Re Locke

IN THE MATTER OF:

The Rules of the Investment Industry Regulatory Organization of Canada

and

Shirley A. Locke

2020 IIROC 14

Investment Industry Regulatory Organization of Canada
Hearing Panel (Nova Scotia District)

Heard: December 16-20, 2019, March 2-5, 2020 in Halifax, Nova Scotia
Decision: May 5, 2020
Reasons for Decision: May 28, 2020

Hearing Panel:
R. Scott Peacock, Chair, Thomas Kostandoff and Roland Coffill
Appearance:
Kathryn Andrews, Senior Enforcement Counsel
April Engelberg, Enforcement Counsel
Kevin Kiley and Thomas Keeler for Shirley Locke
Shirley A. Locke (present)

DECISION ON THE MERITS

INTRODUCTION:

¶ 1 This matter came before the Panel to determine whether Shirley A. Locke met her professional and public interest obligation in respect to the investment accounts of several of her clients. The allegations set forth in the Notice of Hearing are:

> **Contravention 1** Between January 2010 and September 2014, the Respondent 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 Dealer Member Rule 1300.1(a).
>
> **Contravention 2** Between January 2010 and September 2014, the Respondent 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 Dealer Member Rule 1300.1(q).
>
> **Contravention 3** Between January 2010 and September 2014, the Respondent effected trades in the accounts of clients EH and AH that were not within the bounds of good business practice, contrary to Dealer Member Rule 1300.1(o).
>
> **Contravention 4** Between January 2010 and September 2014, the Respondent conducted unauthorized trades in the accounts of clients GR, JF, EH and RC, contrary to Dealer Member Rule 29.1.
>
> **Contravention 5** Between January 2015 and December 2017, the Respondent failed to use due

diligence to learn and remain informed of the essential facts relative to client LG, contrary to Dealer Member Rule 1300.1(a).

Contravention 6 Between January 2015 and December 2017, the Respondent 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 Dealer Member Rule 1300.1(q).

¶ 2 The determination of the outcome of these allegations require an examination and appreciation of more than an elementary review of whether all the boxes have been ticked on a form. Rather, was the intent and purpose of regulations meant to ensure fair and efficient capital markets, investor protection and public interest met in all the relevant circumstances?

¶ 3 Ms. Locke has been registered since October of 1979 and has held various positions including branch manager with several dealers. She has extensive experience in the retail capital markets.

¶ 4 The allegations relate to individuals who were in different stages of their investing life cycle, experience, financial resources, and expectations.

a) JF at the time of the hearing was 103 years of age and had been a client of Ms. Locke for many years. During the relevant periods of January 2010 to September 2014 and January 2015 to December 2017 (the relevant periods), she was in her 90s. The issue for the Panel to determine was whether Ms. Locke had made diligent efforts to learn and remain informed about JF's situation and further whether investments made in her account were suitable and authorized.

b) GR was a self-employed architect nearing retirement age who did not have a pension plan other that Old Age Security (OAS) and CPP. He had an account with Ms. Locke since the 1990s. He stated that he had moderate investment knowledge with retirement as his investment goal. The Panel must consider whether Ms. Locke had made sufficient effort to know her client, made suitable investments and whether the trades made were authorized.

c) F Limited is a private corporation engaged in the forestry industry cutting firewood. Its principles GB, NB and JB are family members with limited investment knowledge or experience. They were seeking to invest $25,000 of the corporation's funds. They were introduced to Ms. Locke by AH, another client of Ms. Locke. F Limited had no income and liquid assets of $80,000. The principles of F Limited GB and NB had only OAS as income, their son JB was employed as a carpenter. The issue for F Limited 's account was whether Ms. Locke used due diligence to know and appreciate the needs of the clients and whether the investments made were suitable.

d) EH is a retired pharmacist who sold his business in 2009 and ultimately had $900,000 to invest with Ms. Locke. EH was employed in the pharmacy part time and was receiving payments over a 10-year period for the balance of the selling price of his business. EH stated his 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. Subsequently he made withdrawals of cash from his accounts after the accounts were converted from cash to margin. To be determined was whether Ms. Locke made diligent efforts to know and remain informed about EH, whether the trading in EH's accounts was within the bounds of good business practices and were the trades in the accounts authorized.

e) AH is a retired businessperson of some success with significant assets. He has a long investment history and good investment knowledge and experience. He had operated investment accounts for himself and corporate interests with registrants other then Ms. Locke before opening accounts with her. In 2009, AH moved his accounts to Ms. Locke because he was not satisfied with the service levels he was receiving. AH was seeking a return of 8% on his investments. AH

transferred a debit balance in his margin account when he transferred his accounts to Ms. Locke. The sole issue for the Panel is whether Ms. Locke acted within the bounds of good business practice in the operation of AH's accounts.

f) LG is a retired person who had operated and subsequently sold a B&B business. She was a resident of New Brunswick and never met with Ms. Locke in person. She opened an account with Ms. Locke in 2007 having been referred to Ms. Locke by a cousin. LG had inherited some securities from a relative and had an account in Quebec funded on the proceeds of a cashed-out pension plan from a former employer. LG professed that her investment knowledge was not good, and her objectives were to fund her retirement and emergency expenses. LG did, at one time, sell one half of her investments to pay off a mortgage, the balance was to provide funds for retirement. This matter requires the Panel to determine whether Ms. Locke was diligent in the learning and remaining informed about LG and whether the investments made in LG's accounts were suitable.

¶ 5 The Panel heard seven days of testimony, received and reviewed voluminous exhibits. Written submissions were made by IIROC Enforcement Staff (Staff) and Ms. Locke's counsel emphasising their respective positions and providing relevant precedents for the Panel's consideration.

¶ 6 After careful review, consideration and deliberation upon all of the material and evidence before the Panel, the Panel concluded that Staff's allegations, as set out in the Notice of Hearing, had on the balance of probabilities been made out, save and except, for the allegation made in respect to AH. A more detailed discussion and analysis of the findings follows.

BACKGROUND:

¶ 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."

ANALYSIS:

FIRST ISSUE: CLIENT JF

¶ 8 Did Ms. Locke use due diligence to learn and remain informed of the essential facts relative to client JF as required by Dealer Member Rule 1300.1(a)?

¶ 9 Dealer Member Rule 1300.1(a) provides:

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.

¶ 10 Did Ms. Locke use due diligence to ensure the purchases made for the account of JF were suitable for her in accordance with Dealer Member Rule 1300.1(q)?

¶ 11 Dealer Member Rule 1300.1(q) provides:

(q) Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of

[1] [2008] SCC 53 at paras 40, 45 and 46

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.

¶ 12 Did Ms. Locke engage in unauthorized trading for the account of JF contrary to Dealer Member Rule 29.1?

¶ 13 Dealer Member Rule 29.1 provides:

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.

¶ 14 The obligation to know your client and suitability are closely intertwined and commonly used interchangeably. A more penetrating analysis results in a distinction between two principles set out in Dealer Member Rule 1300.1(a) and 1300.1 (q). This alignment was discussed by the Alberta Securities Commission in *Re Lamoureux* [2]:

"The "Know Your Client" and "Suitability" Obligations

(a) Generally

The "know your client" and "suitability" obligations are conceptually distinct but, in practice, they are so closely connected and interwoven that the terms are sometimes used interchangeably.

