the clients and the Respondent, and between the Respondent and his superiors at the firm of Wolverton Securities Ltd. ("Wolverton").

¶ 8 LK explained to Choy that she and JK met the Respondent at his previous firm, Raymond James, where he provided some advice to them regarding products to apply to tax obligations.

¶ 9 LK told Choy that she and her husband planned to retire in seven years and she told the Respondent they wanted to semi-retire at the time they opened the accounts with the Respondent. They wanted to leave the investment funds in order to fund their retirement and they depended on the advice of the Respondent because they did not know much about the stock market. LK said the information provided by the Respondent constituted a "huge learning curve" for her.

¶ 10 Choy pointed to certain emails dated June 5, 2013, his interview with LK and his review of their accounts, in support of his conclusion that the accounts did not reflect a balanced portfolio, and contained a lot of speculative stock. Choy concluded that her knowledge was very limited and below average but did not dispute that the investment knowledge of LK and JK was fair.

¶ 11 Choy testified that the objectives set out in the initial NCAFs were appropriate but he considered that when the NCAF was updated six months later and objectives in it changed to 50% growth and 50% high risk for 12 accounts, it was too risky for their personal and financial circumstances.

(ii) Suitability

¶ 12 Choy's asset allocation analysis revealed that large amounts were invested in equities. He noted that the energy sectors were typically more volatile and the degree of concentration in the accounts of LK and JK, for example, at one point were as much as 42.5% in energy securities. This indicated a high level of risk.

¶ 13 Choy noted that their portfolio revealed significant day trading, options and penny stocks. While he could not determine the Respondent's strategy, it was clear to him that it was aggressive.

¶ 14 As another example, Choy pointed out five trades involving a total amount of $250,000 that occurred within one day in August 2013. He noted that short selling of this nature poses a risk of losing a lot of money. He gave other examples of these types of trades involving penny stocks also occurring in August 2013.

¶ 15 Choy expressed the view that short sells, day trading, and sales in penny stock in combination were not suitable for LK and JK, having regard to their age and their personal circumstances.

¶ 16 Choy observed that in his interview, the Respondent claimed that he had told LK and JK he would "do some shorting" to protect them. He said his investment strategy was not designed for retiring clients. The Respondent also told Choy that despite his observation that they were approximately age 60, LK and JK told him they were not retiring and did not need the income.

¶ 17 Choy concluded from his review of the accounts statements by reference to tools provided to him from IIROC that 60 to 75% of the trades were in the high-risk category,

¶ 18 Choy observed from the monthly statements in the accounts of LK and JK that they lost the sum of $125,337.44, which approximated an 11.23% loss on their portfolio. He compared the performance of the TSX and S & P Composite Index for the same period and found it increased by 22.78%.

(iii) Discretionary Trading

¶ 19 Choy noted that the Respondent was not permitted to undertake discretionary trading. He calculated that the Respondent conducted 585 transactions in one year in their accounts and except for reference to certain trades in a total of five emails produced from Wolverton, the Respondent did not retain any notes of obtaining advance permission for trades from LK and JK.

¶ 20 Choy referred to a nine-page memorandum prepared by the Respondent to Wolverton after he had been directed to make notes of trades permitted by the clients.

¶ 21 Choy noted that the memorandum pertained to the period of March 10 - June 6, 2014, which revealed that some notes referenced conversations with LK about trades, but others did not. He also observed there were no notes for events prior to March 10, 2014.

¶ 22 In his interview with LK, she said at the material time she did not know what was meant by "managed" accounts. She said the Respondent did not call to seek permission for every trade and in most cases she learned about the trades from the statements received later and saw that "a lot of flipping was going on".

¶ 23 LK told Choy that on one occasion she had inquired of the Respondent about a discrepancy in her statement, and he explained it was a problem in the Wolverton computer system, and that her statement did not reveal what was "occurring at the backend".

¶ 24 Choy said LK thought at the time that the Respondent was just bad at his job, but at the time of the interview, she concluded he had been cheating.

¶ 25 Choy identified certain specific trades occurring in September and November 2013 to LK who confirmed that she did not instruct the purchase of the same.

¶ 26 Choy then noted certain email exchanges between Wolverton supervisors and Respondent in September 2013 referencing concerns about certain stocks in the accounts of LK and JK being too high-risk and wishing to confirm the Respondent's strategy. The Respondent said he was obtaining approval on all trades.

¶ 27 Choy noted that the correspondence indicated that the Wolverton supervisors advised the Respondent that LK and JK's accounts had too high a concentration in high risk securities in light of the clients' investment objectives and he must rebalance their accounts. The correspondence showed that the Respondent disagreed that his strategy was aggressive and stated that the clients had agreed to it.

¶ 28 It appeared to Choy that the Wolverton supervisors had characterized the account as a "non-approved discretionary" account and decided that the Respondent's trading must be restricted until he had updated the NCAF forms and completed and approved an Investment Policy Statement, ("IPS").

¶ 29 Choy noted further email correspondence with Wolverton supervisors in December 2013 referencing concerns about trades executed without specific instructions. It indicated that Wolverton supervisors restricted trading in the accounts until managed portfolio account documents were received. It showed that the Respondent agreed to convert the accounts to portfolio accounts and draft an IPS to show the strategy plan.

¶ 30 Choy noted the emails also revealed that Wolverton supervisors decided to put the Respondent under internal (i.e. Wolverton) strict supervision, requiring him to have all his trades reviewed and to produce evidence that his clients agreed in advance to his proposed trades. He was also required to rewrite the Conduct and Practices Handbook ("CPH") industry exam.

¶ 31 Choy noted a response from the Respondent that claimed he had complied with all requests, that he implemented note taking of all the discussions with clients and denied he had engaged in discretionary trading.

¶ 32 Choy noted the Respondent did not pass the initial rewrite of the CPH exam.

¶ 33 Choy also noted that the Respondent was suspended from employment at Wolverton in June 2014.

¶ 34 Choy concluded that the Respondent had engaged in discretionary trading and noted that other than in the case of 19 out of 585 trades, no other handwritten notes were found to verify he had prior permission from the clients for the remaining trades.

