Re Suppal

IN THE MATTER OF:

The By-Laws of the Investment Dealers Association of Canada (IDA)

and

The Dealer Member Rules of the
Investment Industry Regulatory Organization of Canada (IIROC)

and

Ravindra Kumar Suppal

2013 IIROC 33

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

Heard: October 9 – 12, 2012 in Winnipeg Manitoba
Written Submissions Completed: November 15, 2012
Decision: June 10, 2013

Hearing Panel:
Thomas J. D. Kormylo (Chair), William Welton and Claude Tétrault
Appearances:
Mr. Tayen Godfrey and Mr. Gil Gauthier, for Investment Industry Regulatory Organization of Canada
Stephanie A. McManus, for the Respondent
Ravindra Kumar Suppal, the Respondent

DECISION AND REASONS

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1. INTRODUCTION

¶ 1 Three individual First Nation Trustees of a Trust formed by a First Nation for the purpose of supporting the future development of the First Nation and the First Nation members, approached the Respondent for investment advice in connection with the investment of funds of the Trust. The Trust Indenture governing the operation of the Trust contained certain guiding principles which required that the initial settlement amount be preserved in perpetuity and that the Trust's investment policy be dedicated to safety of the capital of the Trust in perpetuity. The Trust Indenture required that in making decisions for the Trust, the Trustees act by a majority of the four Trustees, with the Corporate Trustee being one of the majority. The Respondent proceeded to open an investment account for the Trust naming only the First Nation Trustees as persons authorized to give investment instructions on behalf of the Trust. The Respondent ultimately invested substantially all the funds of the Trust in the Account in 123 mutual funds.

2. NOTICE OF HEARING

¶ 2 By Notice of Hearing dated June 26, 2012 (the **"Notice of Hearing"**), the Investment Industry Regulatory Organization of Canada (**"IIROC"**) alleged that Ravindra Kumar Suppal (the **"Respondent"**) committed contraventions of the IIROC Dealer Member Rules (or the equivalent regulations of the Investment Dealers Association of Canada (**"IDA"**)) while registered initially as a Registered Representative and later, as of September 2009, as Branch Manager with First Financial Securities Inc. (**"FFS"**) in Winnipeg, Manitoba.

The alleged contraventions are set forth in three counts as follows:

Count 1

From June of 2005 until April of 2010, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to an account (the **"Account"**) established for the Chemawawin First Nation Development Trust (the **"Trust"**) contrary to IIROC Rule 1300.1(a) IDA Regulation 1300.1(a) prior to June 1, 2008).

Count 2

From May 2007 until April 2010, the Respondent made unsuitable trades in the Account of the Trust contrary to IIROC Rule 1300.1(q) (IDA Regulation 1300.1(q) prior to June 1, 2008).

Count 3

From September 2009 until April 2010, the Respondent made unauthorized trades in the Account of the Trust contrary to IIROC Rule 29.1.

¶ 3 It is well settled that the balance of proof of the alleged contraventions rests with IIROC and that proof on a balance of probabilities is the standard that must be met before the tribunal can conclude there has been a contravention. A consequence of a finding that a contravention has occurred can be severe and accordingly, "the degree of proof required must be nothing short of clear and convincing based upon cogent evidence which is accepted by the tribunal" (*Re Bouliers* (2004), 27 O.S.C.V. 157, affirmed [2005] O.J. No. 1984 (Ont. Div. Ct.).

¶ 4 The allegations of IIROC set forth in the Notice of Hearing related to a period of time commencing June 2005 and ending April 2010, during which on June 1, 2008, the IDA transitioned into IIROC. During that time the Respondent was continuously registered with the IDA or IIROC and subject to the regulatory requirements of each such organization, as applicable. The Notice of Hearing includes 16 paragraphs under the heading "particulars", which provide a summary of the facts alleged by IIROC.

¶ 5 A Response to the Notice of Hearing dated August 15, 2012 was filed by counsel to the Respondent which includes 12 paragraphs responding to allegations of IIROC contained in the Notice of Hearing.

¶ 6 From October 9 to October 12, 2012 a contested hearing (the **"Hearing"**) was held in Winnipeg, Manitoba. Following the Hearing, written submissions were delivered on November 15, 2012.

3. THE RESPONDENT'S BACKGROUND

¶ 7 The Respondent has been registered with the IDA/IIROC for approximately thirty (30) years, twenty-five (25) years as a registered representative and five years as a Branch Manager. He has been with FFS since 2003. Prior to that he was with Prudential Bache and Levesque Securities.

¶ 8 The Respondent is currently the Branch Manager of the Winnipeg Office of FFS and Vice-President of sales of that firm.

¶ 9 The Respondent is well educated, having earned an undergraduate degree in Chemistry from the University of Manitoba and a Master's Degree in International Management from the University of Arizona, majoring in International Finance and Marketing. The Respondent has also completed the Canadian Securities Course, the Branch Manager Course (gold medal) and successfully completed the Partners, Directors and Officers exam and the Options and Commodities exams.

¶ 10 Prior to entering the securities industry the Respondent was a chemist with International Nickel Company for ten (10) years and a corporate mining analyst with The Bank of Montreal, where he managed corporate loan accounts of $10 million and over.

4. THE EVIDENCE

¶ 11 The Trust was established in 1990 with a payment by The Chemawawin First Nation (the **"First Nation"**) of CDN $10,265,921.76 (the **"Initial Settlement Amount"**) in favour of three members of the First Nation (collectively the **"First Nation Trustees"**) and Peace Hills Trust Company (the **"Corporate Trustee"**

and, together with the First Nation Trustees, the **"Trustees"**).

¶ 12 The terms and conditions upon which the Trustees received the Initial Settlement Amount and the powers and provisions relating to the manner in which the four Trustees are to administer the activities of the Trust are set forth in an agreement between the Trustees and the First Nation dated November 1990 (the **"Trust Indenture"**) as amended by the Trust Deed Amendment dated February 4, 2004 (the **"Trust Indenture Amendment"**).

¶ 13 The Trust Indenture (s.4.02) requires that investment decisions be made by a majority of the Trustees and that the Corporate Trust must be one of the majority.

¶ 14 On June 8, 2005 the Respondent met with the three First Nation Trustees and proceeded to complete a new account application form dated June 8, 2005 (the **"NAAF"**) and opened the Account at FFS in the name of "Chemawawin First Nation Development Trust". The NAAF was signed by the Respondent as the registered representative of FFS and the Respondent also signed as Branch Manager.

¶ 15 The NAAF listed Clarence Easter, who was identified as being employed as the Chief of the First Nation as the contact person and one of the three individuals with trading authority over the Account.

¶ 16 The NAAF also listed Albert Young, who was identified as being employed as a Band Councillor at the First Nation, as another individual with trading authority over the Account along with Alvin Lavallee, who was also identified as being employed as a Band Councillor at the First Nation, as a third individual with trading authority over the Account. The First Nation was specified as the beneficial owner of a 100% interest in the Trust.

¶ 17 Neither the Corporate Trustee nor any representative of the Corporate Trustee was specified on the NAAF as being a person with trading authority over the Account; however, the Corporate Trustee was identified as the name of the Bank and Brian G. Bender the Assistant Vice-President of the Corporate Trustee was named as the Bank contact. A notation appeared at the bottom of the first page of the NAAF that stated:

> "PEACE HILLS TRUST IS THE CORPORATE TRUSTEE FOR THIS ACCOUNT. THEY REQUIRE MONTHLY STATEMENT COPY SENT TO MR. BENDER AT 244 PORTAGE AVE. ADDRESS".

¶ 18 The NAAF was signed on behalf of the Trust by Clarence Easter as "Chief of the First Nation" and was supported by a "Resolution for Corporate Accounts" (the **"Corporate Resolution"**) which incorrectly identified the "Chemawawin Cree Nation" as "the corporation." The Resolution was signed by the three First Nation Trustees as "officers of the corporation" and was certified by Clarence Easter, Chief of the First Nation as having been duly passed by the "directors of the corporation".

¶ 19 In support of the Corporate Resolution, the Respondent also had a Certificate of Incumbency signed which included specimen signatures of Clarence Easter, whose position was listed as "Chief", and Albert Young and Alvin Lavallee, whose positions were listed as "Councillor". That Certificate was signed by Sam George, Councillor, who certified that the specimen signatures were those of the "Authorized Officers" [of the corporation].

¶ 20 The text of the Corporate Resolution provides that, "The Corporation is hereby authorized to open one or more accounts in the name of the Corporation… with FFS…to buy, sell, transfer, switch and assign securities now registered or hereinafter registered in the name of the Corporation …" and goes on to state the individuals named as Authorized Officers…"are hereby authorized on behalf of the Corporation to make, execute…and sign…any…documents as the Authorized Officer(s) in his discretion may consider necessary or useful in connection with the Corporation's dealings…". The three First Nations Trustees were listed as the Authorized Officer in the Corporate Resolution.

¶ 21 No FFS Account documentation was produced by the Respondent which verified that the Trust was authorized to open any accounts with FFS, nor was any FFS Account documentation produced by the Respondent which certified that any specified signatory or combination thereof was authorized on behalf of the

Trust to buy, sell, transfer securities registered in the name of the Trust.

¶ 22 The NAAF indicated that Clarence Easter (the **"Chief"**) and the two Councillors who were identified as the three "Individuals with Trading Authority Over the Account" had average investment knowledge.

¶ 23 The NAAF on page 4 listed the investment objectives and risk factors for the Account of the Trust as follows:

Investment Objectives for this Account *(Must equal 100%)*

Capital Preservation *(Liquidity)*	30%		
Balanced Portfolio *(Income and Growth)*	- %		
Income *(Provides steady level of income with some stability of principal)*	30%	**ACCOUNT RISK FACTORS**	
Long Term Growth *(Seeks long term growth of principal through investing in stable securities)*	20%	Low	50%
Speculation *(Seeks short term growth of principal through active trading and investing in junior stocks or volatile mutual funds)*	20%	Medium	50%
		High	- %
Total	100%		100%

¶ 24 The Respondent acknowledged in his testimony that he received the Trust Indenture "before the account was opened", that he "read it", and that he could understand it very well, as a result of having been in corporate banking and dealing with similar documents. He admitted "…it's not very complicated" and that he knew it quite well.

¶ 25 Upon being asked by IIROC counsel what he understood the objectives of the Trust to be after he read the Trust Indenture, the Respondent replied "…it was supposed to last forever, for next generation, for generations to come".

¶ 26 At the time the Account was opened and the risk factors and objectives determined by the Respondent, the net value of the assets of the Trust was $9,600,000, which was below the Initial Settlement Amount of $10,265,921.76.

¶ 27 The Respondent admitted in his testimony that in respect of his obligation to understand and know his client, the Trust, he was getting his information from the First Nation Trustees and from the Trust Indenture. He acknowledged that the First Nation Trustees, who were opening the Account, were bound by the Trust Indenture and that the Trust Indenture provided guidance on what could be done with the Initial Settlement Amount.

¶ 28 In response to questioning by IIROC counsel concerning how the Trustees make decisions, the following exchange occurred:

> Q Okay. So I think your evidence is a couple times in here you just sort of said you had read the trust indenture, but I think you've said a couple of times in your evidence here and also in your evidence perhaps in your interview, I don't know if you recall when you were in the IIROC or, sorry, the Manitoba Securities Commission here, you had given an interview, I think you claimed to know the document quite well, would that be fair?
>
> A I would say that, yes.
>
> Q So I'm going to take you through some bits of the trust indenture just to find out what your understanding is.
>
> So I'm going to start with section 4.02 of the trust indenture. And this has been talked

about a fair bit over the last few days.

A Right.

Q So this section talks about how decisions are made by the trustees, would you agree?

A Yes. Yes, "Powers and Authorities".

Q It's under the heading "Powers and Authorities" --

A Right.

