

# Re White

IN THE MATTER OF:

**The Investment Dealer and Partially Consolidated Rules**

**and**

**Michael Patrick White**

2024 CIRO 67

Canadian Investment Regulatory Organization  
Hearing Panel (Ontario District)

Heard: September 25-29, November 13-14, 16, 21, 23, 27-28, 2023 and March 17, 25-27, 2024  
in Toronto, Ontario via videoconference  
Decision: August 12, 2024

**Hearing Panel:**

John A. Campion, Chair, Daniel Iggers and Peter Gribbin

**Appearances:**

Marie Abraham, Senior Enforcement Counsel  
Ben Fitzgerald, Senior Investigator  
Charles Gibson and Lucas Cutler, for Michael Patrick Mr. White  
Michael Patrick White (present)

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## DECISION ON THE MERITS

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### I. INTRODUCTION

#### (i) Critical Issues

¶ 1 This is a regulatory proceeding in which CIRO Enforcement alleges the Respondent Michael Patrick White (“Mr. White” or the “Respondent”) failed to use due diligence to ensure certain investment recommendations were suitable for particular clients, MS and the Js.

¶ 2 The narratives in the proceeding, among Mr. White and Enforcement, are starkly contradictory and require an assessment of direct evidence, including evidence based on memory (recent memory, memory refreshed, memory revived, past recollection recorded, and evidence of “negative inference or testimonial evidence” [e.g., “I do not remember, but if it had occurred, I would have remembered”]), cross examinations, implications to be drawn from documents, the day-to-day business practice and relationship among Mr. White and his clients, and corroborations through contemporaneous notes.

¶ 3 The issues to be determined are: “front office” issues in that the contradictions in the evidence lie in testimony given, the meaning of events and words spoken, and documents and words exchanged among Mr. White and his clients. Enforcement did not lead evidence that Mr. White failed to do his “back office” due diligence on the nature of the investments and appropriateness of his recommendations.

¶ 4 Mr. White has formally admitted that certain investments recommended to the Js were not suitable for them in contravention of Rule 1300.1(q) of the Dealer Member Rules (“Rules”) of the Investment Industry Regulatory Organization of Canada (“IIROC”), a predecessor of the Canadian Investment Regulatory Organization (“CIRO”). There will be a finding of a breach of the Rules by Mr. White as regards the Js. As

regards the Js, the Panel must still decide an issue of whether Mr. White advised the Js to sign private placement subscription documents without the Js being able to satisfy the required accreditation, namely holding \$1 million in liquid assets.

¶ 5 As regards MS, the Panel's main goal is to resolve whether CIRO Enforcement made out its case against Mr. White. For the reasons set out below, this Panel finds that CIRO Enforcement did not make out its case of an alleged breach of Rule 1300.1(q) regarding the investment recommendations made by Mr. White to MS.

¶ 6 When MS told Mr. White, in November 2019, that he was being civilly sued on allegations similar to those made in this proceeding and that their eleven-year relationship was terminated, Mr. White expressed his deep disappointment about the credibility of the allegations then made by MS. While MS denies saying it, the Panel finds that MS responded to Mr. White by saying "It's just business". This was a chilling response after more than a decade of service by Mr. White.

¶ 7 The phrase "It's just business" used by MS in the context in which it was stated gives rise to a discussion of trust required in a broker/client relationship.

¶ 8 Mr. White conducted his eleven-year relationship with MS with trust, integrity and dignity.

**(ii) Mr. White**

¶ 9 Mr. White has been a Registered Representative since 1990, employed at a number of firms over his career, including BMO, Dundee Goodman, Richardson Partners ("Richardsons") and, since the beginning of 2016, Echelon Wealth Partners Inc. ("Echelon") in Ottawa.

¶ 10 Allegations against Mr. White have been made by CIRO Enforcement that he failed to use due diligence to ensure his investment recommendations were suitable for certain clients, MS and a married couple, the Js, contrary to Rule 1300.1(q).

¶ 11 Mr. White remains a Registered Representative with Echelon. He has not given any investment advice since January 2020 as he has been on medical leave. He has no prior history of disciplinary proceedings.

¶ 12 Mr. White is and has been under medical care since 2020. The process of this hearing was designed to relieve Mr. White from as much stress as possible in the circumstances to diminish any excessive aggravation to his health.

¶ 13 An introduction to the relationships among MS and Mr. White, and the Js and Mr. White is set out below.

**(iii) First Client: MS and DSHI**

¶ 14 MS was married until the passing of her husband in 2007, who was a senior executive and shareholder of a successful enterprise. MS assumed a position on the board of directors and ultimately voted on the sale of the private shares owned by her deceased husband's estate. The sale resulted in approximately \$10 million in after-tax money.

¶ 15 DSHI was an investment vehicle owned by MS by which investments were made in the market on the advice of Mr. White.

¶ 16 From 2007 to 2008, MS had invested through RBC. MS testified that she left RBC in 2008 to seek the advice of Mr. White, who was then with another investment broker. MS and DSHI invested through Mr. White from 2008 to 2019.