Client - SA

(i) Failure to Know Your Client

¶ 35 Choy interviewed SA and determined that she had previously engaged an adviser from the Raymond James firm, through whom she came to know the Respondent, who was then a colleague of that adviser. Choy also located a complaint from SA in the documentation produced from Wolverton.

¶ 36 Choy reviewed an NCAF for SA dated January 26, 2012 signed by the Respondent pertaining to the opening of three accounts. It documented that SA's net worth was $170,000 and that her investment knowledge was less than "fair".

¶ 37 Choy observed from his interview with SA that she wanted to make money for her retirement and that she had never personally met the Respondent. She had no recall of the objectives set out in the NCAF, or that the Respondent explained risk tolerance, investment objectives, numbers, or that he asked any questions of her.

(ii) Suitability

¶ 38 Choy noted the objectives included "60% speculative" which he concluded was too aggressive for SA.

¶ 39 Choy observed from reviewing the records that SA sustained losses of nearly $41,000 over a two-year period that constituted a loss of 38.6% on her portfolio.

¶ 40 Choy concluded that from February 2012 to February 2014, the securities traded were in a high-risk category.

¶ 41 Choy testified as to the methodology used to arrive at his conclusion. One factor was that all the stocks

were placed in the energy sector. Another was the record showing many trades in penny stocks, and short trades which, which taken together, were too risky for her account and demonstrated an unsuitable strategy.

(iii) Discretionary Trading

¶ 42 While Choy found that the Respondent was not permitted to do discretionary trades, there were 109 transactions in SA's account with no notes of conversations with SA prior to the trades.

¶ 43 Choy referenced his interview with SA, who stated that she found out about the trades after the fact by going online or by receiving slips in the mail. SA said the Respondent rarely called in advance to advise of the trade, but often he executed trades on his own, and she did not know he was not to do that.

¶ 44 Choy also pointed to one email dated December 5, 2012 from SA that specifically advised the Respondent she needed more correspondence and reassurance having regard to the important losses she sustained last year. In the email, SA posed a question about a certain redemption and noted it pertained to the only stock on which, until that date, she was not losing money.

Cross examination of Choy

¶ 45 Under cross-examination, Choy admitted that he did not locate many option trades on SA's account and no future trades occurred.

¶ 46 Under cross-examination, Choy admitted that he had only taken the Canadian Securities Course (CSC) and the CPH, and did not know more than the basics of the principles of arbitrage, which to his understanding involved simultaneous buying and selling. He also admitted that he did not know what the elements of a covered call were.

¶ 47 Choy stated that IIROC provides guidance for him to apply his professional judgment in determining risks in securities. He considered that cash or cash equivalents, bank stocks and bonds constituted very low risk. He defined 'risk' as the probability of loss. He admitted he was not familiar with the term 'new issue arbitrage' or the sophisticated practices of arbitrage. He did know that new issue financing involved the raising of money for the purchase of stocks that would be sold to the client through the investment firm.

¶ 48 Choy admitted that with respect to a sale of 60,000 Colossus minerals for LK and JK, he did not look to see if there were other sides to the trade to preclude it from appearing to be a short sale.

¶ 49 Choy admitted that he thought the records revealed that the Respondent was shorting the Colossus shares, but he did not know if the trade occurred before the financing was complete and the shares were placed in the account.

¶ 50 Choy stated that he thought "shorting" occurred when a trade was made with the hope that the share price would drop, but did not know if it occurred before the financing was complete and the shares were placed in the account.

¶ 51 Choy did not know if the Colossus stock was a new issue, or if it came with warrants, but he considered short selling was high risk for the client.

¶ 52 Choy stated that when the Respondent updated the NCAFs of LK and JK, the trading became more aggressive, the Respondent took on higher risks. The strategy became even more inappropriate.

¶ 53 Choy admitted that he looked at the deposits and withdrawals rather than the existing positions when he determined LK and JK had lost $125,000. He admitted he did not know if these losses were a result of choices made by JK.

¶ 54 Choy testified that the definition of "discretionary trading" is one where client consent is not required to effect transactions. Choy said that in this case the Respondent should have set up a Managed Account or secured written authorization from the client to make trades. Otherwise, making trades without prior written permission from the client constitutes discretionary trading.

¶ 55 Choy noted that Wolverton had placed the Respondent under supervision and further, that it had warned

the Respondent not to make trades without prior written permission of the client.

Testimony of LK

¶ 56 LK gave evidence of her employment background and that of her husband JK.

¶ 57 LK had been self-employed with various small businesses. JK had been an oil field consultant, who was often required to travel for extended periods. As a result, LK managed their finances and conducted almost all communications with the Respondent.

¶ 58 LK and JK previously had enjoyed a windfall of $1.156 million resulting from an investment of $25,000 in an oil and gas company whose principals had been well known to JK from his years in oil field consulting.

¶ 59 This windfall generated a large tax obligation and LK sought advice from friends about how to meet it. A friend advised her to contact the Respondent who was selling flow-through shares to meet tax obligations. She thought she had a fair understanding of the stock market, however they had never consulted a stockbroker prior to meeting the Respondent.

¶ 60 LK contacted the Respondent, who advised that he had become a portfolio manager at Wolverton. LK visited the IIROC website and read that he had been placed under close supervision. JK concluded from all the foregoing that the Respondent was very experienced at his business.

¶ 61 LK understood there are always ways of getting money out of the stock market but wanted the Respondent to protect their position against losses and relied on the Respondent to use his knowledge.

¶ 62 LK recalled asking the Respondent why he would not employ a “buy and hold” strategy and being told that was not his strategy. She did not know that he was to call her in advance for permission on all trades. She did not understand the meaning of short sales.

¶ 63 LK testified that the Respondent called in advance in some, but not all, instances for authorization for certain trades. She did not recall talking to the Respondent when she and her husband were both out of the country at various times.

¶ 64 LK testified that the Respondent had her open more accounts but recalled in this respect that she signed the signature page only. The Respondent told her it was necessary to sign the forms because Wolverton was changing computers. She now holds the view that the Respondent lied to her in this regard.