The "know your client" obligation is the obligation to learn about the client, their personal financial situation, financial sophistication and investment experience, investment objectives and risk tolerance.

The "suitability" obligation is the obligation on a registrant to determine whether an investment is appropriate for a particular client. 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."

¶ 15 The duty to effectively know your client goes far beyond pigeon holing the client into categories prescribed in a form and requires a true appreciation of the client's situation, requirements, expectations and comfort level with the strategies and risks associated with the described type of portfolio.

¶ 16 The suitability of an investment is a test of whether the investment is suitable for the client, not does it match what has been transcribed onto a prescribed form. The client description of the NCAF/KYC must be an accurate and true representation of client's investment tolerance and not an effort to confine the client to an arbitrary prescribed description or category. A three-step analysis has been adopted in the assessment of suitability.

"[…] *A knowledge of the forms and procedures applied can help in assessing whether the test has been satisfied but completion of a form by itself is not determinative of whether a registrant "knew his client".*

(c) Three - Stage Process

[2] (2001) ABSECM 813127 at page 10

Suitability is to be assessed prior to any investment recommendation by the registrant to a client. The process that culminates in a registrant's investment recommendation to a client has three component phases or stages that must occur in sequence.

The first stage involves the "due diligence" steps undertaken by the registrant to "know the client" and to "know the product". Knowing the product involves carefully reviewing and understanding the attributes, including associated risks, of the securities that they are considering recommending to their clients. Knowing the client was discussed above.

Only after the "due diligence" of the first stage is completed, can the registrant move to the second stage in which they fulfil their obligation to determine whether specific trades or investments, solicited or unsolicited, are suitable for that client.

Suitability determinations, discussed in section IV (B) (d), will always be fact specific. A proper assessment of suitability will generally require consideration of such factors as a client's income, net worth, risk tolerance, liquid assets, and investment objectives, as well as an understanding of particular investment products. The registrant must apply sound professional judgement to the information elicited from "know your client" inquiries. If, based on the due diligence and professional assessment the registrant reasonably concludes that an investment in a particular security in a particular amount would be suitable for a particular client, it is then appropriate to the registrant to recommend the investment to that client.

By recommending a securities transaction to a client, a registrant enters the third stage of the process. Whether a particular transaction has in fact been "recommended" is to be determined objectively, taking into consideration the content, context and manner of communication from a registrant to the client, to assess whether it could reasonably be understood as a suggestion that the customer engage in a securities transaction. At this stage, when making the client aware of a potential investment, the registrant is obligated to make the client aware of the negative material factors involved in the transaction, as well as positive factors.

The disclosure of material negative factors in the third stage of the process is intended to assist the client in making an informed investment decision. It should be emphasized that such disclosure cannot ameliorate deficiencies in either of the first two stages of the process. If a registrant recommends securities that are not suitable for a particular client, then disclosure by the registrant during the third stage is irrelevant to their suitability obligation in stage two. The registrant's failure may have been the result of not knowing the client, or not knowing the securities, or an error in the suitability determination but, once the improper recommendation has been made, it does not matter whether or how the registrant discloses the material negative factors, or whether the client claims to understand and accept the risks involved in the investment. The registrant has failed to fulfil their obligations."[3]

¶ 17 The evidence of JF, GR, F Limited and EH describe meetings and conversations with Ms. Locke during the completion of the initial NAAF/KYC and subsequent updates. The Panel accepts the evidence of these clients. The forms were completed by Ms. Locke prior to presentment to them for review, initials, and signatures. The Panel is satisfied that clients JF, GR, F Limited and EH did not have a full appreciation of the risks associated with aggressive portfolios and high-risk tolerances. Each of these clients are discussed further.

¶ 18 JF testified that she had been a client of Ms. Locke since before her husband died in 1989. Prior to his death her husband had been responsible for finances and investments. JF had her OAS and some savings in GICs. Her investment knowledge was extremely poor as she had depended on her husband.

¶ 19 JF recalls conversations with Ms. Locke at various times together with her daughter CR who was

[3] Supra 2 at page 14

subsequently made a joint account holder with JF and LC, her other daughter. In 2004, JF was eighty-seven years old. Her evidence was that she wanted income to live on.[4] Ms. Locke prepared two KYCs in 2004 and 2009 at which time JF was eighty-seven and ninety-one years of age respectively. These KYCs provided:

2004[5]	25% low risk income securities
	25% moderate/high risk income securities
	50% moderate growth securities
2009[6]	50% medium risk
	50% high risk
	Growth portfolio

¶ 20 JF was explicit in her evidence that Ms. Locke never discussed with her matters of risk nor the nature of a growth portfolio. Her evidence was that:

> "… She never really talked business to me I don't think..." [7]

¶ 21 Ms. Locke testified that JF "liked to invest in things she knew and understood"[8]. There is nothing in the testimony of JF, her daughter CR nor Ms. Locke that would indicate that JF's portfolio should be growth orientated with high-risk securities being indicated for approximately 50% of JF's holdings.

¶ 22 It is a fact that Ms. Locke obtained JF's signature and initials on the KYCs discussed here. However, the Panel finds that the KYCs do not in fact represent an objectively suitable portfolio for JF. The evidence of JF is clear that there was no full discussion and explanation from Ms. Locke to JF of the nature and risk of the recommended portfolio. The Panel adopts the position taken by the Alberta Securities Commission in *Re Lamoureux*:

> "Neither the "know your client" obligation nor the "suitability" obligation can be fulfilled by completing poorly constructed forms or by following a procedure in a perfunctory fashion. Forms and procedures are merely tools that can assist in performing a task and that may provide reminders or evidence of efforts taken or not undertaken."[9]

¶ 23 Ms. Locke's written submissions stated:

> "… it would be an error to prioritize *viva voce* evidence given at a hearing as much as ten or more years after relevant events when the account documentation signed by the clients themselves clearly indicates the investment objectives and risk tolerances which they actually sought."[10]

¶ 24 The Panel considered Ms. Locke's submission in the light of JF's and Ms. Locke's own testimony. The Panel does not accept Ms. Locke's hypothesis. 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.

¶ 25 Did Ms. Locke fail to use due diligence to ensure that recommendations made for client JF were suitable

---

[4] Transcript 16 December 2019 at page 16 lines 21 to 29

[5] Vol. 1 Tab 1 at page 0018

[6] Vol. 1 Tab 1 at page 0005

[7] Transcript 16 December 2019 at page 20 lines 13 to 16

[8] Transcript 2 March 2020 at page 100 lines 21 to 23

[9] Supra 2 at page 13

[10] Respondent's Written Submissions at para 10

for her based on her investment objectives and risk tolerances in accordance with Dealer Member Rule 1300.1(q)?

¶ 26 Dealer member Rule 1300.1(q) provides:

> (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.

¶ 27 The Panel takes the position that the central factor in suitability analysis is that the focus is on the client and not on the KYC form. If the KYC is not realistic, accurately, and truthfully completed, it cannot be used as the standard for assessing the suitability of subsequent purchases of securities. Given that the Panel has found that due diligence was not exercised by Ms. Locke in the completion of KYCs for JF; those KYCs cannot be the sole reference point for evaluating suitability. Suitability should be assessed *vis a vis* the client JF and her stated desire for income, her age, financial resources, and time horizon.