Q -- and it says, it's quite a long paragraph and there's a section that talks about,

> "... the Trustees hereunder, acting by a majority, with the Corporate Trustee as one of the majority, unless otherwise stated, or the Corporate Trustee, as the case may be, shall have and be invested with the following powers, authorities and discretions ...",

and it goes on, talking about,

> "... no person dealing with them shall be charged with any duty to enquire into the propriety of their action, except as set out herein ..."

But one of the key things in there, it talks about how the trustees make decisions and it says that the corporate trustee has to be part of the majority, is that fair?

A I would say corporate trustee has to be one of the majority, yes.

Q So that's a fairly significant power it hands to the corporate trustee. That is essentially saying they can't act without the corporate trustee, or it essentially gives them a veto power, if they wish to use it that way. Would that be a fair assessment?

MS. McMANUS: I object to that characterization of that section, Mr. Chairman and members. I don't think there's any mention of a veto power. I don't believe there's any mention of a veto power in that section.

THE CHAIRPERSON: He did say essentially, but perhaps you had better reword your question to --

BY MR. GODFREY:

Q In your view, would that be similar to a veto power or have the same result of having given them veto power?

A I'm not sure. Acting by a majority, they have to -- they are four trustees. All the trustees, band trustee, three plus one corporate trustee, has to be a majority and corporate trustee has to be one of them. That's what it says.

Q Fair enough. So has it always been your understanding -- is it your position that that's what it is right now, that -- so your position right now is that they have to act with the corporate trustee?

A Has it always been my understanding that way?

Q Yes, from since you got this trust document and read it.

A Not from day one, but after I read the trust, yes.

¶ 29 The Respondent also acknowledged in his testimony that the power given to the Corporate Trustee in the Trust Indenture, as having to be one of the majority, is significant.

¶ 30 The investment objectives of the Trust are set out in the Trust Indenture under the heading "Power and Authorities" in s.4.02 and specifically under the heading "Investments" in paragraph (2) thereof, which reads as

follows:

> 4.02 Power and Authorities
>
> Subject to section 4.01 hereof, without in any way limiting or derogating from the powers, authorities, and discretions otherwise howsoever available to the Trustees, whether under any statute or at law or otherwise, and without application to or approval by any Court, the Trustees hereunder, acting by a majority, with the Corporate Trustee as one of the majority, unless otherwise stated, or the Corporate Trustee, as the case may be, shall have and be invested with the following powers, authorities and discretions and no person dealing with them shall be charged with any duty to enquire into the propriety of their action, except as set out herein, that is to say:…
>
> (2) Investments
>
> Subject to section 4.01 hereof:
>
> (a) in the first five (5) years following the date of settlement, the Trustees shall be limited to investments in bonds, debentures, or other evidences of indebtedness:
>
> (i) of or guaranteed by the Government of Canada or the government of a Province Canada; or
>
> (ii) rated "R1-middle" or better by Dominion Bond Rating Service, provide that if Dominion Bond Rating Service, or any successor shall not then be providing such a rating service, rated equivalent to an "R1-middle" or better by a recognized national or international debt rating service designated in writing by the Corporate Trustee
>
> (b) In the next five (5) years following the end of the first five (5) years referred to in paragraph (a) above, the Trustees shall be limited as to seventy-five (75%) percent of the realizable value of the investments in the Trust Fund, to investments referred to in paragraph (a) above and as to twenty-five (25%) percent of such realizable value, to investments that are permitted under the Pension Benefits Standards Act 1985 (Canada).
>
> (c) Following the ten (10) year period referred to in paragraphs (a) and (b) above, the Trustees shall be limited to investment authorized by law for Trustees.

¶ 31 The power and authority of the Trustees to invest the funds of the Trust as set forth in s.4.02(2) of the Trust Indenture referred to above, is subject to the provisions of s.4.01 of the Trust Indenture, which reads in part, as follows:

> 4.01 Guiding Principles…
>
> (2) The Trust Fund and, in particular, the Initial Settlement Amount, is intended to be preserved in perpetuity to enable future generations to benefit from this Trust and, without limiting the generality of the foregoing, the Trust's investment policy must be dedicated to safety of the capital in perpetuity;…

¶ 32 The evidence confirmed that the date of settlement, for the purposes of interpreting the provisions of s.4.02(2) of the Trust Indenture, was in excess of ten (10) years from the date the Account was opened. As a result, pursuant to paragraph 4.02(2)(c) of that section, the investment of funds of the Trust by the Trustees was "limited to investments authorized by law for Trusts" and such investment was subject to the applicable provisions of s.4.01 of the Trust Indenture namely paragraph (2) thereof which is cited above. The Respondent's testimony confirmed he was aware of the restrictions imposed by s.4.01 of the Trust Indenture and in response to questioning by IIROC counsel, he stated "It is quite obvious that the safety of the principal is one of the factors that I should look at and take into account."

¶ 33 The Trust Indenture was amended on February 4, 2004 pursuant to the Trust Indenture Amendment which specified in s.2.1 that the investment powers under the Trust Indenture, including those specified under s.4.02(2) thereof, were revised to prohibit the reinvestment of funds of the Trust which, at the time, were invested in a Province of Manitoba bond in the amount of $2,598,000 maturing September 5, 2014 (the **"Coupon Bond"**), into any other investment until such earlier time as the Bond matured or the "net value of the trust fund" (as such terms are defined therein) equals or exceeds the Initial Settlement Amount.

¶ 34 IIROC counsel questioned the Respondent about the disparity between the name of Account ("The Chemawawin First Nation Development Trust") and the name on the Corporate Resolution ("The Chemawawin First Nation"). The Respondent agreed that "they are different entities, yes" and explained the difference as essentially a clerical error.

¶ 35 On November 27, 2009, the Respondent had an updated New Account Application Form (the **"Updated NAAF"**) executed in respect of the Account. The Respondent had the Updated NAAF signed in the same manner as the initial NAAF and at that time also had a new "Resolution for Corporate Accounts" signed in the same manner in respect of "Chemawawin Cree Nation". The Respondent explained that the disparity between the new forms was also a clerical error.

¶ 36 The Respondent at another point explained the disparity arose because "FFS used the "Resolution for Corporate Accounts" to open any non-personal account and that accordingly, it was FSS practice to use the Resolution for Corporate Accounts Form to open accounts for trusts.

¶ 37 Under questioning by IIROC counsel as to whether or not a corporate resolution of the Chemawawin Cree Nation authorizing the opening of an account for the Trust was appropriate or whether a resolution of the Trustees of the Trust ought to have been obtained, the Respondent was extremely evasive and despite extensive questioning, avoided responding to the question. To justify overlooking the distinction he maintained that he was relying on the fact that the three individuals executing the Corporate Resolution on behalf of the First Nation (the Chief and two Band Councillors) were, at the time, also First Nation Trustees of the Trust. He maintained that the three First Nation Trustees had the power and authority to open the Account in the manner that it was opened and that being listed as persons with trading authority, they had the authority to give directions on the Account. At page 27 of the transcript of the Respondent's interview with IIROC Staff, the Respondent explained his justification for accepting direction from the First Nation Trustees and stated "Yeah, I think the [First Nation] Trustees are bound by this [the Trust Indenture] and they are entitled to give me instructions. I am bound by my account-opening documents, which I follow the rules with." However, the Respondent acknowledged (Transcript, p. 65) that during the time the Account was open he accepted instructions from two First Nation Trustees who were not listed as trading officers on the NAAF. In his testimony, the Respondent stated that the directions "I'm supposed to follow are from those Trustees, who have their consent probably from the corporate trustee as well" (p. 221, 257 and 267).

¶ 38 With respect to the role of the Corporate Trustee, the Respondent testified that he was advised by the Chief and Council and by the First Nation Trustees that the role of the Corporate Trustee was merely administrative (Transcript, p. 46) and when asked whether he verified that the Corporate Trustee was part of the decision making process, he stated in his interview (Transcript, p. 47) "I was told by Chief and Council they didn't want them [the Corporate Trustee] to be, but whatever they did inside, I don't know, they were calling, I'm sure, I, I'm assuming, yeah, they were part of it and they always consulted with each other. But I have no idea what they did. According to the Trust Indenture they should have," and later at page 51, when asked whether he ever had anything in writing from the Corporate Trustee saying they granted their consent to a trade, the Respondent replied, "No, but Peace Hills over the course of time is the one who, who sent all the funds, all the assets," and later at page 51 stated "I had no right to go to Peace Hills directly" because they are not on the account."

¶ 39 The "Individuals with Trading Authority over the Account" section on page 2 of the NAAF and the Updated NAAF were both completed by the Respondent describing the persons listed as "trading officers" and not as "trustees".

¶ 40 As regards the manner in which the Account was opened and the apparent document inconsistencies, IIROC counsel described the situation and the Respondent confirmed it to be as follows:

Q So this was the only form you had to use?

A Only form we had to do and I checked with my compliance officer, checked with my CEO, checked with my VP sales, checked with my operations. They said this is fine.

Q Thank you. And then we have the Resolution of the Board of Directors. Again Chemawawin Cree Nation should read Chemawawin Development Trust, is that right?

A Sorry?

Q Sorry, that's two pages -- not the next document, not the Certificate of Incumbency, but the one after that.

A Resolution of the Board of Directors of Chemawawin Cree Nation.

Q Yes. So again that should read the Chemawawin Development Trust?

A Yes.

Q Okay. And what we have here is any two of these three individuals has the power to give you direction to invest or, on the account?

A Yes, any two can, but I never got any instructions from two; I always made sure they all are, three are involved. Not only three, I also made sure the other six councillors are involved as well in ordering, in giving me instructions.

Q So you received a band council resolution for every trade you conducted on the account, is that correct?

A Without fail. And one thing when we are at it, I don't know if I can add one more –

--

Q Absolutely.

A --on that Resolution of the Board of Directors, just the last paragraph, number, item number 5, it says very clearly,

> "…resolution shall remain in full force and effect until a resolution repealing this resolution shall have been passed by the directors of the Corporation and an original…copy shall have been received by this applicable dealer…"

So this will remain in force until I receive amendment to this resolution in writing and an original copy given to me. Otherwise this remains in force.

Q So even though this is not a corporate account and even though these are not corporate directors or officers, you treated it that way and that was the way the First Nation members understood it, is that what you're telling us?

A Yes.

¶ 41 Following the opening of the Account the First Nations Trustees and the Chief and Council directed the Corporate Trustee to transfer the Coupon Bond to the Respondent at FFS.

¶ 42 On April 21, 2005 the Corporate Trustee wrote the Chief a letter acknowledging the direction and pointing out that the Coupon Bond could not be sold until the conditions set out in the Trust Indenture Amendment were satisfied or the Trust Indenture amended further. The Coupon Bond was transferred to FFS.

¶ 43 Commencing in about November 2005 the Respondent began discussing with the First Nation Trustees the reinvestment of the proceeds of various investments held by the Corporate Trustee that were maturing and the Respondent proceeded to make recommendations to the First Nation Trustees for the investment of such

funds. Prior to making trades, he obtained the written approval of the First Nation Trustees/Trading Officers and requested the Corporate Trustee to transfer funds of the Trust to FFS on the basis of the signatures of the three First Nation Trustees/Trading Officers. He also would typically obtain the written consent of the Chief and Council of the First Nation to each trade, but admitted there was no requirement to obtain such consent.

¶ 44 The Respondent testified that each time a GIC or other low yielding investment of the Trust matured, he would write to the First Nation and make recommendations for the investment of the proceeds and obtain approval from the First Nation Trustees/Trading Officers together with a Band Council Resolution (**"BCR"**) to have the Corporate Trustee send the resulting funds to him at FFS for investment into the specific investments he had received. The Respondent testified that he would then send a letter with the approval of the First Nations Trustees and the BCR to the Corporate Trustee and ask that the funds and the consent of the Corporate Trustee be sent to him at FFS (see, for example, letter of FFS to the Corporate Trustee dated January 22, 2008).