¶ 65 LK testified that she complained to the Respondent about the number of accounts opened but he said, ”This is our system and that is what made the money.” LK observed from her statement that the accounts amounts were dropping rapidly and told the Respondent she could not see what was happening from her online searches. She asked to meet with him for an explanation whereupon she received confirmation from him that her observation of her online account was in fact correct.

¶ 66 In her testimony, LK said she was embarrassed that she did not realize it was wrong for the Respondent to advise her of trades made after the fact, and that when he reported trades that made a profit, she did not think to complain.

¶ 67 LK stated that Wolverton compensated her and JK for their loss of $125,000 however it cost $20,000 to achieve this result. JK testified that with this financial loss, if it is now difficult to retire as they had planned to do.

Cross Examination of LK

¶ 68 On cross-examination, LK admitted that the Respondent had provided a book to explain investment practices, two chapters of which she was able to read before giving up.

¶ 69 LK admitted that she probably had the Respondent’s business card and his cell number and that he may have told her she had 24/7 access to him.

¶ 70 LK admitted that in 2014, their joint net worth was $2.5 million dollars. She admitted that the amount of

$1 million shown in the NCAF dated July 24, 2013 represented not their total assets, but the amount they invested with the Respondent.

¶ 71 LK said the Respondent filled in the updated NCAF statement. She thought the agreement declared that they would pay a percentage of the value of the account but did not know why the Respondent reduced the percentage. She agreed that she was not charged for some of the trades.

Testimony of JK

¶ 72 JK briefly testified to confirm that most of the dealings on their account occurred between the Respondent and his wife, LK. He was unaware of the nature of the trading until losses showed in 2014. The loss impacted their life style.

Testimony of SA

¶ 73 SA confirmed she was employed as a data analyst. She had never met the Respondent before the hearing. She considered her investment knowledge was "fair". She gave the Respondent flexibility to do what he wanted. She understood that he was allowed to tell her after the fact of trades made in her account.

¶ 74 SA testified that while she was relying on the Respondent for his investment knowledge, by 2013 all her accounts were in a loss position. At that point SA decided to sell everything and start fresh with a new advisor.

¶ 75 SA testified that she had no discussions with the Respondent about risk and return and looked for activity in her account on line and through monthly statements. She assumed that the losses in her accounts were her fault. She has received no compensation for her loss.

Cross Examination of SA

¶ 76 Under cross-examination, SA stated that she was not aware at any time that the Respondent was under "strict supervision" and did not know what that meant. Certain trades in her account were put to her and she said she did not know if they were high-risk trades.

Testimony of the Respondent

¶ 77 The Respondent produced a record of his educational courses completed in the field of securities investment practices. With regard to his employment history prior to Wolverton, he had held the position of senior vice president at another firm where he was one of the few portfolio managers.

¶ 78 The Respondent explained at some length the extent of his investment knowledge and previous trading experience. As an example, he said previously it was not unusual for him to execute over 250 transactions per day.

¶ 79 The Respondent said he was hired by Wolverton in January 2012 and was paid a significant signing bonus because of the skills he had with new issues securities. He said he found out after he arrived that Wolverton did not do a lot of business in new issues. Further, he said Wolverton was unprofessional, its offices were a disaster, and it was never renovated while he was there.

¶ 80 The Respondent said he had used the strategy of shorting new issues prior to issue date for the prior 10 years, including at Wolverton, until he was put under strict supervision.

¶ 81 The Respondent denied that he resigned from Wolverton as shown on the Termination Notice. He claimed he was fired due to the subject IIROC investigation. However, he volunteered that he had problems with Wolverton senior staff and further that he had been under the strictest form of supervision for the last 8 to 12 months of his employment. This meant that all trades he wished to perform had to be reviewed and approved by Wolverton before he executed the same. The Respondent stated that Wolverton did not provide IIROC with all the emails he had generated between his clients and himself.

¶ 82 The Respondent also volunteered that he has had no previous disciplinary record with IIROC and that he passed the CPH exam when Wolverton required him to do so.

¶ 83 The Respondent claimed that he had very sophisticated knowledge as to suitability, whereas investigator Choy does not know how to assess risks and his analyses were incorrect. The Respondent claimed that investigator Choy referenced only five factors in his analysis of risk and did not understand, for example, that some smaller cap new issues came with a warrant or a half warrant. The Respondent explained that any stock has risk and he typically was able to examine some one hundred factors in considering the risk of a stock trade.

¶ 84 The Respondent explained the nature of new issue arbitrage meant that the risk to the customer on the short sale was eliminated because the risk was transferred to the advisor who would cover the short sale.

¶ 85 The Respondent agreed that the new issue arbitrage strategy was too risky for some select clients. For example, he did not employ this strategy for SA but instead implemented a "buy and hold" strategy.

¶ 86 The Respondent testified that there was confusion about getting authorization from the client about such trades in the event of delay. In fact, the Respondent claimed that he had recommended Wolverton implement a diary system to maintain a record of clients' authorizations in advance of trades. However, he said Wolverton declined to adopt his recommendation.

¶ 87 The Respondent stated that if Wolverton considered the objectives on a client's NCAF to be out of line, he would be directed to talk to the client to update their forms or to rebalance the portfolio. He said he did not trade when the client was not available. He claimed that he entered orders on the data file system after the client emailed permission for a trade.

¶ 88 The Respondent stated that he met with LK and JK 5 to 6 times and had dinner with them at the end of 2013. The Respondent claimed he sometimes talked several times a day to LK including days, nights and weekends. He probably talked 10 times to JK.

¶ 89 The Respondent claimed that LK's testimony was in error because at the time they retained him, he was not placed under close supervision but had just been appointed to Portfolio Manager.

¶ 90 The Respondent stated that he opened new accounts for LK and JK under pressure from Wolverton. He said he wanted to work to have the policy changed but when he could not do so, he did not conduct any trades in those new accounts.