¶ 28 A review of JF's account statement shows a progression of the account in the acquisition of equities and other assets. The nature of these equities must be examined in relation to JF and not solely on the fact of the KYCs. Of note upon review of the account statement for JF are: Artic Glacier, International Tower Hill, 01 Communique, Wi-Lan Inc., Chemtrade Logistics, Gallic Energy Ltd, Reservoir Minerals Inc., Virngo Inc. Petromas Energy Inc., America Petrogas Inc, Corrientge Resources, Lake Shore Gold and Labopharm Inc.. A review of the prospectuses for these securities show that they are variously rated as speculative, high-risk, highly speculative, no revenue or cash flow and no prospect of distribution. Details can be found upon a review of the documentation entered into evidence.[11]

¶ 29 In written submissions, Ms. Locke's counsel stated:

> "…While the parties clearly have differing views regarding the proper approach to determining suitability and rating of investment portfolios, it is clear that by any assessment or methodology the investments held by clients were almost entirely in accordance with the documented investment objectives and risk tolerances as found in the respective KYC documentation."[12]

¶ 30 Ms. Locke's position is to, in effect, use the KYCs as a shield against an objective analysis of the securities held in JF's account. The Panel does not accept that proposition. This issue was considered in *Re Gareau* where an IIROC panel stated[13]:

> "…Mr. Gareau's primary response to the allegation brought against him and the evidence presented was that the investments were suitable for each set of clients because each investment was explained to the client and the individual risk of each investment corresponded with the classification of acceptable risk set out in the NCAFs. This places too great an emphasis on forms completed by clients, particularly the NCAFs."

¶ 31 The Panel is not satisfied and finds that 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.

---

[11] Vol. 7A to 7K

[12] Respondent's Written Submissions at page 6 para 12

[13] 2011 IIROC 53 at para 142

¶ 32 Did Ms. Locke conduct unauthorized trades in the account of JF between January 2010 and September 2014 contrary to Dealer Member Rule 29.1?

¶ 33 Dealer Member Rule 29.1 provides:

> 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.

¶ 34 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. JF testified:

> "Q. Did Ms. Locke call you to discuss investment in your account before an investment was made?
>
> A. Rarely, No, No.
>
> Q. Did you suggest any investment to Ms. Locke that you might want to make?
>
> A. No, because, I don't know, I guess I just depended on her to invest it, to-to advise me.
>
> Q. Did Ms. Locke call you after you had received this statement in the mail and talk about an investment that had been made in your account?
>
> A. No. No she didn't."[14]

¶ 35 The Panel notes that there were 77 trades in JF's account in the first material period.

¶ 36 JF testified that she was not consulting her daughter CR about her account after receiving account statements even thought CR and LC were named on the joint account.

> "Q. …So Mrs.(JF), back when you were receiving your statements on a monthly basis from Wellington West, am I correct that you'd mention them from time to time to (CR) as well as to get her input? Get her assistance?
>
> A. I don't think so."[15]

¶ 37 Ms. Locke, in her written submissions, states that she would often speak directly with client CR, but that "she would also speak with client JF or with both clients independently."[16] It is Ms. Locke's position that she discussed trades in JF's account prior to placing the order with either JF or CR. 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

---

[14] Transcript 16 December 2019 at page 17 lines 1 to 17

[15] Transcript 16 December 2019 at page 32, lines 3 to 8

[16] Respondent's Written Submissions at page 21 para 63

demeanour, veracity and consistency.

¶ 38 The Panel was referred to the following test of credibility:

> "The credibility of interested witnesses, particularly in cases of conflict of evidence cannot be gauged solely by test of whether the personal demeanour of the particular witness carried conviction of truth. The test must reasonably subject his story to an examination of the consistency with the probabilities that surround the currently existing condition. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of probabilities which a practical informed person would readily recognize as reasonable in that place and in those conditions."[17]

¶ 39 Applying that test the Panel accepts and prefers the evidence of JF that she was not consulted in respect to all the trades in her account.

¶ 40 Ms. Locke submits that:

> "The evidence of Ms. Locke demonstrated that she had a clear and detailed recollection of meeting with her clients including a high level of specificity regarding the timing and content of those meetings."[18]

¶ 41 Ms. Locke testified for three days and had opportunity to provide detailed evidence in respect to each of the trades in JF's account. The Panel found her evidence to be unspecific and rambling without detail in respect to the allegations.

¶ 42 Ms. Locke's counsel in written submissions stated that:

> "..she took notes throughout the First Material Period, and that her note taking practice typically involved daily notes in a common note pad which contained information with respect to all her clients. These notes included information with respect to contemplated transactions and meeting with new clients and discussions regarding specific securities."[19]

¶ 43 In a few instances, these notes were presented to the Panel in respect to meetings or calls. However, the notes were not presented to the Panel in respect to most of the trading in the account. Notwithstanding the opportunities to provide cogent evidence that the trades were authorized, none was introduced to counter the evidence of JF that she was not consulted, nor did she authorize the individual trades.

¶ 44 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. Ms. Locke provided translations and summaries of her notes in a typed format. The Panel is of the view that the original notes were best evidence and most reliable of what took place and should be considered.

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

SECOND ISSUE: CLIENT GR

¶ 46 Did Ms. Locke fail to use due diligence to learn and remain informed of the essential facts relative to client GR contrary to Dealer Member Rule 1300.1(a)?

¶ 47 Dealer Member Rule 1300.1(a) provides:

> 1300.1.

---

[17] *Faryna v Chorny* [1952] BCJ 354, 1951 CanLII 252 (BC CA) at page 357

[18] Respondent's Written Submissions at page 5 para 8

[19] Respondent's Written Submissions at page 11 para 32

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.

¶ 48 GR opened his first investment account with Ms. Locke in the 1990s. GR and CR, his wife, were referred to Ms. Locke by a friend. GR signed a NCAF from Wellington West on the 16 February 2004 for an RRSP account. GR's investment objective at that time was retirement. GR does not recall specifically discussing his retirement plans with Ms. Locke. The NCAF provided for 70% non-speculative growth and 30% high-risk speculative securities.

"Q And did you discuss those investment goals with Ms. Locke?

A. I don't recall discussing directly. I guess it was assumed that that's what the investment was for. In my mind at least.

Q. And why-right. And why do you say that?

A. Why do I assume it was for a pension, or..

Q. Yes.

A. retirement? That was my only goal for retirement really."[20]

¶ 49 The evidence of GR is that the NCAF was completed by Ms. Locke, it was not in his handwriting but did bear his signature. This NCAF indicated it was an unsolicited transfer to open the RRSP account. GR's investment knowledge was described a "good".[21] GR testified that in 2004 he described himself as having moderate investment knowledge.[22] GR's evidence is that there was no discussion of risk with Ms. Locke in respect to the account.

"Q. Did you have any discussions with Ms. Locke in terms of risk involving your RIFF account in 2004?

A. Risk in the RIFF?

Q. Yes

A. No, I would say not.

Q. Okay. And I'm going back to the 2004 onward time period. Did you have any discussions with Ms. Locke about whether you wanted a portion of you account to be in high risk securities?