¶ 45 A series of letters sent by the Corporate Trustee to FFS, attention the Respondent, and dated November 18, 2005, June 2, 2006, October 3, 2006, November 20, 2006, June 1, 2007, July 23, 2007, and September 11, 2007, respectively were filed as exhibits (the **"Exhibit Letters"**). With each Exhibit Letter the Corporate Trustee, as requested by the Respondent, sent the funds of the Trust which were previously invested in GIC's or similar investments that had matured, to the Respondent at FFS "In Trust" and imposed the same trust conditions on FFS and the Respondent each time, with the exception of the amount sent and the cheque particulars, the trust conditions imposed were as follows:

> "With reference to the above, please find enclosed our Official Cheque No. 003598 for $175,000.00 payable to First Financial Services Inc. "In Trust".
>
> Please be advised said $175,000.00 represents Assets of the Chemawawin First Nations Development Trust and as such, any activity relating to same must be in compliance with the Original Trust Agreement dated December 14, 1990 and/or the Trust Deed Amendment dated February 4, 2004. In line with this the Official Cheque is being forwarded with the following "Trust Conditions":
>
> 1. Any and all investments must adhere to the Trust Agreement and/or Trust Deed Amendment as it relates to "permissible investments" under the Development Trust. In this particular instance said funds are to be invested as per instructions from the Chief and Council and the Trustees.
> 2. First Financial Services Inc. is to provide Peace Hills Trust Company with transaction reports relating to investment activity.
> 3. First Financial Services Inc. is to provide Peace Hills Trust Company with monthly statements of investments.
> 4. As per the Original Trust Agreement (Page 25 Article 11), any revenues/income generated from the investment activity is to be forwarded to Peace Hills Trust Company 244 Portage Avenue, Winnipeg, Manitoba R3C 0B1 for deposit to the Development Trust Account at Hobbema, or guaranteed by the Government of Canada (11a), or deposited in a specific rated chartered bank or trust company (11b)..."

¶ 46 Each of the various letters also included the following paragraph and an acknowledgment of receipt stamp, which in each case was signed by the Respondent on the duplicate of the letter, and sent back to the Corporate Trustee.

> "Kindly acknowledge receipt of our Official Cheque and the Trust Conditions on which same is being forwarded to your offices by signing the duplicate of this letter and returning same to this office.
>
> > We hereby acknowledge receipt of the Official Cheque for $[applicable amount inserted] and Trust Conditions on which same are being forwarded.
> >
> > First Financial Services Inc. _____"

¶ 47 The Respondent testified that although he signed the acknowledgment on each of the Exhibit Letters, he was just acknowledging receipt of the letter.

¶ 48 The Exhibit Letters dated September 11, 2007, June 1, 2007 and July 23, 2007 all contained the following additional paragraph expressing the Corporate Trustee's disagreement with the purchase of additional mutual funds.

> Peace Hills Trust Company is not in agreement to further expanding the Investments into another 28 Mutual Funds, however, should the Development Trust Trustees and Investment Manager feel otherwise, we will not delay the Development Trust Trustees decision to make further Investments into same. We feel it is not necessary to execute the consent in order for the Investment transaction to proceed.

¶ 49 Upon receipt of the funds sent with each of the Exhibit Letters (in the aggregate totaling $3,709,960.58) together with other funds provided to him prior to September 17, 2009 by the Corporate Trustee, the Respondent proceeded to invest the funds of the Trust on 22 occasions into mutual funds.

¶ 50 Ms. Villeneuve, the account manager at the Corporate Trustee, who assumed responsibility for the Account in August 2009, is a senior trust manager of the Corporate Trustee. Ms. Villeneuve has a Bachelor of Commerce Degree and an MBA. She previously was employed in a similar capacity since 1992 doing trust and estates work with Royal Trust and CIBC Trust and has 14 years' experience dealing with First Nations trusts, similar to the Trust. Her experience included 50 such trusts and dealing with nine different investment management firms. Ms. Villeneuve testified that she was surprised to see the Account had been opened at FFS by the Respondent without the Corporate Trustee being named as a trading officer having trading authority. She indicated she had never seen that happen before in all her dealings with First Nations trusts.

¶ 51 On September 17, 2009, the Respondent wrote to Ms. Villeneuve acknowledging an earlier discussion he had with her and requesting that the $125,000 proceeds of a bond that had matured on September 14, 2009 be sent to FFS for investment into a portfolio of mutual funds (particulars of which were attached) that had been consented to by the First Nation Trustees, the Chief and council. In the letter, the Respondent asked Ms. Villeneuve to acknowledge the consent of the Corporate Trustee to the proposed investments by signing and faxing back the fund list summary that was enclosed with the letter, which had been signed by the First Nation Trustees and by the Chief and the other members of council. The consent of the Corporate Trustee on the fund list was signed by Mr. Kinsella and faxed back to the Respondent on September 18, 2009.

¶ 52 Ms. Villeneuve testified that the fund list summary referred to above was consented to because the Corporate Trustee wanted to be cooperative with FFS and the First Nation, and hoped that it would get them to seek the Corporate Trustee's approval for subsequent trades. Ms. Villeneuve also testified that on one earlier occasion (March 31, 2007) the Corporate Trustee also signed a fund list summary and consented to trades proposed by the Respondent on that fund list summary.

¶ 53 Ms. Villeneuve testified that in connection with signing the fund list summary the Corporate Trustee also sent the Respondent a letter from Mr. Kinsella, the President and CEO, dated September 17, 2009, advising that "changes to the signing/trading officers will be discussed in a joint meeting with the Investment Advisor, the Chief, First Nations Trustees and Peace Hills Trust, at our earliest convenience. The purpose of this discussion will be to bring the account authorizations in line with Article 4.02 of the Trust Indenture that calls for the trustees to act by a *"majority with the Corporate Trustee as one of the majority."* Further, until such time all trading instructions will be authorized by the two aforementioned with the included authorization of the Corporate Trustee as one of the majority."

¶ 54 The September 17, 2009 letter of Mr. Kinsella requested that a duplicate form of the letter be executed by FFS as an acknowledgement and faxed back to Ms. Villeneuve. The acknowledgement was signed and returned by the Respondent. Ms. Villeneuve testified that upon receipt of the signed acknowledgement, she assumed the Respondent had agreed to the terms set out in that letter (i.e., that there would be no further trading without the authorization of the Corporate Trustee).

¶ 55 In his testimony, the Respondent indicated that by signing the acknowledgement, he was merely acknowledging receipt of the letter.

¶ 56 Ms. Villeneuve testified that following the September 17, 2009 letter, she met with the Chief and the First Nation Trustees without the Respondent present, and explained that the Corporate Trustee was to be part of the majority when decisions were made regarding the Trust. Following that meeting, she said she expected that the First Nation Trustees were going to comply, as they indicated they understood the rules and would get the Respondent to comply.

¶ 57 Ms. Villeneuve testified that following numerous unanswered requests to the Respondent for a copy of new account opening documentation relating to the Account, she sent a letter dated December 10, 2009 to the Respondent again advising him that the manner in which the Account had been opened was in breach of Trust requirements, asking to have the Corporate Trustee named as a person authorized to give instructions on the Account and requesting new account opening documentation reflecting that the consent of the Corporate Trustee is required. Ms. Villeneuve indicated she did not receive such new account opening documentation from the Respondent in response to that letter.

¶ 58 Ms. Villeneuve testified that by way of a letter dated January 11, 2010 couriered to the Respondent, she send the Respondent a copy of the Trust Indenture and once again requested that new account opening documentation showing the Corporate Trustee as a signing authority be sent to her as soon as possible.

¶ 59 In her evidence, Ms. Villeneuve said she found the Respondent to be uncooperative and aggressive, often raising his voice in conversations. She indicated that the Corporate Trustee had complied with his requests for funds in the past rather than deal with his aggression because it was easier to transfer the funds than take abuse from the Respondent. Under questioning by Respondent's counsel as to whether that was a proper approach for the Corporate Trustee to have taken to deal with the problem, she replied that was before she was given responsibility for the file and admitted she would not have handled it that way.

¶ 60 On November 27, 2009, the First Nation wrote to its solicitors requesting confirmation that, based upon documentation supporting the "net value of the Trust Fund" as being in excess of the Initial Settlement Amount on November 25, 2009, the Trustees were no longer, as of that date, required to maintain the investment in the Coupon Bond as provided for in the Trust Indenture Amendment.

¶ 61 On that same day, November 27, 2009, the Updated NAAF was prepared by the Respondent and executed. The Updated NAAF changed the investment objectives for the Account from 30% capital preservation, 30% income, 20% long term growth and 20% speculative to 80% long term growth and 20% speculative, and changed the Account risk factors from 50% low risk and 50% medium risk to 100% high risk.

¶ 62 On December 11, 2009, the Respondent sold the Coupon Bond, which had been in the possession of FFS since April 21, 2005, and used the proceeds to purchase mutual funds in reliance on a direction by the First Nation Trustees dated December 2, 2009 without providing any notice to the Corporate Trustee and without receiving any evidence of consent to that sale from the Corporate Trustee. The Trust Indenture Amendment provided that the Coupon Bond should not be sold until it matured in 2014 or the Net Value of the Trust Fund equaled or exceeded the Initial Settlement Amount of $10,265,921.76. That threshold had been exceeded.

¶ 63 On or about January 13, 2012, the Corporate Trustee learned of the sale of the Coupon Bond by the Respondent and the subsequent investment of the proceeds thereof and made enquiries regarding the Respondent's authorization to conduct the sale of the Coupon Bond.

¶ 64 On February 2, 2012, Ms. Villeneuve sent the Respondent a letter again repeating the earlier advice in the September 17, 2009 letter from Mr. Kinsella to the Respondent that all trading instructions must be authorized by the Corporate Trustee as one of the majority and stated "It has come to the attention of Peace Hills Trust that you have sold the bond without our authorization." The letter went on to state:

> "**Effective immediately, you are instructed to stop all trading on the Chemawawin Development Trust** - To be clear - you are NOT AUTHORIZED TO CARRY OUT ANY TRADES IN RELATION TO THE CHEMAWAWIN DEVELOPMENT TRUST. Should you

choose not to comply with these instruction [*sic*] Peace Hills Trust will engage legal counsel to pursue remedies, as necessary to protect the trust."

¶ 65 When the Respondent was asked by IIROC counsel whether he at any time felt worried that he wasn't authorized to conduct the trade in the Coupon Bond or any of the mutual funds purchased after that time, he replied:

> A Was I worried?
>
> Q Did you feel that you weren't authorized to conduct that coupon bond trade?
>
> A No, I was not worried because after we received second letter from Kinsella saying do not trade, I took it again to chief and at that time he just agreed, for two weeks I'm not going to do anything. We are not going to do anything, he tells me and we don't do anything.
>
> I wasn't worried about it, no. If I get authorization from them in writing, I'm assuming they have their meeting, trustee meeting, they agreed. It was mainly chief who talked with the, you know, corporate trustee, that was the interaction most of the time, and I had no reason not to believe him.

¶ 66 Mr. Floyd George, a member of the First Nation and a member of council for a period while the Account was open and a First Nation Trustee for a period as well, testified to the effect that he never personally sought the consent of the Corporate Trustee to any trades, but he believed that the Chief had. He indicated the Chief had consented to the Respondent selling the Coupon Bond, but didn't know if the Corporate Trustee had consented. He was not aware of the substance of any conversations the Chief had with the Corporate Trustee, but he relied on what the Chef said. Mr. George confirmed that he believed the Chief was in contact with the Corporate Trustee often.

¶ 67 In his testimony regarding obtaining the consent of the Corporate Trustee to decisions made by the First Nation Trustees, the Respondent, on three occasions, stated he "assumed" the consent of the Corporate Trustee had been obtained by the First Nation Trustees.

¶ 68 The Chief was not called to provide evidence on that issue at the hearing.