¶ 91 The Respondent said that JK told him he planned to retire in 7 to 10 years, but never mentioned that his job was in danger or that he was retiring soon. The Respondent knew they had savings because he had made money for them at his previous firm.

¶ 92 In the Respondent's opinion, JK had above fair knowledge of investment trading. He agreed that he might have decided upon a more aggressive strategy for them at the date of completing the NCAFs.

¶ 93 The Respondent admitted that he was put under strict supervision and the restrictions upon his trading activity were put in place in late 2013. He admitted that between November and December 2013, Wolverton directed that all his trades on behalf of the clients LK and JK had to be verified by the client before they occurred. He claimed that Wolverton considered it too onerous to have clients send emails to verify each and every trade.

¶ 94 The Respondent stated that he did engage in trades higher than the limits set out in their NCAF because he was doing new issue arbitrage. He stated that the accounts suffered after he was put under strict supervision. However, he considered the accounts were low risk and that he endeavored to take steps to mitigate the risks. He repeated that Investigator Choy looked at these positions incorrectly.

Cross examination of the Respondent

¶ 95 On cross examination, the Respondent admitted that if an account was set up properly, a portfolio manager can use his discretion to place trades in clients' accounts. He admitted that the accounts for LK and JK were not up for portfolio management. He said he explained to LK that he could not use his discretion on her account, but that he was working on it.

¶ 96 The Respondent agreed that the trading in their account was largely short-term in nature, and said he

considered short-term trading to be suitable. As regards his notes, only 19 conversations were taken with respect to LK and JK. He said he did not take notes until March 2014 because it was not required while he was under strict supervision.

¶ 97 The Respondent admitted that the accounts of LK and JK lost approximately $125,000 or 11% of their portfolio, and in the period between July 2013 and July 2014, the S&P index rose 22.78%.

¶ 98 The Respondent admitted that he did not pass the industry practice exam taken on June 12, 2013 due, he claimed, to illness, but rewrote it successfully on June 23, 2013.

¶ 99 As regards SA, the Respondent testified that he met her first in 2006 at his previous firm when she was consulting another adviser. Under cross examination he conceded such meeting constituted no more than saying "hi" when he saw her in the office.

¶ 100 As regards the losses resulting in SA's account, the Respondent said that he tried his best, and held her funds in cash, but "some accounts don't work out". The Respondent stated that he considered any trades resulting in a loss to be "unsuitable".

¶ 101 The Respondent did not agree that as of November 2013 the accounts showed losses of $40,000. He thought the accounts were then up minimally. He said the losses were not devastating.

¶ 102 As regards the results for the client SA, the Respondent claimed that he did well for her when at his former firm and admitted he did poorly for her at Wolverton.

¶ 103 The Respondent admitted that there was much short-term trading in her account and claimed it was coded for the same. He did not think that a conservative strategy was warranted in her case.

¶ 104 The Respondent claimed that he secured SA's approval for every trade before it was made. He admitted that while at Wolverton, she lost $40,000 or 38.6% of her portfolio. He agreed that in the same time period, the TSX increased by 19.79%. However, he claimed that her account was not benchmarked to the TSX.

¶ 105 The Responded stated that while he did maintain notes of every trade he made, he shredded those notes approximately one week after they were made for the purpose of preserving the clients' confidentiality.

Closing Submissions

¶ 106 In his closing submissions, the Respondent stated that he was aged 38 when he joined Wolverton.

¶ 107 The Respondent said Wolverton never developed the requisite IPS to enable him to perform discretionary trades. He intended to convert the accounts for LK and JK to managed accounts when the IPS was finalized but he got no support from Wolverton for the development of the IPS. He also stated that Wolverton upper management bullied him. He claimed that the trades he undertook for the clients were appropriate, and that Wolverton wrongly terminated him.

¶ 108 The Respondent claimed that being put under close supervision meant that he could not perform discretionary trades. He said that he had maintained all the notes he was required to maintain. He said that he had analyzed all the trades for these clients before affecting them and always had their best interests at heart.

¶ 109 The Respondent stated that the consequences of his dismissal resulted in the loss of his house, a loss of income and his career path has been limited without the production of any hard evidence against him.

¶ 110 In response to questioning from the Panel as to whether it would not be in the interest of Wolverton to produce email exchanges between him and his clients to evidence receipt of prior approval from his clients for trades made on their behalf, the Respondent contended that Wolverton would have withheld such emails to justify their dismissal of him.

¶ 111 In closing argument, Enforcement Counsel contended that the Respondent had wrongly projected the capabilities of a portfolio manager to LK and JK before the accounts had been properly set up and as result, had improperly conducted discretionary trading contrary to the IIROC rules.

¶ 112 Enforcement Counsel argued that Wolverton directed the Respondent to desist, and to set up proper accounts but that did not occur prior to the Respondent's departure from the firm.

¶ 113 Enforcement Counsel further argued that the clients LK and JK were aged approximately 60, had limited investment experience, despite their one significant windfall a few years prior, which in fact had made them vulnerable to the behavior of the Respondent. In these circumstances, LK and JK trusted the Respondent, however he did not handle their accounts the way he represented in his initial email he would do, and he did not follow a strategy consistent with his initial proposal or the NCAF.

¶ 114 Enforcement Counsel argued that despite setting up the forms and objectives, LK and JK did not understand the Respondent's strategy or the discussions about new issue arbitrage, shorting, or the rationale for the 585 transactions he conducted in their accounts.

¶ 115 As regards the potential flaws in the testimony of investigator Choy, Enforcement Counsel argued that IIROC investigators do not profess to be financial experts. In any case, Choy's analysis focused on a high number of trades, and the high level of sector concentration trades in many small-cap companies that the Respondent agreed were risky. Enforcement Counsel argued that the records of the trades themselves evidenced there was too much volatility in the clients' accounts.

¶ 116 Enforcement Counsel also argued that the Respondent's views as to suitability were wrong, i.e. that trades are suitable, if the portfolio goes up.

¶ 117 Enforcement Counsel argued finally that the evidence showed that the Respondent did not take SA's account seriously, that he took significant risks in her accounts without talking to her beforehand, and essentially was gambling with her funds.