A. We had no discussions. No."[23]

¶ 50 In December of 2009, GR signed an updated NCAF from Wellington West. This NCAF described a growth portfolio with 50% medium risk and 50% high risk.[24] This NCAF was presented to GR by Ms. Locke completed, GR did sign the document. GR's evidence is that:

"Q. And did you indicate to Ms. Locke that you wanted 50% high risk?

A. Fifty percent? No, I did not indicate that.

---

[20] Transcript 16 December 2019 at page 42 lines 2 to 14

[21] Vol. 2 Tab 11 at page 0355

[22] Transcript 16 December 2019 at page 41 lines 15 to 17

[23] Transcript 16 December 2019 at page 43 lines 4 to 13

[24] Vol. 2 Tab 12 at page 0377

Q. Did you have any discussions at this time with the amount of risk that you wanted for the account in discussion?

A. Not that I recall."[25]

¶ 51 GR's testimony was that there had been no change in his investment objective of retirement and pension, and his expectation was that he had a low to moderate risk portfolio.

¶ 52 In October of 2012, GR signed a NCAF/KYC with National Bank where it described a growth portfolio with 50% medium-risk and 50% high-risk securities.[26] Ms. Locke then being with National bank Financial. It was GR's evidence that this was a roll over of his prior accounts to National Bank Financial and that there had been no change in his desire for pension or retirement funds.

"Q So, what were you relying upon if anything for a pension?

A. These investments that we're dealing with.

Q. Did you ever say to Ms. Locke that you were comfortable with some risk?

A. No, I don't recall ever saying that.

Q. And is it your evidence that Ms. Locke understood that this was your retirement fund?

A. My assumption was to that effect, yes."[27]

¶ 53 Ms. Locke testified that GR had never informed her that the investments were for the purpose of his retirement. Although GR does not expressly remember telling Ms. Locke the funds were for his retirement, he believes that was implicit in their discussions. These were RRSP accounts, GR was at the relevant times in his early to late sixties, self-employed without a pension plan other than OAS or CPP.

¶ 54 In written submissions, Ms. Locke states that "at no point did [GR] advise Ms. Locke that his account was for the purpose of retirement. At best this is a misstatement of the evidence as GR testified, he could not recall" discussing directly his retirement plans.[28] It was the duty of Ms. Locke to actively explore these issues with the client and make a determination of the actual and objectively supportable uses for the investment funds.

¶ 55 Under cross-examination GR stated that he does not recall any or much discussion.

"Q. Presumably there was a discussion about something?

A. Well not to my recollection."[29]

¶ 56 However, GR did acknowledge a discussion with Ms. Locke when the 2009 KYC was updated where he was told that, due to the market crisis of 2008, some of the securities in his account would now be considered higher risk. He was told if he wanted to keep them, he would have to accept higher risk.[30]

¶ 57 The Panel finds that this is 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. A client who is not comfortable with a higher degree of risk should not be advised to increase their risk tolerance due to a change in market conditions but

---

[25] Transcript 16 December 2019 at page 45 lines 5 to 10

[26] Vol. 2, Tab 12 at page 0360

[27] Transcript 16 December 2019 at page 49 lines 12 to 20

[28] Transcript 16 December 2019 at page 49 line 7

[29] Transcript 16 December 2019 at page 63 lines 12 to 14

[30] Transcript 16 December 2019 at page 44 line 1

rather to look for alternative investments that conform to the true profile of the investor.

¶ 58 Did Ms. Locke fail to use due diligence to ensure that the recommendations for GR were suitable based on his investment objectives and risk tolerances contrary to Dealer Member Rule 1300.1(q)?

¶ 59 Dealer Member Rule 1300.1 (q) provides:

> (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.

¶ 60 GR's account statements show that in the relevant periods several high-risk securities were purchased by Ms. Locke for GR's RRSP/RIFF accounts. A summary of these securities purchased for GR's account can be found in the Written Submissions, Schedule A and the account statements.[31]

¶ 61 A review of the risk ratings for these securities as stated in the Securities Commission's approved documents for public consideration such as prospectus, Short Form Prospectuses and information circulars reveals a concentration of high-risk securities[32]. These are variously described as being volatile, could result in substantial losses, high risk, considered speculative, a history of significant losses. IIROC Staff prepared a yearly suitability analysis for GR's account in the relevant periods.[33] It is noted that there were holdings in GR's account that were low to medium risk together with the high-risk securities.

¶ 62 The Panel finds that 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. Once again, as stated in consideration of client JF, the Panel finds that 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.

¶ 63 Ms. Locke, in written submissions, stated that she had clear recollection of GR stating his investment objectives as set out in the account documentation she prepared. Further, that the securities purchased conformed with the KYCs. There is a clear contradiction of the evidence of GR and Ms. Locke on these points.

¶ 64 In assessing the credibility of GR and Ms. Locke on this contradiction, the Panel notes that GR was willing to admit that there were conversations that he could not recall with specificity. However, he was not moved on cross-examination as to what his actual investment intentions were. Ms. Locke testified over three days giving overly broad testimony establishing that there was a significant amount of social contact between GR, CR and Ms. Locke, but nothing aside from her bold assertions that GR asked for the high-risk securities in a growth portfolio.

¶ 65 A review of Ms. Locke's notes in Vol. 8A and 8B did not provide any clear and intelligible evidence to support Ms. Locke's recollection. Applying the test earlier stated in this decision, the Panel prefers the evidence of GR in respect to his investment intentions.

¶ 66 Did Ms. Locke conduct unauthorized trades in the account of GR between January 2010 and September 2014 contrary to Dealer Member Rule 29.1?

¶ 67 Dealer Member Rule 29.1 provides:

> 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

---

[31] Respondent's Written Submissions at pages 87 to 92, Vol. 2 Tab 13

[32] Vol. 7A to 7K

[33] Vol. 2 Tab 15 at pages 0723 to 0729

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.

¶ 68 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.

¶ 69 It is clear from the evidence of GR, CR and Ms. Locke that there were frequent social interactions. What is not disclosed on the evidence is that Ms. Locke obtained trading instruction from GR before initiating trades. GR testified:

> "Q. from 2010 to 2014 time period did Ms. Locke discuss each trade with you before it was made in your RIFF account.
>
> A. No, not with me directly. There's ongoing and – and other discussion between Ms. Locke and my wife…"[35]

¶ 70 GR also testified under cross-examination that:

> "Q. And do you recall times where Shirley and CR would talk about your-your account and your family accounts and receive recommendations from Shirley, and CR would share those recommendations with you, and Shirley would follow up on a call and make sure that you're Okay with it?
>
> A. No, I don't recall that.
>
> Q. Is it possible that occurred at all?
>
> A. Probably. There was, you know, this was over quite a period of time so I can't recall specific discussions and telephone calls…"[36]

¶ 71 Even though CR was not authorized to give instructions for trading in GR's account, the evidence discloses that Ms. Locke sometimes contacted CR to discuss the accounts of CR, JF and GR. CR testified:

> "Q. Did Ms. Locke contact you for instructions on all the trades in GR's RIFF account?
>
> A. She contacted me on-I would estimate about 20% of the trades. We only found out about others as they arrived in the mail, but yes she did contact me on occasions on some of the accounts on some of the equities, yeah."[37]

¶ 72 Ms. Locke executed 124 trades in GR's account during the first material period.