¶ 69 Mr. Peter Glowacki, a Manitoba lawyer with 15 years' experience in the area of trust law, testified on behalf of the Respondent, based on a number of assumed facts. Mr. Glowacki's testimony was not particularly helpful, but he did indicate that documents (including new account documentation) could be executed on behalf of the Trust by persons who were properly approved by the Trustees. Mr. Glowacki's written opinion (which was filed as an exhibit) was that, based upon the Trust Indenture, the First Nation Trustees could have opened the Account if they had the consent of the Corporate Trustee and that Trustees are responsible for making investment decisions in line with the Trust Indenture, and that if acting by majority decision with respect to investments, the Corporate Trustee must form part of the majority. Mr. Glowacki's opinion was based upon the assumption that the Corporate Trustee participated in every meeting where investment recommendations and investment objectives were discussed and participated in the vote as to whether they should be followed.

¶ 70 In February 2010, the First Nation Trustees agreed with the Corporate Trustee that the Account at FFS should be closed. On February 5, 2012, the Respondent confirmed to the Corporate Trustee that he had received instructions from the First Nation Trustees that no trading should take place until February 19, 2010.

¶ 71 The Respondent testified there was no trading on the Account after January 4, 2010, although documents filed indicate trading took place as late as January 22, 2010. On March 8, 2010, the Respondent sought the release from the Corporate Trustee of $100,000 cash on hand and $150,000 proceeds from a GIC. The Corporate Trustee did not transfer the requested funds.

¶ 72 The funds of the Trust were sent to Scotia Trust in April 2010, which commenced acting as Investment Manager from that date.

¶ 73 Following the receipt of the letter from the Corporate Trustee on September 17, 2009, the Respondent sold the Coupon Bond on December 11, 2009 and effected a total of 91 purchase or redemption transactions in

the Account prior to the Account being transferred on April 30, 2010. The Corporate Trustee consented on September 18, 2009 to six trades.

¶ 74 As of January 31, 2010, the total assets of the Trust amounted to $9,921,000, as shown on the Corporate Trustee's financial statements for the Trust, which was approximately $338,000 less than the Initial Settlement Amount. Approximately $8,486,229 (85%) of such assets were invested in 123 mutual funds at FFS. At the time the Account was transferred on April 30, 2010, the value of the total assets of the Trust amounted to $10,494,824, as shown on the Corporate Trustee's financial statements for the Trust, which represented an increase over and above the Initial Settlement Amount of $311,575. Respondent's counsel advised the Panel that between 2009 and 2010, the value of the Account/Assets increased by 23% while at FFS.

¶ 75 Mr. Gauthier, the IIROC manager of investigations, testified and produced calculations showing that during the period from September 18, 2009 to April 30, 2010, the Respondent was paid commission of $137,079 in respect of the purchase of mutual funds for the Account.

¶ 76 As regards the Updated NAAF, the Respondent indicated in his testimony that he prepared the Updated NAAF and had it executed on November 27, 2009 to change the Account Risk Factors to 100% high risk to allow the Account to be invested in common shares, if the First Nation Trustees ever wanted to do that. The Respondent indicated that all investments in the Account were purchased based upon his recommendation to match the objectives of the Trust. He testified he was bound to take instructions from the trading officers named on the Account, namely the three First Nation Trustees, and that he determined the objectives of the Trust from their desire to obtain a 10% return. He stated that to get a 10% return, the Trust had to invest in long term growth investments. The Respondent acknowledged that he could refuse to implement the instructions of the First Nation Trustees if the instructions were inconsistent with the objectives of the Trust.

¶ 77 The Disclosure Insert, signed by the First Nation Trustees and attached as pages 8 and 9 to the Updated NAAF, states as follows:

> **"Understanding Investment Objectives and Ability to Assume Risk**
>
> The investment objectives of all clients fall into a combination of Growth, Income and Capital Preservation. The total return from an investment portfolio is derived almost entirely from the allocation between these three objectives. In addition, investment objectives are directly related to the ability to assume risk. The higher the expected rate of return, the greater must be the tolerance for risk. The lower the tolerance for risk, the lower the expected rate of return must become."
>
> **"Historical Average Annual Compound Returns over a 6 to 8 year period.**

Cash Instruments	(Capital Preservation and Liquidity)	2% to 4%
Income Instruments	(Bond and Mortgage Income)	4% to 8%
Equity Instruments	(Long Term Growth)	8% to 12%
Inflation	(Erosion of Purchasing Power)	2% to 4%"

5. SUBMISSIONS - SUMMARY

¶ 78 **COUNT 1** - It is alleged the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to the Trust and every order or account accepted on behalf of the Trust from June 2005 to April 2010, contrary to IIROC Rule 1300.1(a) and IDA Regulation 1300.1, which read as follows:

> 1300.1
>
> **Identity and Creditworthiness**
>
> (a) Each Dealer Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted.

¶ 79 **Submission of IIROC Counsel** - IIROC counsel submitted that the Respondent failed to take the

proper steps and conduct the appropriate due diligence when opening the Account for the Trust to understand the essential facts concerning the manner in which investment decisions were to be made by the Trust.

¶ 80 IIROC maintains that the NAAF's were flawed in many respects and did not contain all pertinent information relative to the Trust, specifically:

(a) The trading authorities were wrong. Only the three First Nation Trustees were named as individuals with trading authority over the Account, when the Trust Indenture provided that all decisions of the Trust were to be made by a majority of the four Trustees which included the Corporate Trustee.

(b) The Account was opened without the involvement or the authorization of the Corporate Trustee. The documentation relied upon to open the Account consisted of corporate resolutions of the First Nation authorizing the First Nation Trustees to open the Account for the Trust. The Respondent did not obtain any evidence that the opening of the Account by the three First Nation Trustees had been authorized or approved by the Trust or that the three First Nation Trustees were authorized or approved to give investment instructions on behalf of the Trust.

(c) The objectives and risk factors specified were not consistent with the investment policy prescribed by the Trust Indenture, which stated that the Trust's investment policy must be dedicated to the safety of the capital in perpetuity.

(d) Despite the investment policy and that the net value of the Trust was below the Initial Settlement Amount, the Account's investment objectives were listed as:

Capital preservation 30%

Income (with some stability of principal) 30%

Long term growth 20%

Speculation 20%

with risk factors specified as 50% low risk and 50% medium risk.

(e) Upon the value of the assets of the Trust exceeding the Initial Settlement Amount in 2009, the NAAF was updated as follows:

Long term growth 80%

Speculation 20%

with risk factors specified as 100% high risk.

¶ 81 IIROC's position is that the investment objectives and risk factors for the Trust as set out in the NAAF and the Updated NAAF were not consistent with the Trust's requirements. The overriding investment policy for the Trust must be consistent with the Trust Indenture, which provided that the funds of the Trust, and in particular the Initial Settlement Amount, were intended to be preserved in perpetuity and clearly stated that the Trust's investment policy must be dedicated to the safety of the capital in perpetuity.

¶ 82 IIROC counsel urged the Panel to focus on the actions of the Respondent and his failure to take appropriate steps to know his client. He submitted the Account was unique and required special attention and due diligence and a full understanding of the Trust Indenture. He submitted that the ability of the Trustees to invest in permissible investments under the Trustees Act remained subject to the constraints imposed by the Trust Indenture and that understanding the Trust Indenture was critical to knowing the client and properly completing the NAAF and the Updated NAAF.

¶ 83 IIROC counsel refuted the contention of the Respondent that relying on corporate resolutions of the First Nation to open the Account was merely a clerical error, and suggested it demonstrated a fundamental misunderstanding of who could make decisions involving the Trust and went to the heart of the Respondent's failure to know the client.

¶ 84 IIROC counsel noted the Respondent's extensive background and experience and his insistence that he read and knew the Trust Indenture well. His acknowledgment that the Corporate Trustee was given significant power under the Trust Indenture should have caused him to reflect on why the Corporate Trustee was given such powers. He should have insisted on receiving documentation confirming that the Corporate Trustee had authorized the First Nation Trustees to open the Account for the Trust and had authorized the First Nation Trustees to make all the decisions on the Account. By not doing so, he failed to exercise the due diligence necessary to verify essential facts relative to the Trust and its Account.

¶ 85 **Submission of Respondent's Counsel** - Respondent's counsel submitted that the Respondent conducted the necessary due diligence and obtained and reviewed the necessary documentation to support opening of the Account in the manner that it was opened. The Respondent's position is that he properly relied on the representations of the First Nation Trustees to understand the operation of the Trust and investment objectives and risk profile of the Trust. He maintains the terms of the Trust Indenture relieved him from the duty of having to enquire into the propriety of the actions of the First Nation Trustees. He also relies on having received head office approval on the account opening process he used to open the Account.

¶ 86 Respondent's counsel echoed IIROC counsel in making the point that the Account was not an ordinary account and it took the Respondent time to learn about the client and what the Trust Indenture provided for. Respondent's counsel referred to the evidence relating to the numerous meetings the Respondent had with the First Nation Trustees and the Chief and Council of the First Nation as early as one year before opening the Account, which led to the Respondent being able to learn the essential facts about the First Nation and the Trust. He was told by the First Nation Trustees that the Corporate Trustee had no interest in the Trust.

¶ 87 The Respondent relies on the fact that he sent the Corporate Trustee the NAAF and apprised the Corporate Trustee that transactions in the Account would be made on the instructions of the trading officers. He confirmed that written transaction confirmations would be sent to the Corporate Trustee together with monthly account statements.

¶ 88 The Respondent also relies on the fact that, at the time the Account was opened, no objection was raised by the Corporate Trustee as to the manner in which the Account was set up and no request was made to be added as a trading officer. The Respondent's position is that he properly understood the Trust Indenture and although the Corporate Trustee is required to be one of the majority, the Trust Indenture does not require that the Corporate Trustee be one of the persons authorized to give instructions on the Account.

¶ 89 The Respondent's position is that he always received instructions from the First Nation Trustees (who were authorized to give instructions on the Account) and from the First Nation, following a council meeting, which he understood the Corporate Trustee had participated in. For four years, that process and manner of operating were ratified by the Corporate Trustee's actions, until Ms. Villeneuve assumed responsibility at the Corporate Trustee for the Trust.

¶ 90 The Respondent relies on the fact that the Corporate Trustee sent over the funds upon request and only asked to receive copies of account statements as evidence of the Corporate Trustee's concurrence with the manner in which the Account was opened and the funds invested.

¶ 91 **COUNT 2** - It is alleged the Respondent failed, from May 2007 to April 2010, to use due diligence to ensure the recommendations made to the Trust were suitable for the Trust, based upon factors which included its financial situation, investment knowledge, investment objectives and risk tolerance, contrary to IIROC Rule 1300.1(q) and IDA Regulation 1300.19, which read as follows:

> 1300.1
>
> **Suitability Determination Required When Recommendation Provided**
>
> (q) Each Dealer Member, when recommending to a customer 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.

¶ 92 **Submission of IIROC Counsel -** IIROC's position is quite simply that the investments recommended by the Respondent for the Trust since May 2007 were unsuitable for the Trust, given the investment policy prescribed by the Trust Indenture, which required safety of the capital in perpetuity. That restriction imposed by the Trust Indenture is, in the opinion of IIROC, paramount. In support of its position, IIROC counsel relied on the exhibits filed at the hearing, and the evidence of Mr. Gauthier, the IIROC manager of investigations, that on January 10, 2010, the Account had a balance of approximately $8 million, all of which had been invested in mutual funds (90% of which were equity funds). Prior to May 2007, only 23% of the Account had been invested in equity mutual funds.

¶ 93 IIROC maintains that the investment objectives and risk factors for the Trust listed by the Respondent in the NAAF were those of the First Nation Trustees, which were inconsistent with the Trust Indenture. What should have been specified in the NAAF are the investment objectives and risk profile of the Trust. The changes in objectives and the increase in the risk profile of the Trust to 100% high risk in the Updated NAAF were also based on the First Nation Trustees' objectives and risk profile and again, were not consistent with the paramount objectives of the Trust, as prescribed by s.4.01 of the Trust Indenture, which reads as follows:

"Article IV

Powers and Authorities of Trustees

4.01 Guiding Principles

In carrying out the powers, authorities and discretions howsoever available to the Trustees, whether under statute or Law or otherwise, the Trustees shall be guided by the following principles:

…(2) The Trust Fund and, in particular, the Initial Settlement Amount, is intended to be preserved in perpetuity to enable future generations to benefit from the Trust and, without limiting the generality of the foregoing, the Trust's investment policy must be dedicated to safety of the capital in perpetuity;"

¶ 94 It is IIROC's position that only recommendations that ensure "safety of capital" and "preservation of the Initial Settlement Amount in perpetuity" within the meaning of the above clause are suitable for the Trust. IIROC does not take the position that the Trust cannot invest in equities, or other investments "authorized by law for Trustees", however, IIROC maintains the guiding principles enunciated in 4.01(2) of the Trust Indenture take precedent.