¶ 118 This Panel then adjourned the hearing to deliberate and to then deliver written reasons. Those reasons are set out below.

APPLICABLE LAW AND CASE AUTHORITIES

A. Standard of Proof

¶ 119 As noted in *Re Jones*, 2013 IIROC 58, the standard of proof is sufficiently set out and summarized at paragraph 10 of *Re Floyd & McDonald*, 2013 IIROC 4 as follows**:**

> *10. The parties do not dispute and the panel accepts that the standard of proof in these proceedings is the civil standard of a balance of probabilities. (Law Society of Upper Canada v. Neinstein [2007] O.J. No. 958 (Ont. Div. Ct) at paragraph 54. As was stated in Re Boulieris (2004) 27 OSCB affirmed [2005] O.J. No. 1984 (Ont. Div. Ct):*
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> > *[33] The degree of proof required…is such that before a tribunal reaches a conclusion of fact, the tribunal must be reasonably satisfied that the fact occurred; and whether the tribunal is so satisfied depends on the totality of the circumstances including the nature and consequences of the facts to be proved, the seriousness of an allegation made, and the gravity of consequences that will flow from a particular finding. See Bernstein and College of Physicians and Surgeons of Ontario (1977), 15 O.R. (2d) 447 at 470(Ont. Div. Ct.): and Re Coates et al. and Registrar of Motor Vehicle Dealers and Salesmen (1988), 65 O.R. (2d) 526 at 536 (Ont. Div. Ct.)*
> >
> > *[34] Bernstein stands for the proposition that grave charges against a person cannot be established to the reasonable satisfaction of a discipline committee by fragile or suspect testimony. The evidence to establish the charges have to be of such quality and quantity as to lead a discipline committee acting with care and caution to the fair and reasonable conclusion that the person is guilty of those charges. The degree of proof must be nothing short of clear and convincing and based on cogent evidence which is accepted by the tribunal. See Bernstein at 485 and Coates at 536.*

B. Know your client and suitability obligation

¶ 120 The jurisprudence on the ”know your client” and “suitability” obligations of a registrant to determine whether an investment is appropriate for a client often includes reference to the ASC decision in *Re Lamoureux*, [2001] A.S.C.D. No. 613 which set out applicable principles that should guide a panel’s decision. The following lengthy extract at *Part IV (B) (3) (d)* is apt:

> *“The obligation to ensure that recommendations are suitable or appropriate for the client rests solely with the registrant. This responsibility cannot be substituted, avoided or transferred to the client, even by obtaining from the client an acknowledgment that they are aware of the negative material factors or risks associated with the particular investment.*
>
> *The obligation on a registrant to ensure that each investment recommended to a client is suitable is a particularly important protection for those clients whose investment experience and sophistication may be insufficient to enable them to fully recognize or assess the risks inherent in an investment. As noted below, disclosure to the client of the negative material factors of an investment, however important, is not necessarily relevant to a suitability determination and cannot replace a registrant’s obligation to assess suitability. Acknowledgment on the part of an investor of awareness of the material negative factors or risk does not convert an unsuitable investment into a suitable one.*
>
> *Our view is consistent with the OSC’s decision in Marchment & MacKay, supra. There, the OSC considered whether the respondents, who had sent a variety of documents to their clients, could rely on this documentation to satisfy their obligation to ensure that securities sold to their customers were suitable and that they had adequately disclosed to the clients the risks associated with investing in the securities recommended. The OSC, in deciding that the obligation to determine suitability rests with the registrant and cannot be transferred to the client, stated [at p. 4735]:*
>
> > *We reject this attempt to rely on these procedures as an effort to transfer to the customers the burden of determining whether the high risk investments being recommended to them by Marchment salespersons were suitable for purchase by them. The obligation to determine suitability clearly rests with the registrant.*
>
> *The suitability of an investment product for any prospective investor will be determined to a large measure by comparison of the risks associated with the investment product with the risk profile of the investor. This comparison is probably the most critical element in the registrant’s suitability obligation.*
>
> *Understanding an investor’s risk profile is not a simple matter of looking at numbers on an NCAF. Some of the assessments recorded in the NCAFs can have a range of meanings, depending on the context. For example, a wealthy investor indicating a tolerance for “medium risk” might contemplate a tolerance for a larger dollar risk than another investor with a small net worth who selects the same risk category. In neither case does the term make clear what probability of loss is acceptable to the investor. A registrant must truly “know his client”.*
>
> *A risky investment may fit nicely with an investor who has an appetite for risk, the ability to understand the risks associated with an investment product and the capacity to withstand the potential additional outlays or losses associated with the investment. The same product would, however, be inappropriate for an investor with less appetite for risk, less investment sophistication or less capacity to withstand the potential loss.*
>
> *During this hearing, it was suggested that these Partnership investments failed as a result of fraud and that, but for that fraud, they would have been successful and. therefore, suitable investments. There was insufficient evidence for us to reach any conclusion as to what led to the failure of these Partnerships, but we reject any suggestion that the subsequent performance of an investment or the actual reasons for its success or failure are relevant to the suitability assessment.*
>
> *As the OSC stated in Re Dime, supra, [at p. 2693]:*
>
> > *“it is no answer to say that none of the intended customers lost any money. The credibility of the*

securities markets is damaged–perhaps irrevocably, as to each of the complaints in this case– by conduct such as Dimes.

A registrant's obligation is to "know his client" and to ensure that any recommendations made by them are appropriate for the client based on the factors, both negative and positive, reasonably known to a diligent registrant at the time the investment is contemplated. Only those factors that are reasonably foreseeable at the time the investment is contemplated are relevant to the suitability determination. If a suitable investment actually fails due to some unforeseeable circumstance, that does not retroactively make it an unsuitable investment. If an unsuitable investment is recommended by a registrant, the fact that the investment is in fact proven to be successful does not retroactively make it suitable. It would be improper and unreasonable to assess a registrant's performance of his duties, which arise at the outset. in light of subsequent unforeseeable events."