¶ 73 Ms. Locke asserts, in her written submissions, that she contacted GR with respect to contemplated transactions in his account in every instance, but in many cases, this would be for the simple purpose of

---

[34] Vol. 2 Tab 12 at pages 0360 to 0390

[35] Transcript 16 December 2019 at page 50 lines 1 to 6

[36] Transcript 16 December 2019 at pages 74 to 75 line 10

[37] Transcript 16 December 2019 at page 97

confirming her discussions with CR.[38]

¶ 74 The Panel is aware that in 2014 GR and CR had a joint account in which CR could give instructions but not in the account in question at the relevant material time.

¶ 75 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.

¶ 76 The Panel does not accept Ms. Locke's broad assertion that she had instructions for each trade in GR's account. Her evidence is clearly contradicted by GR and CR, whose evidence was not diminished in cross-examination. The Panel has made this determination in applying the test for credibility in *Faryna v Chorny*[39]. Further, 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.

THIRD ISSUE: F LIMITED

¶ 77 Did Ms. Locke fail to use due diligence to learn and remain informed of the essential facts relative to client F Limited contrary to IIROC Dealer Member Rule 1300.1(a)?

¶ 78 Dealer Member Rule 1300.1(a) provides:

> 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.

¶ 79 F Limited is a small family wood lot cooperation owned by GB, NB and their son JB. The corporation had $300,000 in net assets including land, machinery and $50,000 to $60,000 in liquid assets. GB and NB had no income from F Limited nor did the corporation have any income. GB and NB's only source of income was from OAS. Their son JB was employed as a carpenter. 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.

¶ 80 It is clear from the evidence that Ms. Locke spent considerable time meeting with GB, NB, and JB in the company of AH who had referred GB and NB to Ms. Locke. A review of Ms. Locke's notes[40] provide a cryptic record of the initial meeting in 2011 with the clients as contrasted to the detailed written response to a complaint prepared by Ms. Locke in 2016.[41] The Panel observes that the sparse notes taken at the time do not support the detail in the response to the complaint.

¶ 81 The evidence is clear from all parties that GB and NB were influenced by their relationship and discussions with AH. It is also clear they were seeking a return on their $25,000 investable funds beyond what they were likely to receive in a bank savings account. GB testified:

> "Q. What was your understanding of the risk of your investment?
>
> A. She told us there was a risk but she would definitely look after it, and if she seen something going down she would watch if from day to day and that she would call us and let us know to

[38] Respondent's Written Submissions at page 29 para 95

[39] Supra at 17

[40] Vol. 8A Tab 192 at pages 04692 to 04695

[41] Vol. 8A Tab 193 at pages 04696 to 04698

change to another company"[42]

¶ 82 GB also testified:

"Q. Did you tell Ms. Locke that you wanted aggressive growth?

A. I told her I wanted to make money with this money.

Q. Did Ms. Locke explain to you that you could lose all of your money with the 100% high risk investment?

A. No she did not."[43]

¶ 83 NB testified:

"Q. Did you say to Ms. Locke that you wanted 100% high risk investments?

A. I don't know that I ever said 100% but she did say that there would be some risk but, we did expect a good return.

Q. Did Ms. Locke explain you could lose all of your money?

A. Definitely not.

Q. Did she explain to you that you could lose a lot of your money?

A. No."[44]

¶ 84 The Wellington West NCAF completed by Ms. Locke for NB, GB and JB's signature on 6 September 2011[45] on behalf of F Limited shows no investment experience, limited investment knowledge and an aggressive growth target mix at 100% high risk. There is a notation on page 0866 that the "client referred by AH and wanted to be aggressive with these funds".

¶ 85 The initial purchases for this account are shown as "solicited"[46]. The Panel is of the opinion that the advisor faced with a client whose instructions appear to be at conflict with their stated objective knowledge and experience must take additional steps. The Conduct and Practices Handbook (CPH) provides guidance for such situations:

"Unsolicited Orders: [...] If the order received from a client is not suitable the client must, at a minimum, be advised against proceeding with the order."[47]

¶ 86 The CPH in its summary section to the Standard of Conduct says:

"Ethical conduct entails that registrants concern themselves not only with the actual rules as written, but also the spirit and intent of the rules."[48]

¶ 87 F Limited's case presents an interesting dilemma. Unsophisticated, inexperienced investors are influenced to seek a higher return than a bank account could offer by a sophisticated experienced investor. Ms. Locke was presented with a factual situation, which required the exercise of her knowledge and

---

[42] Transcript 17 December 2019 at page 51 lines 7 to 12

[43] Transcript 17 December 2019 at page 51 lines 16 to 20

[44] Transcript 17 December 2019 at pages 68 to 69 lines 20 to 9

[45] Vol. 4 Tab 24 at pages 0682 to 0872

[46] Vol. 4 Tab 25 at page 0874

[47] CPH 1.10

[48] CPH 1.24

experience. Notwithstanding the lack of investment experience or knowledge, she placed F Limited's $ 25,000 in an aggressive mix at 100% high risk because NB and GB wanted to make some money.

¶ 88 Ms. Locke states in her evidence that she told GB and NB that the portfolio of AH was aggressive and that there were other investments better suited to their situation. An examination of Ms. Locke's contemporaneous notes of the meeting with NB, GB and JB make no reference to telling her clients they could lose all or substantial portions of their investment. However, her written response prepared when a complaint was filed states:

> "I specifically said that under a possible worst-case scenario, they could lose all of the capital invested."[49]

¶ 89 The Panel accepts the evidence of GB and NB that they were not told they could lose all or substantially all their investment. GB and NB were not moved in their evidence under cross -examination and an assessment of credibility inconsideration of all the circumstances favours NB and GB. 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]

¶ 90 The Panel has earlier reviewed the cases of *Re Gareau*[51] and *Re Lamoureux*[52]. 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.

¶ 91 Did Ms. Locke use due diligence to ensure that recommendations made for F Limited were suitable based on the investment objectives and risk tolerance in compliance with Dealer Member Rule 1300.1(q)?

¶ 92 Dealer Member Rule 1300.1 (q) provides:

> (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.

¶ 93 Ms. Locke made purchases for the account of F Limited upon completion of the NCAF/KYC documentation in September of 2011. The account statements for 30 September 2011 show the solicited purchases of equity securities: Americas Petrogas Inc., 01 Communique Lab Inc., Swisher Hygiene Inc., International Tower Hill, Capstone Turbine Corp. and Ford motor Company.

¶ 94 These securities are rated[53] variously as highly speculative, high degree of risk and substantial doubts about its ability to continue, except Ford Motor Company. 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.