¶ 95 As regards the paramount objective of safety of capital in perpetuity, the Respondent argued that in order to preserve capital, current portfolio management theory maintains that the effects of inflation must be considered and an investment policy implemented which is not limited solely to low-risk income producing investments like GIC's and Government bonds. IIROC counsel and counsel for the Respondent made oral submissions in respect of that matter which were followed by written submissions.

¶ 96 The Respondent's position is that the tenets of "Modern Portfolio Management" as described in a report (the **"Report"**)[1] issued by the Manitoba Law Reform Commission should be applied when considering the suitability of the investments recommended by the Respondent for the Trust. That theory involves considering the prudence of the investments made for a trust by trustees using a "portfolio investment" approach. Essentially, the theory entails looking at the suitability of the investments as a whole, rather than considering the suitability of each security.

¶ 97 The Respondent suggests that the suitability of the investments for the Trust should focus primarily on whether they meet the criteria prescribed by s.4.02(2)(c) of the Trust Indenture, which says, after 10 years, investments are to be limited to investments authorized by the *Trustee Act* (Manitoba) for trustees; and investments after 10 years should not be restricted by s.4.01 of the Trust Indenture, which sets out the guiding principles relating to "the preservation of the Trust Fund and, in particular, the Initial Settlement Amount… in

[1] Law Reform Commission, "Trustee Investments: the Modern Portfolio Theory" June 1999.

perpetuity" and dedicating the investment policy "to safety of the capital in perpetuity."

¶ 98 The Respondent takes issue with IIROC's view that under the Trust Indenture, the ability of the Trustees to make investment permitted under the *Trustee Act* (Manitoba) is "subject to" the guiding principles prescribed under s.4.01 of the Trust Indenture, which restricts those investments. The Respondent relies on the progressive nature of s.4.02(2) of the Trust Indenture in restricting investments in the first 10 years to a prescribed mix of low risk debt instruments and thereafter to investments permitted by the *Trustee Act* (Manitoba), to justify the suitability of equity investments. The Respondent argues that if the effect of applying the guiding principles is to restrict all investment to low risk, low yielding investment properties after the 10th year, then that would render meaningless the provisions of clause (c) of s.4.02(2) of the Trust Indenture.

¶ 99 The Respondent therefore maintains that the suitability issue should be considered, having regard to whether the investments were permitted under the *Trustee Act* (Manitoba) applying a "portfolio investment approach" and considering the investments as a whole (rather than the suitability of each specific investment), which, having regard to modern portfolio investing, entails including a growth component in a portfolio to combat the effect of inflation on the "value" of the trust fund.

¶ 100 IIROC counsel has argued that the Report is not relevant, as its recommendations that the tenets of "Modern Portfolio Theory" be incorporated into the *Trustee Act* (Manitoba) have not been adopted and in any event, the Report recommendations are only intended to address situations where a trust deed does not attempt to specify the width of the investment power of the trustees. IIROC maintains that is precisely what s.4.01 of the Trust Indenture does.

¶ 101 The Respondent maintains that the *Trustee Act* (Manitoba) gives trustees the power to invest in a variety of investments in addition to the investment powers prescribed by a trust deed, so long as prudence is exercised. IIROC contends that such additional investment powers, in the case of the Trust, are restricted by the governing principles articulated in s.4.01 of the Trust Indenture, to which the powers granted under s.4.02(2)(c) are subject.

¶ 102 IIROC counsel submitted that the Respondent's position on this matter focuses on the duties and obligations of trustees and fails to focus on the duties and obligations of the Respondent as a Registered Representative in relation to the Trust's investments. In that regard, reference was made to the decision in *Re Gareau* 2011 IIROC 53, where the panel in that case adopted the following findings in *Re Lamoureaux* [2001] A.S.C.D. No. 613 in regard to the obligations of a registrant.

> The obligation to ensure that recommendations are suitable or appropriate for the client rests solely with the Registrant. The responsibility cannot be substituted, avoided or transferred to the client, even by obtaining from the client acknowledgement that they are aware of the negative material factors or risks associated with the particular investment....

¶ 103 IIROC counsel also focused on the Respondent's obligation to know the client so as to be in a position to make suitable recommendations and referred to the panel's observation in *Re Gareau*, supra [Par. 31] that these are "separate concepts but practically interwoven" and that panel's reference to the following observations made by the panel in *Re Steinhoff*, 2011 IIROC 54:

> The "Know Your Client" rule is related to another fundamental duty owed by the financial advisor to his client, which is to ensure that all investments made for the client are suitable for the client and in keeping with the client's investment objectives and risk tolerances. An investment portfolio created by an advisor must be suitable for the client. The advisor must also monitor the ongoing suitability of investments to ensure they continue to remain suitable when there are material changes in the client's personal or financial circumstances, investment objectives or risk tolerances.

¶ 104 IIROC counsel relied on the evidence of Mr. Gauthier, the IIROC investigator, as a clear indication that the investments recommended by the Respondent were not suitable for the Trust, in particular he referenced Mr. Gauthier's evidence in relation to the Trust's financial status as at January 31, 2010 that as of January 31, 2010

the investments in the Account were approximately $8 million, 90% of which were equity mutual funds, and that the value of the assets of the Trust was less than the Initial Settlement Amount at the time.

¶ 105 IIROC maintains that the Respondent failed to understand key terms of the Trust Indenture and in particular that he failed to appreciate or understand.

a. The significance of s.4.01(2) and its relationship to s.4.02(1) of the Trust Indenture;

b. The role of the corporate trustee, as set out in s.4.02 of the Trust Indenture;

c. The ability to question the "propriety" of the First Nation Trustee's actions.

¶ 106 **Submission of Respondent's Counsel** - The Respondent's position is that the investment objectives and risk factors set out in the NAAF and Updated NAAF were consistent with the Trust's requirements, and that all recommendations made adhered to the guiding principles in s.4.01 of the Trust Indenture.

¶ 107 The Respondent maintains that the First Nation Trustees had sought legal advice and were fully aware of their investment powers and the level of risk associated with the prescribed investment objectives.

¶ 108 The Respondent maintains that s.4.02(2) of the Trust Indenture prescribed an ever increasing level of investment risk over the life of the Trust and that after 10 years, the Trustees were limited to investments authorized by law for Trustees. The Respondent submits that s.4.02(2)(c) of the Trust Indenture specifically contemplates a move away from investing in low risk, low yielding investments toward the "prudent investor" approach permitted by law for Trustees.

¶ 109 The Respondent maintains that s.4.01(2) of the Trust Indenture is merely a guiding principle, an enunciation of underlying concepts that must govern the conduct of the Trustees and therefore, the Respondent, but it does not prohibit the Respondent from recommending investments other than low risk, low yield investments merely because of the use of the term "subject to 4.01".

¶ 110 The Respondent maintains that the wording of s.4.02(2) of the Trust Indenture can only reasonably be interpreted to mean there are other ways of preserving the Initial Settlement Amount or preserving the capital in perpetuity besides investing in low risk, low yield, income producing investments.

¶ 111 The Respondent takes the position that the law of trusts recognizes the effect of inflation and erosion of currency value and requires that there be a growth component in any portfolio if it is to be preserved. Accordingly, the reliance on the *Trustee Act* (Manitoba) provides the Trustees with broad investment powers, in addition to the specific power conferred under the Trust Indenture, and therefore, the inclusion of a growth component by the First Nation Trustees, and the Respondent's recommendations, in that regard, were both permissible and suitable.

¶ 112 The Respondent submitted the Modern Portfolio Theory recommended in the Report was adopted in recognition of the dual roles faced by trustees to income and capital beneficiaries of a trust and justifies trustees viewing the portfolio as a whole and balancing risk across a variety of investment types and not just confining trust investments to low income investments for the sake of safety.

¶ 113 The Respondent's counsel noted that Ms. Villeneuve, the person in charge of the Trust with the Corporate Trustee, indicated that she typically saw portfolios 50/50 debt/equity where perpetuity was an objective. The Respondent submitted that as of January 31, 2010, the investments in the Account were 35% in fixed income investments and 65% in medium volatility mutual funds.

¶ 114 Counsel for the Respondent relied on a 23% gain generated in the Account from 2009 to 2010 as evidence of the suitability of the recommendations made by the Respondent.

¶ 115 **COUNT 3** - It is alleged that, from September 2009 until April 2010, the Respondent made unauthorized trades for the Trust and thereby failed to observe high standards of ethics and conduct and that he engaged in conduct and practice which was unbecoming and contrary to the public interest and contrary to IIROC Rule 29.1., which reads as follows:

RULE 29

BUSINESS CONDUCT

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.

¶ 116 **Submission of IIROC Counsel** - IIROC takes the position that, following the receipt by the Respondent of the Corporate Trustee's letter of September 17, 2009 where the President - CEO of the Corporate Trustee advised the Respondent that all future trading instructions on the Account must be authorized by the Corporate Trustee, any subsequent trades made without the consent of the Corporate Trustee were unauthorized.

¶ 117 IIROC notes that the Respondent acknowledged receiving the September 17, 2009 letter as well as similar letters from the Corporate Trustee dated December 10, 2009 and January 11, 2010, each of which advised the Respondent that he had breached the requirements of the Trust Indenture by opening the Account without naming the Corporate Trustee a signing authority and requested that the Account documentation be changed to name the Corporate Trustee as a signing authority.

¶ 118 IIROC relies on the fact that despite receiving the above referenced letter, the Respondent continued trading in the Trust's Account without authorization form the Corporate Trustee.

¶ 119 IIROC also relies on the February 10, 2010 letter of the Corporate Trustee to the Respondent, which noted trading in the Account by the Respondent, reiterated the advice given in the September 17, 2009 letter referenced above, and instructed the Respondent to immediately cease all trading in the Account of the Trust. IIROC maintains that the Respondent earned commission of $137,000 on unauthorized trades between September 18, 2009 and April 2010.

¶ 120 IIROC counsel submitted that the Respondent's interpretation of the Trust Indenture was flawed and his resulting failure to include the Corporate Trustee as a person with trading authority on the improperly completed NAAF and Updated NAAF does not relieve him from his obligation to obtain proper authorization from the Trust for all trades which included the consent of the Corporate Trustee. Mere acquiescence is not sufficient to imply consent of the Corporate Trustee, nor is it appropriate for the Respondent to have assumed the consent of the Corporate Trustee had been given.

¶ 121 **Submission of Respondent's Counsel** - The Respondent takes the position that he obtained all necessary documentation from the First Nation to support opening the Account in the way it was opened and that he properly relied on the terms of the Trust Indenture and the representations of the First Nation Trustees in completing the Account opening documentation. He also maintains that he sought and received FFS head office approval of the Account opening documentation.

¶ 122 The Respondent's position is that under IIROC Rule 200.1, he is prohibited from taking trading instructions from persons not having trading authority over an Account. Accordingly, he was obligated to take instructions from the three First Nation Trustees having trading authority on the Account and upon doing so, he acted properly and discharged his obligations under IIROC Rules.

¶ 123 The Respondent maintains he advised the First Nation Trustees about the Corporate Trustee's concerns raised in the September 17, 2009 letter and they advised him they would deal with the Corporate Trustee.

¶ 124 The Respondent maintains he was advised by the Chief, one of the First Nation Trustees, that the Corporate Trustee was in agreement with the trading authorized by the First Nation Trustees and the Respondent maintains he did not realize there was a problem until January 2010, after which no trades were conducted on the Account.