¶ 121 In *Re Gareau, 2011 IIROC No. 53*, the panel stated the salient points concerning the suitability obligations as follows:

- *The obligation is a particularly important protection for clients whose investment experience and sophistication is limited.*
- *An investor's risk profile is not simply a matter of looking at numbers on an NCAF.*
- *The "know your client" and "suitability" obligations must be measured at the time the investment is contemplated. It is not measured in light of subsequent unforeseeable events of either a positive or negative nature.*

In determining the obligations of investment advisors the courts and regulatory bodies have not limited themselves only to a consideration of the rules of the respective regulatory body. In addition, fiduciary obligations imposed by general common law have been relied upon.

¶ 122 *Re Lamoureux (supra)* also holds that the "know your client" and "suitability" obligations, while conceptually distinct, are closely connected in practice, such that the former is the obligation to learn about the client, their personal financial situation, financial sophistication and investment experience, investment objectives and risk tolerance. The latter is the obligation to determine if an investment is appropriate for a particular client and assessment of suitability requires both that the registrant understands the investment product and knows enough about the client to assess whether the product and client are a match (at page 13).

C. Discretionary trading

¶ 123 The meaning of "discretionary trading" was considered in *Re Wenzel* [2005] A.S. C. D. No. 153 where the ASC stated that:

"when a person effects a securities transaction for a client without obtaining from the client, in advance, specifics as to four elements of the transaction- quantity, security, price and timing- that person is exercising "discretion". (para 26)

D. Conflicting Testimony of Witnesses at a Hearing

¶ 124 The panel in *Re Gareau*, (*supra)* also made apt comments as to the approach required when witnesses produce conflicting testimony. It stated at paragraph 152:

"It is always a very difficult decision for a fact-finding tribunal to be required to choose the direct testimony of one witness over another. Rarely will the evidence establish that one version of events is absolutely certain and this case is not an exception. Our task, however, does not require absolute certainty. Rather, it requires us to determine on a balance of probabilities whether IIROC has met the burden of proof placed upon it."

¶ 125 One example of conflicting testimony pertained to the nature of supervision over the Respondent at various times. Some witnesses referred to the supervision as "close" and others as "strict" but no clarification was elicited in cross-examination. This discrepancy did not however impact the Panel's findings.

Findings

¶ 126 This Panel had the opportunity to carefully assess the demeanour and credibility of each witness giving evidence at the hearing. As regards the testimony of investigator Choy, this Panel observed his acknowledged lack of expertise in the matter of new issue arbitrage, including particulars of and the manner of short selling. This resulted in some flaws in his analysis. With that said, this Panel found his presentation of information relevant to the allegations and his rationale for his conclusions that his testimony to be generally credible. In short, this Panel found any such shortcomings not fatal to his overall analysis.

¶ 127 As regards the quality of the testimony of LK, it was evident to this Panel that she is an intelligent woman with considerable years of business experience. On the one hand, those qualities would at first blush, appear to stand her in good stead in determining how to grow income for retirement. On the other hand, absent the significant one-time windfall in the stock market, this Panel was satisfied that she did not have any individual investment skills at the date she met the Respondent. This Panel was also satisfied that, despite her appetite for learning about the investment practices in the stock market, she had never during the material times acquired the requisite skills to fully understand or approve the Respondent's investment strategy.

¶ 128 As regards the quality of the testimony of SA, this Panel accepted her evidence in its entirety. She was articulate, self-effacing, and having regard to the substantial losses she incurred, extremely patient with the investigation and hearing process. Clearly, she began dealings with the Respondent with only modest savings that she desired to grow prudently for her retirement. Despite her lack of sophistication regarding the stock market, she diligently reviewed her account statements on a regular basis.

¶ 129 It was evident that the Respondent had never met with SA even once during the tenure of their investment relationship to discuss her objectives, her personal circumstances, her risk appetite or his investment strategy. When losses occurred on her stocks, SA innocently concluded that they were somehow due to her own fault. In the view of this Panel, had the Respondent provided her with any explanation or education as to his investment strategy and how it related to her future, she would have candidly testified as to those details.

¶ 130 As against the evidence of each of the IIROC witnesses, the testimony of the Respondent stood in stark contrast. During his evidence in chief, the Respondent sketched a profile of himself as a young, yet gifted, man whose talents in learning and practicing his sophisticated techniques and new issue arbitrage had put him in the top ranks of his field. He presented himself as an elite Portfolio Manager who had many desirable offers of employment before accepting a position with Wolverton.

¶ 131 The Respondent's account of his employment trajectory was that it had been on a steep rise, up to and including shortly after his arrival at Wolverton, but then due to forces entirely external to him, he was thwarted in his ability to realize his career potential.

¶ 132 During the course of his testimony, the Respondent endeavoured to show that no one, including JK, LK, SA, Investigator Choy, or his supervisors at Wolverton, properly understood the nature of sophisticated investment practices, or his unique talent in plotting potentially profitable trades for his clients. The Respondent even found fault with the way Enforcement Counsel framed his questions during cross-examination. As a result, his position was that the foregoing individuals could not recognize that the trades he executed were well within reasonable risk, were suitable to the clients in all the circumstances and did not fall within the definition of "discretionary trading".

¶ 133 In considering the conflicting evidence between LK and the Respondent, as to their plans for retirement, and appetite for risk, this Panel concluded that while the Respondent outlined in an initial email the nature of his strategy, when he began to receive directions from Wolverton to bring their account back into balance, to obtain prior consent for trades, and to document discussing explaining the trades in advance of execution, he responded with resistance to the interference with his actions.

¶ 134 As a result, the testimony of LK as to having little or no understanding of why she was asked to execute another signature page, and not getting clear answers from the Respondent to concerns about her accounts statements seemed more consistent with the Respondent's reluctance to modify strategy to bring it in line with

the Wolverton directives than his evidence that the allegations were unfounded.

¶ 135 The Panel preferred the testimony of LK as to her lack of understanding on the rationale for the many trades she observed to have been made in their accounts and the less than candid responses she received from the Respondent to that of the Respondent's testimony as to suitability.