¶ 95 In *Re Lamoureux*, the Alberta Securities Commission states:

> "Receiving an offering memorandum or signing an acknowledgement does not necessarily show that a

---

[49] Vol. 8A Tab 193

[50] IIROC DMR 1300.1(a), Staff Book of Authorities at Tab 1 page 4

[51] Supra at 13

[52] Supra at 2

[53] Staff's Written Submissions, Sch. A at page 48 and Vol. 7A to 7K, Vol. 4 Tab 27 at pages 0977 to 0983

purchaser has been made aware of the risks associated with a particular investment. That determination requires an assessment of all the circumstances surrounding the transaction including the documents presented to the investor, the sophistication of the investor and the circumstances in which the offering memorandum was received, and acknowledgment signed."[54]

¶ 96 These same principles apply to the account opening documentation for F Limited. Suitability should not be determined solely because of check marks and notations made by the registrant. The Alberta Securities Commission relied upon the comments made by the Supreme Court of Canada in *Hodgkinnson v Samis et al* where it cited *Varcoe v Sterling*:

> "The relationship of broker and client is not *per se* a fiduciary relationship. Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary."[55]

¶ 97 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.

¶ 98 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.

FOURTH ISSUE: CLIENT EH

¶ 99 Did Ms. Locke fail to use due diligence to learn and remain informed of the essential facts relative to EH contrary to IIROC Dealer Member Rule 1300.1(a)?

¶ 100 Dealer Member Rule 1300.1(a) provides:

> 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.

¶ 101 Ms. Locke's relationship with EH was more complex than with other clients involved in this proceeding. EH came to Ms. Locke with the semblance of a plan, which he proposed to her. All said, EH had approximately $900,000 to invest. Of that amount, he wanted $500,000 to be invested in safe securities. Any amount over the $500,000 he wanted to explore opportunities in the market and expected to invest those funds in high-risk securities. His plan also provided that he wanted to draw $4,000 per month for living expenses. In his testimony EH stated:

> "Q. Did you understand that you could lose money if you were investing in high risk securities?
>
> A. Yes, I was, she explained that to me and I understood that when she explained it could happen. And I said OK. As long as my $500,000 wasn't involved."[56]

¶ 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

---

[54] Supra at 2 and Respondent's Book of Authorities Tab 3 at page 27

[55] Supra at 2 and Respondent's Book of Authorities Tab 3 at page 7

[56] Transcript 18 December 2019 at page 13 lines 16 to 20

[57] Vol. 9A Tab 223 at pages 05286 to 05295

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.

¶ 103 EH was unexpectedly confronted with a $168,000 tax liability from CRA from the sale of his business. He had intended to borrow funds from a bank, but was informed he could get the money from National Bank Financial by use of a margin account. On the 9th day of March 2011, EH signed a Wellington West NCAF.[58] This margin account document shows one-year experience in stocks, twenty years with bonds and twenty years with GICs. EH's testimony was he had never invested outside his private corporation prior to becoming a client of Ms. Locke in 2010. Once again, the objectives and risk tolerance provided for aggressive growth 100% high risk. The described portfolio remained 5% cash 95% equities and 0% fixed income and equivalents. EH maintained his desire to have $500,000 securely invested to provide income. EH's cash account was closed and transferred.

¶ 104 On 28 July 2010, EH deposited $10,718.40 to his account and on 20 October 2010, $900,000 to that account.[59] These deposits represent the whole of his investable funds of which he expected $500,000 to generate income.

¶ 105 EH testified:

> "Q. …do you see your signature requesting margin?
>
> A. Yes
>
> Q. And do you remember signing this documentation with Ms. Lock.?
>
> A. Well, I signed with Ms. Locke, I'm sure I did, my signature is there.
>
> Q. Do you know where you signed it?
>
> A. In her office.
>
> Q. Okay
>
> A. Can I ask you a question? What do you mean by margin?"[60]

¶ 106 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.

> "Q. And who informed you could get it from National Bank?
>
> A. Ms. Locke.
>
> Q. And did she explain how this would work?
>
> A. Well, I would expect that it would have come from the amount of money over $500,000 and my understanding from that money would pay that. There wasn't any discussion of a monthly payment. I just left it in her hands.[61]

¶ 107 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

---

[58] Vol. 9A Tab 223 at pages 05297 to 05303

[59] Vol. 9A Tab 224 at pages 05323 to 05333

[60] Transcript 18 December 2019 at page 24 lines 1 to 6

[61] Transcript 18 December 2019 at pages 24 and 25 lines 16 to 1

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.

¶ 108 Did Ms. Locke effect trades in the account of EH that were not within the bounds of good business practice contrary to IIROC Dealer Member Rule 1300.1(o)?

¶ 109 Dealer Member Rule 1300.1(o) provides that:

> **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.

¶ 110 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.

¶ 111 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. EH was willing to accept a higher level of risk with his portfolio or any amount above $500,000. The margin debit balance in EH's account between 31 October 2011 and 30 September 2014 was in the range of 26% to 45%. The account actively traded in high-risk and speculative securities. Of the $900,000 deposited in 2011, the balance at 30 September 20144 was $ 333,019.22. 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.

¶ 112 Ms. Locke in her evidence states that EH was fully aware of the risk associated with his aggressive growth margin account. In her direct examination she testified:

> "…By putting his original strategy in place and trying to withdraw that money and get it through the market he increased the risk at that point in time. By borrowing against it in a way of a margin account that is unpredictable on the market, he increased it again. And so, each step he took moved him further into aggressive growth section of his… you know, I had to understand that he understood what he was doing was aggressive and he said "Yes it was and he knew that.""[62]

¶ 113 In cross-examination, EH refuted Ms. Locke's assertion that he had a full appreciation of the margin risks in answering questions about cash withdrawal from margin:

> "Hold it a moment. May I say to you and I've said it about 10 or 12 times, now everything, that $500,000 was not to be touched and it was left there so I'd get $4,000 a month, everything over and above it was the $50,000, whatever the $168,000 was relative to everything over and above $500,000."[63]

¶ 114 Ms. Locke gave evidence that covered a broad range of conversations and explanations of risk to her client EH, which were refuted or not recalled by the client. The Panel was not directed to any intelligible written record or note of these detailed explanations to which Ms. Locke referred. Nor could one be found in

[62] Transcript 3 March 2020 at page 156 line 4

[63] Transcript 18 December 20129 at pages 75 and 76 lines 212 to 4

the notes kept by Ms. Locke.[64]

¶ 115 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.

¶ 116 Did Ms. Locke conduct unauthorized trades in the account of EH contrary to IIROC Dealer member Rule 29.1?

¶ 117 Dealer Member Rule 29.1 provides:

> 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.

¶ 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]

¶ 119 EH accounts were not discretionary. The issue is then did Ms. Locke obtain prior approval for each transaction made in EH's accounts?

¶ 120 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.

> "Q. Okay, let me put it a different way. Are you aware that there were shares of Crombie (Reid (sic) sold in account on September 27, 2011?
>
> A. No.
>
> Q. You didn't think it happened?
>
> A. Oh, it happened, but I didn't authorize it..
>
> Q. That's wasn't what..
>
> A. ..because I didn't want anything touched with the $500,000."[66]

---

[64] Vol. 8A Tab 216 at pages 04897 to 04928

[65] *Re Li* 2010 IIROC 7 at pages 29 to 33

[66] Transcript 18 December 2019 at pages 78 to 79 lines 14 to 1

¶ 121 EH was forthright in acknowledging that he could not recall every call from Ms. Locke:

> "A. I got a few calls; I can't determine exactly. Nobody could sit here and say, I got 10 calls, 15 calls, 5 calls. I did not get a continuous phone call every 2 or 3 weeks which you were implying earlier."[67]

¶ 122 The Panel finds EH's evidence credible and accepts it.