¶ 125 The Respondent maintains that the Corporate Trustee was acting in a conflict of interest and if the Corporate Trustee had difficulty with the investment decision process on the Account, which emanated from the First Nation, its remedy was with the First Nation or the courts.

¶ 126 The Respondent submitted that the documentation, the clerical errors and the procedural inconsistencies and the terms of the Trust Indenture should be overlooked in favour of the fact the First Nation was the ultimate beneficiary of the Trust, he opened the Account as directed by the First Nation and acted on instructions from the First Nation. His recommendations resulting in the Trust assets increasing in value and the First Nation benefiting. He therefore should not be punished.

6. ANALYSIS AND DECISION

¶ 127 General - IIROC counsel provided us with the decisions of the hearing panels in the matters of *Re Steinhoff*, supra and *Re Gareau*, supra. In both decisions, the panels undertook extensive reviews of the applicable IIROC and IDA Rules and Regulations, previous decisions of the courts, regulatory tribunals and other hearing panels and came to various conclusions regarding a number of issues relevant to the matters before us. We adopt and thoroughly endorse those conclusions, some of which we have referred to below. We do not consider it necessary to refer to and quote from each of the decisions those panels relied upon in coming to their conclusions. Suffice it to say we accept their analysis and reasoning and the decisions upon which they relied and intend to rely on the analysis of the duties and obligations of registered representatives under the applicable IIROC and IDA Rules and Regulations conducted by those hearing panels and rely on their conclusions, including the following matters of a general nature:

¶ 128 Onus and Standard of Proof:

> "…There is only one standard of proof and that is proof on a balance of probabilities. In all cases, the evidence must be scrutinized with care by the trial judge (or panel). The evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test." *Re Steinhoff*, supra [p.23]

¶ 129 Credibility - The panel in *Re Steinhoff*, supra [p.28] adopted the following test cited by the Ontario Supreme Court of Justice in *Young Estate v. RBC Dominion Securities and Houghton* 2008 O.J. No. 5418 from a decision of the British Columbia Court of Appeal in *Faryna v. Chorney* [1952] 2 D.L.R. 354 at 357, which we likewise adopt.

> 198: " The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanour of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. 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 the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. "

¶ 130 The Panel found Mr. Gauthier, Ms. Villeneuve and Mr. George to be credible witnesses. The evidence given by Mr. Gauthier was clear and concise and was supported by the documentary evidence he referenced. Likewise, Ms. Villeneuve's evidence was clear and concise. She had a good recollection of the events and her explanation of what transpired over the period she was dealing with the Trust was reasonable and consistent with the documentary evidence. She answered questions under cross-examination in a straightforward manner and was not evasive or argumentative. Ms. Villeneuve appeared to be a highly qualified, diligent administrator, well versed in dealing with trusts in similar circumstances, who had a clear understanding of the principles governing the operation of the Trust and the restrictions imposed upon the Trustees by the Trust Indenture. Her

considerable experience in dealing with investments of trust funds by similar trusts enabled her to identify what was to be expected from the Respondent.

¶ 131 The evidence given by Mr. George was not of particular relevance. Mr. George appeared to be an honest person who answered questions in a straightforward manner. On the question of whether the First Nation Trustees ever consulted with the Corporate Trustee prior to making decisions and instructing the Respondent, he admitted that did not happen but he appeared sincere in his belief that the Chief had been in constant and regular contact with the Corporate Trustee. It is clear he relied on the Chief and did not question any directive given by the Chief.

¶ 132 Mr. Suppal is a well-educated, intelligent individual with considerable background and experience in the investment industry and in dealing with complex documentation in general. He admitted to reading and understanding the Trust Indenture and the Trust Indenture Amendment (see ¶24 above). The Panel had no hesitation in believing that indeed was the case. However, Mr. Suppal's evidence was of considerable concern to the Panel. Under cross-examination, he was extremely evasive and was masterful at avoiding providing straightforward answers to simple questions, consistently and deliberately attempting to confuse and obfuscate concepts, responsibilities, entities, approvals and countless other important elements fundamental to the essence of his responsibilities under applicable rules and the terms and conditions of the Trust Indenture applicable to the Trustees. His evidence was often inconsistent with the documentary evidence.

¶ 133 On a number of occasions, the Panel did not find Mr. Suppal's testimony to be believable. For example, on numerous occasions, the Respondent signed an acknowledgement on letters he returned to the Corporate Trustee which stated he acknowledged receipt of the letters, the documentation enclosed with those letters, and the trust conditions upon which they were being forwarded, but under cross-examination, Mr. Suppal consistently maintained he was signing merely to confirm receipt of the document only (see ¶47 and ¶55 above). We have considerable difficulty in believing that the Respondent honestly expected the Corporate Trustee to understand that his signed acknowledgments extended only to the receipt of the letters and documents and not as an acknowledgment of the trust conditions upon which they were sent. Surely if that was his intent, the acknowledgments could have been revised to make that clear.

¶ 134 Mr. Suppal's evasiveness was troubling. He was consistently prone to not answering questions (asked on cross-examination), choosing instead to respond in a self-serving manner calculated to distract the focus of the enquiry to some other element of the transactions in question. His answers were often essentially non-responsive. In a number of respects, the Panel did not believe the responses of the Respondent accurately reflected his actual understanding of the Trust and the constraints imposed on the Trustees by the Trust Indenture, but rather were contrived to support his justification for proceeding to handle the account of the Trust in the way he did.

¶ 135 The Panel was also very concerned about the failure of the Respondent to produce the Chief at the hearing to give evidence in support of the representations made by the Respondent in his testimony to the effect that it was his understanding (and he assumed) that the Chief had discussed investment decisions with the Corporate Trustee and that, accordingly, instructions given by the three First Nation Trustees reflected a decision made by all the Trustees, including the Corporate Trustee. Except with respect to two instances, the Respondent did not produce any clear and unequivocal documentation from the Corporate Trustee to support or corroborate the Corporate Trustee's concurrence with instructions given by the First Nation Trustees to the Respondent. The correspondence sent by the Corporate Trustee when the funds were transferred to FFS was not, in our opinion, clear and unequivocal. The Chief would have been a key witness and presumably would have been able to confirm investment decisions had been made by the First Nation Trustees with the consent of the Corporate Trustee and in compliance with the Trust Indenture. The lack of clear documentary evidence confirming the Corporate Trustee's concurrence was given would nevertheless still have remained a fundamental omission on the part of the Respondent (see ¶21 above).

¶ 136 With respect to the Respondent's failure to call the Chief as a witness, the Panel considered the decision in *Les Pro-Poseurs Inc. v. Canada* (2012 FCA) where the court confirmed "The trial court judge was also correct to draw a negative inference from the fact that many of the individuals who supposedly could have

backed up the Appellant's claim were not called as witnesses," and *Singh v. Canada (Citizenship and Immigration)* (1999 IRB) where the panel, in that case, stated "The Panel draws a negative inference from the failure of these key witnesses to provide *viva voce* evidence, given the lack of reasonable explanations for their absence, in a matter that the Panel finds should be of importance to these persons." The Panel, in considering the evidence and the Respondent's testimony, has similarly drawn a negative inference from Mr. Suppal's failure to have the Chief testify.

¶ 137 There are other inconsistencies and contradictions in Mr. Suppal's testimony that have caused the Panel concern. In particular, Mr. Suppal acknowledged that the Account was the account of the Trust, that decisions regarding the Trust are to be made by the four Trustees, and that decisions of the Trustees were to be made by a majority of the Trustees, with the Corporate Trustee forming part of such majority, yet he argued that he was justified in taking trading instructions from the three First Nations Trustees without having obtained clear unequivocal evidence of concurrence from the Corporate Trustee. He defended taking instructions from only the three First Nation Trustees relying on the resolution of the "Board of Directors" of the First Nation, the beneficiary of the Trust, pursuant to which they were designated as individuals with trading authority over the Account. Relying on that resolution, such persons were described by the Respondent as "trading officers" and not as "trustees" in the NAAF. In the result, the NAAF and the supporting documentation prepared by the Respondent constituted misleading disclosure concerning the client and in essence was an attempt by the Respondent to justify not having to secure the approval of the Corporate Trustee for any trading instructions.

¶ 138 On a number of occasions, the Panel did not find Mr. Suppal's testimony to be believable.

¶ 139 Upon considering the documentary evidence and having regard to the Respondent's testimony before the Panel and his previous testimony under oath at his IIROC interview, and after having had the opportunity to observe the Respondent in giving his testimony, we have not found Mr. Suppal to be honest, forthcoming or credible. In the view of the Panel, Mr. Suppal's explanation of his actions in many respects were simply inconsistent with what a practical and informed person would readily recognize as reasonable in the circumstances.

¶ 140 In the Notice of Hearing, IIROC alleges contraventions in three counts, specifics of which are set forth below. For the purposes of disciplinary proceedings, each officer and registered representative of a Dealer Member is required to comply with all the Rules and Regulations required to be complied with by the Dealer Member. Having reviewed the considerable documentary evidence put before us and after considering the testimony of the witnesses and our findings, the Panel is satisfied that we have clear, convincing and cogent evidence upon which to base our decision.

7. DECISION

A. Count 1

¶ 141 The essence of Count 1 is that during the approximately five year period from June 2005 to April 2010, the Respondent failed to use due diligence to learn and remain informed of the essential facts relative to the Trust in connection with the establishment and operation of the Account, contrary to IIROC Rule 1300.1(a) and IDA Regulation 1300.1(a), both of which are identical, and read 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.

¶ 142 The "know your client" rule stated above is of paramount importance for the securities industry. All registrants are required to make diligent and businesslike efforts to learn and record the essential facts and the essential objectives of each client. Knowing the client is a fundamental ongoing obligation that a Registrant must discharge to act in the best interests of clients. It follows, that the account documentation prepared in relation to such client must initially and on an ongoing basis accurately reflect that client's particular situation, including investment objectives and risk profile.

¶ 143 In this case, the client was the Trust. Mr. Suppal was provided with a copy of the Trust Indenture, which he acknowledged reading and which he claimed to have understood. The First Nation was designated the beneficiary under the Trust Indenture. The Account was opened by the Respondent in the name of the Trust, however, supporting documentation included a "corporate" resolution of the "board of directors" of the First Nation, which was signed by the band council of the First Nation.

¶ 144 The Book of Authorities provided by IIROC counsel included, at Tab 4, the IDA Compliance Interpretation Bulletin C-35 dated February 10, 1992. Interpretation Bulletin C-35 is a fairly comprehensive document addressing trusts and how they are to be dealt with by Dealer Members. Paragraph 7 of that bulletin addresses specifically the importance of complying with the "know your client" and suitability rules when dealing with a trust and cautions that necessary enquiries must be made to understand the nature of the Trust, the authority of the trustees, and the identity of the persons authorized to act on behalf of the trust. The Bulletin makes direct reference to Regulation 1300.1 and cautions that Regulation 1300.1 imposes responsibility on Members to understand the general terms and purpose of the trust. The Bulletin goes on in Paragraph 9(b) to highlight the key factors Members must be aware of when dealing with trust accounts and states:

> "The authority of the trustees and any agents authorized to act on behalf of the trust should be determined. If, for instance, it is necessary that two trustees sign contracts, cheques or any other instrument, the record of the Member should reflect this fact and be checked before any written instruction or instrument is accepted from the trust."

¶ 145 Later in Paragraph 9(c), with respect to the "know your client" rule, it states:

> "The new account or know-your-client form should be completed and kept up to date with particular care in the case of a trust in order that the beneficiaries of the trust are known and the investment objectives of the trust understood by the dealer."