¶ 136 Similarly, the Panel preferred the testimony of LK that on certain occasions she learned of trades made in their account only after they occurred and that she did not have sufficient knowledge of the stock market to have ever directed the Respondent to make any trades in their accounts.

¶ 137 This Panel found the testimony of the Respondent as to discretionary trading to be at best, internally inconsistent. First, he claimed that after the initial discipline at Wolverton, he considered the note taking on client accounts to be deficient, and he recommended a more robust policy to be implemented at Wolverton, without success. Second, he claimed that when required, he dutifully made notes of every discussion with a client before a trade, but then regularly shredded those notes within a week of creating the same. When asked why he did not maintain notes consistent with his own view of what was best practice, his answer was that he "did what he was required to do."

¶ 138 As to the trading in SA's account, the testimony of the Respondent and that of SA was consistent in that both agreed the Respondent never personally met SA prior to setting up her account at Wolverton. As a result, there had been no discussions as to her investment objectives, risk appetite, plans for retirement or capital preservation.

¶ 139 This Panel accepted the testimony of SA, as to the discretionary trading in SA's account, that she usually learned of trades made by the Respondent after reading her account statements.

¶ 140 After considering all of the *viva voce* evidence of the witnesses presented on behalf of IIROC, the evidence and the submissions of the Respondent and submissions of Enforcement Counsel, this Panel concluded that the following facts were established:

As regards the failure to know the clients, LK and JK

(a) The Respondent was a Registered Representative since 1999, and was employed with Wolverton in Calgary since 2012;

(b) LK and JK were a married couple aged 59 and 57, respectively, when they opened accounts with the Respondent,

(c) LK and JK were an oil and gas field manager and small business owner, respectively, with little knowledge of financial markets,

(d) LK and JK sought the Respondent's advice as to how to invest a sum of approximately $1.15 million which remained from a sale of shares they held in an oil and gas company bought in 1998 for $25,000 and sold in 2012 for approximately $1.4 million,

(e) LK told the Respondent they were planning to retire, did not have detailed knowledge of financial markets, and planned to rely on him for investment advice and recommendations,

(f) The Respondent was responsible for the accounts of LK and JK,

(g) On April 16, 2013, he became registered as a portfolio manager, but none of his accounts were set up as managed for discretionary accounts,

(h) The Respondent opened 12 accounts in July, 2013, for LK and JK, all of which had new client account forms, ("NCAFs") with the following investment objectives: 0% income/ 75% growth/ 25% speculative, and the following risk tolerance parameters: 0% low/75% medium/25% high. In the NCAFs, their investment knowledge was stated to be "fair",

(i) The Respondent asked LK and JK in February 2014 to sign an updated NCAF form and a managed account agreement. In those forms, he had modified the investment objectives to allow

him to undertake a more aggressive trading strategy,

(j) LK and JK signed the forms without realizing the objectives and risk tolerance had increased~~.~~, and

(k) LK and JK had no trading experience with options and short selling.

As regards recommendations that were not suitable for LK and JK

(l) The Respondent focused trading in their accounts on frequent trades in high-risk securities and employed speculative short selling strategies,

(m) The Respondent undertook an investment strategy not designed for clients entering into their retirement years, such as engaging in numerous trades in penny stocks, day trading and short sales, which was not consistent with the personal circumstances of LK and JK including their expressed intentions with respect to retirement,

(n) In the 12-month period of July 2013 to July 2014, the accounts contained 11% lower risk, 19% medium risk and 70% high risk classified securities, and

(o) During the same period, the accounts lost approximately $125,000, or 11% of the clients' portfolio and during the same period, the S&P TSX Composite Index increased by approximately 22%.

As regards engaging in discretionary trading for LK and JK

(p) In December 2013, Wolverton compliance personnel expressed concerns about discretionary trading in the accounts of LK and JK, and imposed a restriction limiting new positions,

(q) As a result, the Respondent agreed to set up the accounts as managed accounts but despite a process being undertaken, managed accounts were not established,

(r) Between July 23, 2013 and June 6, 2014 the Respondent conducted 585 trades in the accounts, but prior to March 10, 2014 made no notes evidencing client approval for trades,

(s) In February, 2014 Wolverton notified the Respondent of evidence of executed trades without prior client consent in the LK and JK accounts and required all new trades be approved by his supervisor with evidence of client consent,

(t) Of the 159 trades that occurred after March 10, 2014, the Respondent provided notes evidencing only 19 telephone conversations with LK and JK,

(u) Many of the trades executed by the Respondent in the accounts of LK and JK occurred without prior confirmation with the clients of the details of the same,

(v) The Respondent did not obtain the written authorization of LK and JK to conduct discretionary trading in their accounts,

(w) Wolverton did not designate the accounts of LK and JK as discretionary,

(x) At no material times did the Respondent have the authority to conduct discretionary trades in any client accounts, and

(y) The Clients sustained varying degrees of losses in their accounts.

As regards failure to know client SA:

(z) SA was the client of the Respondent at his previous firm, and transferred her account to Wolverton when he joined it in January, 2012,

(aa) In January 2012 SA was age 49, single and employed as a computer programmer who was seeking secure investments with respect to her eventual retirement,

(bb) In the NCAFs dated January 26, 2012, it was stated she opened three accounts, one an RRSP, one a TFSA, and a Cash account. It showed her investment experience as "fair", and

(cc) The cash account had stated investment objectives of 0% income/40% growth/60% speculative and risk tolerance parameters of 0% low/40% medium/60% high.

As to recommendations that were not suitable for SA:

(dd) The Respondent pursued an aggressive investment strategy involving a high degree of risk to her account, and which Choy concluded was too aggressive for SA,

(ee) The Respondent focused trading in her accounts on frequent trades in high-risk securities in the energy and materials sectors,

(ff) Between February 2012 and February 2014, 100% of the holdings in her account were in high-risk securities, and approximately 75% of the account holdings were concentrated in the energy and materials sectors, and

(gg) Between February 2012 and February 2014, she lost approximately $41,000, or 38.6% of her portfolio and during the same period, the S&P TSX Composite Index increased by 19.79%.