¶ 123 Ms. Locke, in her written submissions, stated:

> "By contrast, Ms. Locke provided clear evidence regarding the interactions she had with client EH. It should be noted that Ms. Locke maintained notes which contain reference to some transactions with client EH."[68] (emphasis added)

¶ 124 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.

¶ 125 The Panel finds that Ms. Locke did conduct unauthorized trades in the account of EH during the relevant periods.

FIFTH ISSUE: CLIENT AH

¶ 126 Did Ms. Locke effect trades in the account of AH that were not within the bounds of good business practice, contrary to IIROC Dealer Member Rule 1300.1 (o)?

¶ 127 Dealer Member Rule 1300.1(o) provides:

> **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.

¶ 128 AH is a retired businessperson with a Business Degree from Michigan State University. He has been engaged in commercial property development over his career. He had operated both corporate and personal accounts prior to moving his accounts to Ms. Locke. AH described himself as not being a sophisticated investor and not having a good investment knowledge. AH did not recall transferring a margin debit from CIBC to Wellington West when he opened his accounts with Ms. Locke depositing approximately $ 2,000,000 in various accounts and executing cross guarantees between AH's margin account and O's corporate margin account.

¶ 129 In his initial meetings with Ms. Locke, he expressly stated he wanted an 8% return on his investments and executed NCAF/KYC s setting out an aggressive growth high-risk investment profile. AH gave evidence that he did not ask for high-risk aggressive portfolio nor was there any discussion about high risk.[69]

¶ 130 AH under cross examination stated:

> "Q. Do you recall having accounts with Mr. Levine during the tech bubble?
>
> A. I believe.
>
> Q. And suffering losses?
>
> A. Yes, you asked me question. Yes.
>
> Q. Yes. And with respect to your investment history, you are someone who generally either on

---

[67] Transcript 18 December 2019 at page 92 lines 21 to 4

[68] Respondent's Written Submissions at page 54 para 178

[69] Transcript 18 December 2019 at page 111 lines 2 to 14

your own or with your advisor, you are looking for opportunities, correct?

A. Yes.

Q. And when you do see an opportunity either through an investment or a prospective investment, you are someone that follows prices closely?

A. Yes.

Q. And some of your trading is short term trading correct?

A. Yes, it could have been."[70]

¶ 131 During cross-examination, AH acknowledged that he had a history of having high concentrations of certain securities sometimes approaching 90% and of running debit balances in his margin accounts. He had in the past dealt with margin calls at CIBC. AH received a concentration letter from National Bank Financial date 28 February 2013 in respect to 01 Communique Lab Inc. having a concentration of 72% in one of his accounts. The letter describes such concentration as "speculative and risky".[71] AH did not sign and return the letter as requested by National Bank Financial, demonstrating a lack of concern on his part of the speculative position of the account.

¶ 132 AH acknowledged under cross-examination that he had discussions with Ms. Locke in respect to the debit balances in the margin accounts:

"Q. Okay, And what discussions, if any did you and Ms. Locke have about your debit balance in your personal margin account?

A. Well, I wouldn't remember specifically other than that this went on for quite a long time where we were having to either shore it up or sell to keep my margin comfort zone and we did both of those things.

Q. Okay, Were you aware that in 2011 and 2012 that purchases were made on margin in your personal margin while the debit balance was increasing?

A. I probable knew at the time."[72]

¶ 133 Considering the evidence of AH and the documentary evidence in respect to the margin accounts of AH, the Panel finds that IIROC Staff has not met its burden to establish that the trades in AH's account were not within the bounds of good business practice. AH was actively involved in the trading of the accounts and aware of their status during the relevant period. AH may not have considered himself a knowledgeable and experience investor, but he certainly operated his accounts in such a manner.

SIXTH ISSUE: CLIENT LG

¶ 134 Did Ms. Locke fail to use due diligence to learn and remain informed of the essential facts relative to LG contrary to IIROC Dealer Member Rule 1300.1(a)?

¶ 135 Dealer Member Rule 1300.1(a) provides:

1300.1.

Identity and Creditworthiness

(a) Each Dealer Member shall use due diligence to learn and remain informed of the essential facts

[70] Transcript 18 December 2019 at page 139 lines 3 to 17

[71] Vol. 10B Tab 242 at page 06996

[72] Transcript 18 December 2019 at page 114 lines 1 to 18

relative to every customer and to every order or account accepted.

¶ 136 LG signed an Industrial Alliance NCAF/KYC on 21 November 2014 that had been prepared by Ms. Locke and forwarded to her for signature.[73] Ms. Locke had never met LG in person as she was a resident of New Brunswick. The form, as completed by Ms. Locke, shows the investor profile as LG having 20 years of experience with T Bills, Money Market Funds, Saving Bonds, GICs, Bonds, Common Shares and Mutual Funds. The asset allocation was for a growth strategy. Investment knowledge was shown as good, objectives were to generate income for current or future expenses and finance a portion of retirement. LG's annual income was $7,000 per year. The growth designation called for high risk and is purported to be initialed by LG. This will be the subject of later discussion.

¶ 137 LG and Ms. Locke communicated by telephone and exchanged documents by post or courier. LG testified that she did not want to have a high-risk portfolio and that her investment was to fund her retirement. LG did have another investment account with a dealer in Quebec, but no details were provided to the Panel.

¶ 138 LG's evidence was that she had not authorized anyone to sign account documents on her behalf. This is relevant because the risk tolerance provision on the KYC was not initialed by LG. She testified:

> "Q. You can see in the middle of the page it says, "the risk is high" and there's an initial there, although I think yours is redacted.
>
> A. It's redacted.
>
> Q. …I'm just showing the unredacted.
>
> A. Yes, that not my initial, that's backwards."[74]

¶ 139 Ms. Locke's counsel suggested to LG that she had neglected to initial the risk tolerance and that Ms. Locke sent it back for her to initial. LG denied the form was sent back to her and that the initial was hers.

> "Q. Okay, And I suggest to you that Ms. Locke received the form back in November and she gave you a call and sent it back to you to initial?
>
> A. No.
>
> Q. She told you to look at the form carefully and initial it, and send it back.
>
> A. No."[75]

¶ 140 Ms. Locke completed another NCAF/KYC for LG in April of 2016 when Ms. Locke moved from Industrial Alliance to Aligned Capital Partners. This new document showed LG has having an annual income of $10,000, $100,000 in liquid assets and fixed assets of $300,000 for a net worth of $400,000. No other person had authority over the account. Ms. Locke described LG's investment knowledge as good, a time horizon of 10 years or more for a growth objective it was 50% medium, 30% medium high and high at 20%. LG signed this document prepared by Ms. Locke in April of 2016.

¶ 141 In her direct examination about the new NCAF/KYC, LG denied that her investment knowledge was good, nor did she want medium high- or high-risk investments. LG further testified:

> "Q. Thank you. And did Ms. Locke discuss with you your retirement plans or ask you about them?
>
> A. No.
>
> Q. Did Ms. Locke discuss risk of securities that she was purchasing in advance of purchasing them?