¶ 146 In Paragraph 5, the Bulletin states that in the case of a trust, "the trustee is not the agent of the beneficiaries of the trust; a trustee is regarded as dealing as a principal with the Member. There is no legal relationship between the Member and the beneficiaries…"

¶ 147 Mr. Suppal testified he understood the Trust Indenture, he acknowledged that decisions of the Trust were required to be made by a majority vote of the four Trustees, with the Corporate Trustee being part of that majority. Notwithstanding, he opened the Account in reliance on a "resolution of the Board of Directors" of the First Nation (the "beneficiary") and named on the NAAF the three First Nation Trustees specified in the resolution as the persons authorized to give instructions on the Account, Relying on the resolution, the First Nations Trustees were described by the Respondent on the NAAF as "trading officers" and not as "trustees". By doing that, the Account was established in such a way that enabled the Respondent to take instructions from the three First Nation Trustees alone, in obvious contravention of the terms of the Trust Indenture.

¶ 148 Despite receipt of repeated correspondence from Ms. Villeneuve (see ¶57 and ¶58 above) requesting that new account opening documentation be prepared for the Account to properly include the Corporate Trustee, the Respondent apparently did not feel there was any reason to do so and he neglected to respond to the Corporate Trustee's correspondence.

¶ 149 On November 27, 2009, the Respondent prepared the Updated NAAF. The Updated NAAF continued to list three First Nations Trustees as the persons authorized to give instructions on the Account. By way of explanation for the manner in which the NAAF and Updated NAAF were prepared, the Respondent testified (see ¶40 above) that FFS compliance and management concurred in the manner in which the Account was opened and the Respondent maintained that the (corporate) forms he used were the only forms used by FFS in situations where the account was for a person other than an individual. At a later point in his testimony, the Respondent maintained that using the corporate form was a "clerical" error.

¶ 150 The Trust Indenture prescribes certain guiding principles relative to the investment of the funds of the Trust and states in s. 4.01(2) that Trust funds and in particular the Initial Settlement Amount, are intended to be preserved in perpetuity, and states further that, without limiting the generality of the foregoing, the investment

and policy of the Trust "must be dedicated to the safety of the capital in perpetuity" (see ¶31 above).

¶ 151 The Trust Indenture also provides in s. 4.02(2)(c) that as of the date the Account was opened, the investments were to be limited to investments authorized by law for Trustees (see ¶32 above). The NAAF was prepared by the Respondent and the Account was opened on June 8, 2005.

¶ 152 The Trust Indenture Amendment required that the Coupon Bond be maintained and prohibited the sale of the Coupon Bond and the reinvestment of $2,598,000 invested in the Coupon Bond until the net value of the Trust funds was equal to or exceeded the Initial Settlement Amount (see ¶33 above). That occurred on November 25, 2009 (see ¶60 above) and on November 27, 2009 the Respondent prepared the Updated NAAF.

¶ 153 The Respondent prepared the NAAF and the Account was opened with the following investment objectives, and risk profile despite the assets of the Trust being below the Initial Settlement Amount:

Capital preservation 30%

Income (with some stability of principal) 30%

Long term growth 20%

Speculation 20%

Account risk factors were specified as 50% low risk and 50% medium risk.

¶ 154 Following the value of the assets of the Trust exceeding the Initial Settlement Amount the Respondent immediately updated the NAAF on November 27, 2009 and revised the investment objectives and risk profile in the Updated NAAF to be as follows:

Long Term	80%
Speculation	20%

Account risk factors were specified as 100% high risk.

¶ 155 In the view of the Panel, the manner in which the NAAF and the Updated NAAF were prepared by the Respondent in reliance on a corporate resolution signed by the Band Council of the beneficiary of the Trust, clearly indicates that the Respondent failed to take sufficient steps to adequately know his client and demonstrates a fundamental misunderstanding of the persons authorized to act on behalf of the Trust. Further, in the view of the Panel, the investment objectives and risk factors for the Trust set out by the Respondent in the NAAF and in particular in the Updated NAAF, were not consistent with the Trust's requirements. The overriding investment policy for the Trust ought to have been consistent with the Trust Indenture which provided that the Initial Settlement Amount was to be preserved in perpetuity and prescribed that the investment policy of the Trust be dedicated to the safety of the capital in perpetuity.

¶ 156 On the basis of the foregoing, and the other evidence put before us, and after hearing from IIROC counsel, the Respondent and Respondent's counsel, the Panel has no hesitation in finding that the Respondent failed to use adequate due diligence to learn and remain informed of the essential facts relative to the Trust in connection with the establishment and operation of the Account, contrary to IIROC Rule 1300. 1(a) and IDA Regulation 1300. 1(a).

B. Count 2

¶ 157 The essence of Count 2 is that during the three year period from May 2007 to April 30, 2010, the Respondent made unsuitable trades in the Account of the Trust contrary to IIROC Rule 1300.1(q) and IDA Regulation 1300.1(q), both of which are identical, and read as follows:

> 1300.1
>
> **Suitability Determination Required When Recommendation Provided**
>
> (q) Each Dealer Member, when recommending to a customer 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.

¶ 158 The "suitability requirement" as Rule 1300.1(q) is often referred to, has been reviewed in considerable detail by many other tribunals. The Panel in *Re Gareau*, supra [p. 29], concluded that "the suitability of an investment product for any prospective investor will be determined to a large measure by comparison of the rules 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. The panel in that case rejected "any suggestion that the subsequent performance of an investment or the actual reasons for its success or failure are relevant to the suitability assessment" and correctly, in our view, concluded that "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."

¶ 159 Respondent's counsel has, to the contrary, argued that performance is relevant for the purposes of determining suitability and suggested the Morningstar Index, which measures the volatility of mutual funds, is an appropriate gauge of risk and the suitability of a mutual fund. We are not prepared to accept the position taken by the Respondent. In our view, there is no question actual performance of the recommended investment is not to be considered in determining suitability. As the Morningstar Index is based upon an historic analysis of price fluctuation, we do not consider the volatility of a mutual fund as shown on that index as being solely determinative of suitability.

¶ 160 One of the main purposes of completing the NAAF (and the Updated NAAF) was to determine the Trust's investment objectives and risk profile, but regardless, as the Alberta Securities Commission panel stated in *Re Lamoureaux*, supra [at Part IV(B)(3)(b)], "neither the "know your client" obligation or the "suitability" obligation can be fulfilled merely 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 undertaken or not undertaken." As noted by the panel in *Re Gareau*, supra [p. 26], "…the authorities make it clear that the obligations imposed upon a registrant to know their client and provide suitable investment advice are distinct from the information that may or may not be included in a NCAF."

¶ 161 As indicated previously, we are of the view that the information recorded by the Respondent on the NAAF and the Updated NAAF in relation to the investment objectives and risk profile of the Trust was incorrect and inaccurate. The Respondent changing the Trust's risk profile to 100% high risk immediately upon the Trust's funds reaching the Initial Investment Amount was entirely inappropriate and in our view cannot be relied upon when determining the suitability of subsequent investments recommended by the Respondent.

¶ 162 We adopt the test for suitability as stated by the Alberta Securities Commission panel in *Lamoureaux*, supra [Part IV(B)(2)], which was cited by the panel in *Re Gareau*, supra [p. 7]:

> "Determining whether a registrant has satisfied their regulatory obligations in relation to an individual client depends upon the particular circumstances of each case. It requires close analysis of the client's situation and the relationship between the registrant and the client. Both the fiduciary and the regulatory obligations of a registrant may be more or less onerous depending upon the extent of the client's reliance upon the registrant."

¶ 163 In our view, the relationship between the Respondent and the Trust was a fiduciary relationship. The necessary elements of trust, confidence and reliance by the Trustees on Mr. Suppal's skill and knowledge in making suitable recommendations for the Trust were clearly present. The Trustees relied completely on Mr. Suppal's advice. Mr. Suppal, in a letter dated March 8, 2010 to the Corporate Trustee, confirmed he had a fiduciary relationship with the Trust.

¶ 164 In order to discharge his regulatory and fiduciary obligations, it was incumbent on the Respondent to recommend suitable investments for the Trust based upon a full and complete understanding of the Trust Indenture and the Trust Indenture Amendment. The Trust Indenture clearly prescribed guiding principles in

relation to the investment of funds of the Trust and states in s.4.01(2) that the Trust's funds and, in particular, the Initial Settlement Amount are intended to be preserved in perpetuity and that the investment policy of the Trust "must be dedicated to the safety of the capital in perpetuity" (see ¶31 above). In contrast to those guiding principles, the Respondent prepared the Updated NAAF with risk factors specified as 100% high risk and the investment objectives as 80% Long Term and 20% Speculation.

¶ 165 Counsel for the Respondent attempted to justify the investment objectives and risk factors listed by the Respondent in the NAAF and the Updated NAAF and the investments recommended by Mr. Suppal in reliance thereon by suggesting that modern portfolio management theory acknowledges the effect of inflation and the erosion of currency value and requires that there be a growth component in any portfolio if the capital is to be preserved. The Respondent's position is the Trust Indenture authorized an ever increasing level of risk over the life of the Trust and merely prescribed guiding principles as factors to be considered by the Trustees in making investments in accordance with the *Trustee Act*. Respondent's counsel argued that the Trust Indenture included an enunciation of concepts that must govern the conduct of the Trustees and the Respondent, but did not prohibit the Respondent from recommending investments other than low risk, low yielding investments simply because of the mandate to preserve capital. Respondent's counsel maintained that there are other ways of preserving the Initial Settlement Amount and the capital besides investing in low risk, low yield, income producing investments. In defense of that position, she cited the 23% returns generated by the investments selected by Mr. Suppal between 2009 and 2010.

¶ 166 Ms. Villeneuve, in her testimony under cross-examination, confirmed that in the course of administering other trusts with similar investment objectives regarding the preservation of capital, she has seen portfolio managers recommend a 50/50 split for equities and fixed income investments.

¶ 167 Mr. Suppal testified he changed the investment objectives to a more aggressive profile and Account Risk Factors were increased to 100% high risk to allow the Account to be invested in common shares if the authorized persons ever wanted to do that. He also testified investments were purchased upon his recommendations to match the objectives of the Trust as described in the NAAF and the Updated NAAF. He indicated the objectives were changed in the Updated NAAF based upon the authorized persons' desire to achieve a 10% return. By doing that, the Respondent knew, or ought to have known, that by recording the "know your client" information inaccurately, he was also making it difficult for FFS compliance to assess suitability properly.

¶ 168 The IIROC manager of investigations, Mr. Gauthier, in his testimony, relied on the financial statements of the Trust dated as of January 31, 2010 prepared by the Corporate Trustee when commenting on make-up of the assets of the Trust as of that date. Those financial statements confirm the value of the Trust's assets was $9,921,934 at that time (which is $334,066 below the Initial Settlement Amount of $10,265,000) and that the investments in the Account represented $8,486,229 (85%) of that amount. The entire Account was comprised of investments in 123 mutual funds. Mr. Gauthier indicated 90% of those mutual funds were equity funds with 10% being balanced funds (equity and bonds).

¶ 169 While there may be some merit in the argument advanced by Respondent's counsel (see ¶95 to ¶99 above) regarding the appropriate balance between secure debt and equity in the portfolio of a trust client that is governed by a trust deed having preservation of capital as its principal investment guideline, it is not necessary for this Panel to consider the argument and determine what an appropriate balance might be under the circumstances, as in this case there was no balance in the portfolio of the Trust. Following the sale of the Coupon Bond on December 11, 2009, all of the proceeds were invested by the Respondent in mutual funds (see ¶74).

¶ 170 We were not provided with any significant evidence regarding deferred sales charges that were incurred with respect to the mutual fund investments made by the Respondent on behalf of the Trust. Mr. Gauthier confirmed in his testimony that between September 18, 2009 and April 30, 2010, the Respondent received remuneration of $137,079 from trading the Account. Ms. Villeneuve, in a letter to Mr. Gauthier dated September 8, 2010, stated that, in her opinion, based upon information received from the First Nation Trustees, full and complete disclosure of the fees associated with the purchase of the mutual funds was not made by the

Respondent.