As regards engaging in discretionary trading for SA

(hh) In March, 2014, shortly after SA closed her RRSP and TFSA accounts, a Wolverton internal compliance review found evidence that the Respondent had engaged in discretionary trading in SA's accounts,

(ii) The Respondent was fined and ordered to rewrite the Conduct and Practices Handbook examination,

(jj) On April 8, 2014, the Respondent agreed in writing to Wolverton that discretionary trades would not occur in any account without a signed and approved managed agreement in place,

(kk) Between February, 2012 email and February 28, 2014 the Respondent conducted 109 trades in SA's accounts, but made no notes evidencing her approval for the same,

(ll) During the material times, the Respondent executed several trades in SA's account, without confirming the details of the trades prior to their execution, and

(mm) The Respondent did not obtain SA's written authorization for discretionary trading, and Wolverton did not designate her accounts as discretionary.

Conclusions

¶ 141 *Re Lamoureaux (supra)* notes that the suitability obligation of the registrant cannot be passed to the client and is particularly important for clients who are not sufficiently sophisticated to enable them to fully recognize or assess the risks inherent in an investment. (at page 19-20)

¶ 142 In addition to the *Floyd*, *Lamoureaux* and *Wenzel* decisions, (*supra*) this Panel also reviewed the authorities including *Re Gareau,* [2011] IIROC No. 53, *Re Jones,* 2013 IIROC 58, *Re Matthews* 2014 IIROC 56, and *Re Shamseer* 2011 IIROC No. 5.

¶ 143 One of the fact patterns in *Re Gareau,* (*supra*), involved a couple which had not insignificant past experience and general sophistication, a portfolio size that would allow more risk generally and ages which for investment objectives might not be weighted as strongly towards capital preservation. The panel there found that even though the couple with those personal characteristics had signed the NCAFs, due to the respondent's numerous calls and meetings with clients, he knew or should have known that it was inaccurate to characterize their investment objectives as high risk. The panel noted (at paragraph 136) from the review all the evidence presented that there was little doubt that the relationship between the respondent and the client was one where they had placed "their reliance upon and trust in the Respondent.

¶ 144 The panel in *Re Gareau,* (*supra* at paragraph 143) also noted that the respondent was relied upon and trusted and in his capacity as a financial advisor had the responsibility of a fiduciary or near fiduciary to his client. It noted that such duty was so high that even if the clients had instructed the respondent to create a totally inappropriate and unsuitable portfolio, he had a responsibility to warn them and to even protect them against themselves.

¶ 145 In the result, the panel *in Re Gareau,* (*supra*), concluded that the total equity positions of the clients in question were unsuitable given the totality of their personal circumstances including age, risk tolerance, investment knowledge, and general sophistication with respect to investments and the market.

¶ 146 Having regard to the foregoing findings and the foregoing case authorities considered, in the view of this Panel, the Respondent here failed to meet the know your client requirements in the cases of LK, JK, and SA. His initial communications documented in an email to LK and JK demonstrated that he well knew those requirements. Regrettably, he altered that strategy to one that suited his own personal views of attaining profitable results, which appeared to be somehow founded on the principle that the ends would justify his means.

¶ 147 This Panel also concludes that the Respondent failed to meet the suitability assessment outlined in *Re Lamoureux (supra*). As noted by Enforcement Counsel and as testified to by the Respondent himself, his views that trades that do not turn a profit are by definition "unsuitable", (with the logical corollary that trades that do turn a profit are "per se suitable") do not meet the standard required by the Dealer Member Rules and case authorities interpreting them. Further, the Respondent's testimony that all trades involve some risk, but that he did not consider trades conducted on behalf of these clients to be risky, reveals that he appeared to hold the view that he was too knowledgeable about the intricacies of the investment industry to be subject to its rules and regulations as to ensuring trades were suitable to clients.

¶ 148 On the subject of discretionary trading, this Panel concludes that the Respondent on many occasions executed trades without prior information provided to, or informed consent received from, clients beforehand. On his own evidence, the Respondent had within his power to document requisite proof of appropriate client instructions as to trades he desired to execute. He also well knew it was a desirable practice, particularly with the strategies he chose to implement. Nevertheless, on his own evidence, he chose to undertake the bare minimum amount of note taking that he considered required of him in the circumstances, and even then elected to discard notes that would have corroborated his version of events. In this regard, the Panel can conclude only that the notes he chose to destroy would not have assisted him.

¶ 149 This Panel also rejects the contention of the Respondent that Wolverton had not provided to IIROC all of the relevant documentation in its possession that pertained to his trading activity in the accounts of these clients. More particularly, this Panel concludes that had Wolverton in its possession documentation to show the Respondent had secured the requisite advance informed consent from these clients to conduct the trades question, including data entry files, it would have produced such proof to the clients and to IIROC.

¶ 150 This Panel rejects the Respondent's contention that these clients' accounts were low risk and that he endeavoured to take prudent steps to mitigate risks. Instead, this Panel concludes that the Respondent wrongly concluded that his clients and Wolverton would endorse the aggressive trading strategies he chose to undertake for these clients when he produced profitable results, which he was convinced in his own mind he would do. Unfortunately for the Respondent, compliance with the Dealer Member Rules is not based upon a subjective test applied by an individual Registered Representative.

¶ 151 In summary, based on the facts and the foregoing analysis of the applicable case law this Panel finds:

(a) The Respondent failed to know the Clients, all of whom had limited investment knowledge,

(b) The Respondent failed to use due diligence to ensure that his recommendations were suitable for the clients when he pursued an aggressive investment strategy which involved the pursuit of many high-risk, speculative securities concentrated primarily in the energy and materials sectors,

(c) The Respondent engaged in discretionary trading in the accounts of the clients without first having those accounts approved and accepted as discretionary accounts.

¶ 152 As a result, this Panel finds that the allegations have been proven to the required standard and directs that a penalty hearing be scheduled.

Dated at Calgary this 5th day of December, 2016.

Shelley L. Miller

Chair

Kathleen Jost

Industry Representative

Don Milligan

Industry Representative