[73] Vol. 6 Tab 35 at page 01105

[74] Transcript 17 December 2019 at page 11 lines 7 to 14

[75] Transcript 17 December 2019 at page 36 lines 13 to 19

A. No."[76]

¶ 142 LG sold her position at a point and paid off her mortgage and held 50% of the proceeds in cash within the account. During LG's discussions about moving from Industrial Alliance to Aligned Capital Partners, there were discussions about using the cash in the account to purchase securities. LG's evidence is that the KYC does not reflect her actual investment objective and that she was risk averse. She testified that Ms. Locke mentioned by name some of the securities she recommended but that she did not know their risk rating.[77]

¶ 143 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.

¶ 144 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.

¶ 145 Did Ms. Locke fail to use due diligence to ensure that the recommendations made for LG were suitable for her based on her investment objectives and risk tolerance contrary to IIROC Dealer Member Rule 1300.1(q)?

¶ 146 Dealer Member Rule 1300.1(q) provides:

> (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.

¶ 147 As discussed earlier, the Panel must decide whether securities purchased by Ms. Locke for LG were suitable for her on an objective assessment of the client's investment knowledge, experience, risk tolerance and time horizon. In a situation where the foundational NCAF/KYCs have been called into question, the Panel must look beyond the black and white categorization of the client. In her direct examination, LG stated that she did not want high-risk securities.[79] LG also testified that Ms. Locke did not discuss LG's retirement plans even though her age was 58 and 60 for the two KYC's prepared by Ms. Locke for LG.

> "Q. Did Ms. Locke discuss with you your retirement plans or ask about them?
>
> A. No.
>
> Q. Did Ms. Locke discuss risk of securities that she was purchasing for you in advance of purchasing them?
>
> A. No."[80]

¶ 148 LG testified that Ms. Locke mentioned several securities she intended to purchase for her account, but she was not informed and did not know that there were high-risk ratings for these securities. The trading in

---

[76] Transcript 17 December 2019 at page 13 lines 6 to 11

[77] Transcript 17 December 2019 at pages 13 to 14

[78] Vol. 8A Tab 196 at pages 04710 to 04723

[79] Transcript 17 December 2019 at page 12 lines 1 to 2

[80] Transcript 17 December 2019 at page 13 lines 6 to 11

the accounts of LG show repeated sales and purchases of medium to high-risk securities.[81]

¶ 149 Ms. Locke, in her evidence, stated that she discussed the individual securities with LG when she wanted to move the cash in her account back into the market. 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.

¶ 150 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.

SEVENTH ISSUE: THE EXPERT REPORT

¶ 151 Ms. Locke retained the services of an expert witness Mr. Leo J. Purcell of Comram Solutions Inc. of Toronto Ontario. His CV was tendered as Exhibit 18 and his report as Exhibit 19 in this proceeding. The report was admitted, and Mr. Purcell testified as an expert witness without objection by Staff counsel.

¶ 152 Mr. Purcell gave his testimony based upon his review of the letters of complaint, Ms. Locke's written responses, client KYCs and monthly statements. He also based his opinion on the assumption that LG had a second account containing $100,000, EH knew he would be paying interest and that his securities would be used as collateral and finally that AH transferred a margin debit balance from CIBC. The Panel has considered Mr. Purcell's report and his testimony in detail. The Panel takes note of Mr. Purcell's reliance upon Ms. Locke's written responses prepared for her dealer in respect to each of the clients' complaints. Without comment on the reliability of those perhaps self-interested responses, his assessment of KYC and suitability are made in the absence of the testimony of the clients. Reliance upon the letters of complaint and responses to the complaint absent any objective evaluation of the evidence is not in the Panel's finding a reliable means of deciding and offering an opinion. In her written submissions, reference is made to Mr. Purcell's comments that "letters of complaint are directly contradictory to their documented investment objectives and risk tolerance as outlined in the applicable NCAF forms". Respectfully, this is the very matter to be determined by the finder of fact. Mr. Purcell's opinion is rendered without providing any basis for an assessment of the veracity of the evidence nor the integrity of the procedures utilized to complete the NCAFs upon which the basis for his opinion lies.

¶ 153 Mr. Purcell's opinion in respect to suitability was based on his use of an arbitrary $5.00 price for the security. His evidence was that this was an industry standard and a rule of thumb for establishing eligibility for reduced margin. The Panel notes his opinion that the prospectuses for the securities in question were less useful when evaluating a security as they were "risk mitigation" documents which do not lend themselves to comparative evaluation of risk. The Panel rejects that presumption as the prospectuses and other public documents approved for distribution to investors by appropriate securities regulators are for the maintenance of fair and efficient markets and in the public interest. The Panel finds that the use of a $5.00 threshold without an examination of the specific market, monetary, legislative, litigation geopolitical and other risks alone is not a sufficient basis for assessing suitability for a specific client.

¶ 154 The Panel received Mr. Purcell's report and heard his opinions upon consent of the parties and have given it such weight, as it deems reasonable. However, it is the responsibility of and within the expertise of the

---

[81] Vol. 6 Tabs 35 to 53 and Tab 67

[82] Respondent's Written Submissions at page 39 para 135

[83] Vol. 8A Tabs 196 to 211

Panel to make its own determination upon the evidence before it, the panel has made its findings in respect to each of the counts set forth in the Notice of Hearing and Statement of Allegations in consideration of all the evidence. The Panel does not find Mr. Purcell's report or evidence determinative of any of the issues before the Panel.

¶ 155 As the report did not offer opinion on any matter not within the expertise or experience of the Panel members, the Panel could have refused to receive it. In applying the test in *R Mohan*[84] 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.

¶ 156 In the case of *Northern Securities v OSC*[85], the Ontario Superior Court of Justice, Divisional Court considered an appeal of the OSC's decision on an appeal from an IIROC panel. The IIROC panel had refused to admit an expert's report stating in part:

> "32. The IIROC panel refused to admit an expert report tendered by the appellants. On the use of accumulation accounts in the investment industry. IIROC correctly stated the test for admission of expert evidence. It noted its own expertise in the area of the proposed evidence. IIROC considered the qualifications of the proposed expert, the subject matter of the tendered report and the quality of the report. It concluded that it did not need the report in order to decide the question before it, and the report would be of "no assistance''.
>
> 33. The OSC deferred to this described decision of IIROC. The OSC also stated that in a hearing on the merits before it, it likely would have wanted to receive further evidence concerning industry practice. There is no inconsistency between this statement and the conclusion reached by IIROC a specialized tribunal best fixed to decide what it needs to decide a question squarely within the ambit of its expertise […]."

CONCLUSION:

¶ 157 The Panel is satisfied upon the preponderance of *viva voce* and documentary evidence having considered the credibility and reliability of the evidence in all the relevant circumstances that Staff has met its burden of proof in respect to Contraventions 1,2,4,5 and 6 in all respects.

¶ 158 Regarding Contravention 3, the Panel finds that Staff has met its burden in respect to client EH but not client AH.

¶ 159 Therefore, the Panel finds that Ms. Shirley A Locke has contravened IIROC Dealer Member Rules as alleged and set out in this decision.

Dated at Halifax, Nova Scotia this 28 day of May, 2020.

R. Scott Peacock

Thomas Kostandoff

Roland Coffill

[84] [1994] 2 SCR 9

[85] 2015 ONSC 3641