¶ 171 Having reviewed the considerable documentary evidence before us, and in particular the various mutual funds comprising the investments of the fund as at January 31, 2010, and after having heard the testimony of the various witnesses and after considering the submission of IIROC counsel and counsel to the Respondent, it is our conclusion that the Respondent failed to ensure the recommendations he made to the Trust were suitable for the Trust and by doing so breached Rule 1300.1(q). Disposing of the Coupon Bond and investing the entire portfolio of the Trust in 123 mutual funds (a significant number of which, in our view, were extremely high risk), which were further encumbered by deferred sales charges, leaves us with no doubt whatsoever that the recommendations of the Respondent were extremely inappropriate and the investments unsuitable.

C. Count 3

¶ 172 The essence of Count 3 is that during the period from September 2009 until April 2010, the Respondent made unauthorized trades in the Account of the Trust and in doing so, contravened IIROC Rule 29.1, which reads as follows:

> **"RULE 29**
>
> **BUSINESS CONDUCT**
>
> 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."

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

¶ 174 The Respondent's position is that all trades made by the Respondent in the Account were authorized by the three First Nation Trustees who were authorized to give instructions on the Account. The Respondent maintains that he was prevented under IIROC Rules from accepting instructions from the Corporate Trustee, or anyone else for that matter, unless or until they were named on the NAAF or the Updated NAAF or a subsequently revised NAAF. In other words, the Respondent is relying on the manner in which he completed the NAAF and the Updated NAAF (i.e., with the three First Nation Trustees alone named as persons authorized to give instructions) as the basis for stating all trades were authorized because those three individuals authorized each trade.

¶ 175 In his testimony, the Respondent acknowledges reading and being familiar with the Trust Indenture. He also acknowledges that the Trust Indenture requires decisions to be made on behalf of the Trust by a majority of the Trustees, with the Corporate Trustee being part of such majority. The Respondent, throughout his testimony, attempted to reconcile the apparent conflict between the provisions of the Trust Indenture requiring mandatory consent of the Corporate Trustee and the manner in which the Account was opened, allowing instructions from the three First Nation Trustees alone. Essentially, the position advanced by the Respondent is that he enquired

about the participation by the Corporate Trustee in the investment decisions and was told by the Chief that the Corporate Trustee was always consulted and participated in making the trading decisions that were communicated to him by the First Nation Trustees. The Respondent stated he relied on that representation from the Chief, and thereafter always assumed the trading instructions authorized by the three First Nation Trustees had been agreed to by the Corporate Trustee. We are skeptical about whether any such enquiry was made by the Respondent, whether any such reassurance was given and if so, whether in fact it was true.

¶ 176 The Respondent provided evidence that the Corporate Trustee approved certain trades on two occasions, but provided no unequivocal, concrete evidence from the Corporate Trustee that it indeed participated in the decision-making process throughout and agreed to all the other trades authorized by the three First Nation Trustees, from time to time. The Chief was not called to confirm the Corporate Trustee was always consulted and verify that he had given such assurances to the Respondent. The Respondent did not call anyone from the Corporate Trustee to testify and substantiate the involvement of the Corporate Trustee in the decision making process and its concurrence with trading instructions given to him by the First Nation Trustees from time to time. Corroborative evidence would have validated the reasonableness of the Respondent making the assumptions he purports to have made that all trades authorized by the First Nation Trustees had been approved by the Corporate Trustee. While not determinative, we have drawn a negative inference from the Respondent's failure to call the Chief and a representative of the Corporate Trustee to corroborate the claims.

¶ 177 Considerable documentary evidence was filed comprised of the following:

(a) various letters from the Respondent to the First Nation, copied to the Corporate Trustee, providing recommendations for various investments and requesting the enclosed authorization be executed by the First Nation Trustees to authorize the proposed trades and that the Corporate Trustee consent to the proposed trades and execute the authorization as evidence of such consent;

(b) various correspondence from the Chief to the Corporate Trustee directing funds be sent to FFS for investment by the Respondent into specified investments, particulars of which were attached;

(c) various correspondence from the Respondent to the Corporate Trustee requesting the consent of the Corporate Trustee to certain proposed trades, particulars of which were attached;

(d) various letters from the Corporate Trustee to the Respondent enclosing funds for deposit into the Account, as requested by the First Nation and/or the Respondent, which funds were to be used for the purpose of certain specified investments. Those letters imposed certain trust conditions on the Respondent and advised "it was not necessary for the Corporate Trustee to execute the consent for the transactions to proceed";

(e) two consents executed by the Corporate Trustee consenting to certain trades specified therein (see ¶51 and ¶52 above).

¶ 178 The gist of what transpired between the Respondent, the First Nation Trustees and the Corporate Trustee in relation to trading in the Account from the date the Account was opened on June 8, 2005 to September 2009, was essentially that the Respondent would recommend investments to the First Nation Trustees (being the persons authorized to provide instructions on the Account), the First Nation would pass a BCR (which was signed by all the band councillors, including the three First Nation Trustees, who were also band councilors) and a form of authorization prepared by the Respondent would be signed by the First Nation Trustees and returned to the Respondent, together with the BCR, thereby authorizing the proposed trades. The BCR and the signed authorization would then be sent by the Respondent or the Chief to the Corporate Trustee with a request that the funds necessary to purchase the recommended investments be sent to FFS. That request would also ask the Corporate Trustee to consent to the proposed investments and sign the authorization and return it to the Respondent. The Corporate Trustee would then comply with the request and send the funds to the Respondent with a letter imposing trust conditions, which included a condition, among others, that "any and all investments must adhere to the Trust [Indenture] and/or Trust [Indenture Amendment] as it relates to "permissible investments" under the Development Trust. In this particular instance, said funds are to be invested as per instructions from the Chief and Council and the Trustees." The letter enclosing the funds also stated that "We

feel it is not necessary to execute the consent in order for the investment transaction to proceed." Upon receipt of the funds and the letter from the Corporate Trustee, the Respondent would sign and return to the Corporate Trustee a copy of the letter acknowledging receipt of the funds and the trust conditions upon which they were being forwarded. The Respondent would then use the funds to acquire the investments he had recommended. On two occasions the Corporate Trustee actually signed and returned the authorization to the Respondent. In all other cases the authorization was not signed by the Corporate Trustee.

¶ 179 It is apparent from the exchange of correspondence between the parties that there was some basis upon which the Respondent could argue trades he made in the Account were either approved by the Corporate Trustee, were not required to be approved or were impliedly approved by the Corporate Trustee. Likewise, there is an argument that can be made that investments had to be made in compliance with the Trust Indenture and only with the clear unequivocal consent of the Corporate Trustee and, since the terms of the Trust Indenture were not strictly complied with, the trades were not properly authorized. Count 3 alleges the Respondent made unauthorized trades on the Account from September 2009 until the Account was closed in April 2010. Accordingly, in determining whether unauthorized trading occurred between those dates, it is not necessary that we consider whether the trading that occurred prior to September 2009 was authorized or not. The history of the trading and the relationship between the parties prior to September 2009 is, nevertheless, relevant when considering what occurred between September 2009 and April 2010. While there is some evidence that that could be construed as constituting an implied consent on the part of the Corporate Trustee prior to September 2009, in our view, the Respondent, nevertheless, failed to satisfy the obligation imposed on a registered representative to obtain clear, unequivocal written evidence of consent from the client to each trade. In that regard, in our view, the Respondent fell short of meeting expectations prior to September 2009.

¶ 180 In August 2009, Ms. Villeneuve assumed responsibility for the account of the Trust at the offices of the Corporate Trustee (see ¶50 above). After a review of the file and applicable documentation relating to the Trust, Ms. Villeneuve determined that the Account at FFS had been opened improperly as the Corporate Trustee was not named as one of the persons whose consent had to be obtained to authorize trading in the Account (see ¶50 above).

¶ 181 On September 18, 2009, at the request of the Respondent, the Corporate Trustee signed a consent authorizing certain trades in the Account of the Trust (see ¶51 above). Ms. Villeneuve indicated that the consent was provided in an attempt to have the Respondent seek and obtain the Corporate Trustee's consent to all future trading. That consent was sent to the Respondent with a letter from the President and CEO of the Corporate Trustee, advising that the Corporate Trustee wanted to meet with the Chief, the First Nation Trustees and the Respondent to discuss changing the FFS documentation relating to the Account "to bring the account authorizations in line with Article 4.02 of the Trust Indenture that calls for the trustees to act by a majority with the Corporate Trustee as one of the majority," and went on to say, "Further, until such time all trading instructions will be authorized by the two aforementioned with the included authorization of the Corporate Trustee as one of the majority." The Respondent signed the acknowledgment of receipt on that letter and returned it to the Corporate Trustee. In his testimony, Mr. Suppal said by signing the acknowledgment, he was only acknowledging receipt of the letter and not agreeing with the contents. Upon receipt of the signed acknowledgment, Ms. Villeneuve testified the Corporate Trustee expected that there would be no further trading in the Account by the Respondent without the consent of the Corporate Trustee. A meeting between the Corporate Trustee and the Chief and the First Nation Trustees was held. The Respondent did not attend the meeting.

¶ 182 Ms. Villeneuve testified that following the September 18, 2009 letter, she sent several unanswered requests to the Respondent for revised Account documentation and on December 10, 2009, sent the Respondent another letter reiterating that the manner in which the Account was opened was in breach of the Trust Indenture and requesting that the Respondent send her revised account opening documents as soon as possible. The Respondent ignored the request and did not send revised account opening documentation. A subsequent letter was sent by Ms. Villeneuve to the Respondent on January 11, 2010, substantially to the same effect.

¶ 183 Between December 11, 2010 and January 30, 2010, the Respondent, without the consent or knowledge

of the Corporate Trustee, sold the Coupon Bond and bought and sold various mutual fund investments in the Account of the Trust.

¶ 184 Having carefully considered the documentary evidence filed in relation to Count 3 and after hearing the testimony of the various witnesses in relation to this matter, the Panel has concluded that upon receipt by the Respondent of the September 17, 2009 letter of the Corporate Trustee, the Respondent knew or ought to have known that the Corporate Trustee was insisting that its consent be obtained before any further trading took place on the Account. Following receipt of the December 11, 2009 letter from the Corporate Trustee, there can be no doubt whatsoever that, to the extent the Corporate Trustee could have been seen in the past to have directly, indirectly or by implication, consented to trading in the Account without its express approval, after the December 11, 2009 letter, it was not reasonable for the Respondent to have considered the Corporate Trustee as approving or consenting to any trading in the Account of the Trust. For reasons stated earlier, we are of the opinion that the client of Respondent was the Trust and that pursuant to the Trust Indenture, decisions of the Trust were to be made by a majority of the Trustees, with the Corporate Trustee forming part of such majority. The failure of the Respondent to have the consent of the Corporate Trustee for the sale of the Coupon Bond or for the purchase or sale of any securities on behalf of the Trust after September 10, 2009 and in particular after December 10, 2009, constituted unauthorized trading on behalf of the Trust and, having regard to the circumstances, such trading constituted conduct detrimental to the public interest and accordingly, a breach of IIROC Rule 29.1. In the opinion of the Panel, the Respondent's flagrant disregard for the position taken by the Corporate Trustee and his continuing to trade without any reasonable belief that the Corporate Trustee was consenting to the trading, knowing full well that the Trust Indenture required decisions of the Trust to be authorized by the Corporate Trustee, is clear evidence of unbecoming business conduct which calls into question the character and business repute of the Respondent, thereby also constituting a breach of IIROC Rule 29.1.

¶ 185 The Panel considers the conduct of the Respondent and the extensiveness of the infractions to be very serious and evidence of a complete disregard of the fundamental rules of IIROC by the Respondent.

8. SUMMARY AND CONCLUSIONS

¶ 186 In summary, for reasons we have set out, we have concluded that IIROC has made out its case, in the respects we have indicated, on Counts 1, 2 and 3.

This Decision may be signed in counterpart.

DATED at Winnipeg, Manitoba this 10th day of June, 2013.

Thomas J. D. Kormylo, Chair

William Welton

Claude Tétrault