**(iv) Second Clients: RJ and FJ**

¶ 17 RJ and FJ (collectively, the "Js") are married.

¶ 18 The Js met in person with Mr. White on only one occasion when the investment relationship commenced in January 2018. The Js ended the relationship in January 2020.

¶ 19 Mr. White has formally admitted in this proceeding that some of the investments recommended to and purchased by the Js were unsuitable for them and therefore in breach of Rule 1300.1(q).

**(v) Investigator**

¶ 20 Ben Fitzgerald was called to testify as a senior investigator in the Enforcement department of CIRO. His evidence is not necessary on the central issues of credibility. Mr. Fitzgerald gave evidence about the risks of investments made by MS and the Js as against the investment objectives stated in the NAAF and KYC forms of both client sets. He gave testimony about commissions made from the various investments made on behalf of MS and the Js. His evidence was not determinative of liability. Regarding the Js, Mr. White has admitted that the investments recommended to the Js were not suitable for them. Regarding MS, the evidence was not relevant to the underlying issue of whether the Panel accepted the evidence of Mr. White regarding his investment recommendations and actions on behalf of MS or accepted the evidence of MS that she was an unsophisticated investor who remembered little of giving instructions to Mr. White regarding her investment objectives and individual investments. The Panel has accepted the evidence of Mr. White to be preferred over that of MS for reasons that are hereinafter set out. Mr. Fitzgerald's testimony did not change the balance against MS and for Mr. White.

**II. FUNDAMENTALS OF THE ENFORCEMENT PROCEEDING**

**(i) Rule 1300.1(q) – Suitability Obligations**

¶ 21 Rule 1300.1(q) states:

**Suitability determination required when recommendation provided**

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

*IIROC Dealer Member Rule 1300.1(q)*

**(ii) Standard and Elements of Proof**

¶ 22 The standard of proof (lying upon CIRO to prove the essential and determining facts necessary for a successful prosecution made against Mr. White) is made on a balance of probabilities. The evidence brought forward in the prosecution must be clear, convincing, unambiguous and cogent.

*Budzinski (Re), 2023 ABA SC 13 at para 1*

*Re Bergeron 2008 IIROC 08 at para 72*

*F.H. v McDougall, 2008 SCJ No. 54 at para 40*

¶ 23 Counsel for Mr. White has urged that where the consequences to the respondent are significant, the level of proof increases, relying on *Prince v. Ontario (CEO of FSRA), 2022 ONFST 8* at para 105. The Panel does not accept the proposition of a sliding scale of proof on the balance of probabilities depending upon the seriousness of the consequences in the decision. It has been made clear that the standard is one of the balance of probabilities. That is a flexible standard reliant upon the evidence. It is not helpful to further confuse the characterization and application of the standard, as it renders the conduct of a hearing and the analysis of evidence in any particular case subjective and unpredictable. In any event, prosecutions of this type against a professional person with a public reputation are always very serious and should be subjected to a common standard without variation.

¶ 24 Before turning to principles of evidence, credibility, and the evidence itself, it is significant to set out the seven factors drawn from Rule 1300.1(q), and related principles drawn from prior cases against the standard of proof necessary to reach a finding that a registrant has not used due diligence to ensure that each and every one of their investment recommendations is suitable for the client, on the balance of probabilities:

(a) the standard to show due diligence under Rule 1300.1(q) sets out seven factors to consider, namely:

- (i) the client’s current financial situation;
  - (ii) the client’s investment knowledge;
  - (iii) the client’s investment objectives;
  - (iv) the client’s time horizon for the investment;
  - (v) the risk tolerance of the client;
  - (vi) the current investment portfolio composition; and
  - (vii) the risk level;
- (b) the evidence brought under the Rule must prove the facts necessary for a successful prosecution on the balance of probabilities;
- (c) the evidence of the prosecution must be clear, convincing, unambiguous and cogent;
- (d) in the suitability analysis, the suitability obligation is guided by the following legal principles:
- (i) the suitability assessment rests solely upon the advisor, and cannot be transferred to the client even if the client acknowledges the risks;
  - (ii) disclosure of negative factors of an investment to and/or the acknowledgment of the risks in an investment by a client may not be sufficient to fulfil the suitability obligation and does not replace the obligation to assess the suitability that rests on the advisor;
  - (iii) merely completing a Know Your Client (“KYC”) analysis and KYC form at a level of high risk is not sufficient in and of itself to meet the suitability obligation lying upon an advisor as “more is demanded than simply filling out a form with the client”;
  - (iv) the advisor must assess the client’s level of reliance upon their advice and recommendations as a factor to be considered along with overall risk tolerance assessed by the advisor; and
  - (v) one of the significant comparisons is the investment product proposed as against the risk profile of the client;
- (e) the suitability assessment is an obligation of an advisor to determine if an investment is appropriate for a particular client, for which the analysis may be properly carried out in three stages:
- (i) what is the due diligence carried out by the advisor to know the client and the investment products recommended to assess whether the product and client are a match;
  - (ii) applying sound judgment in establishing suitability of the product for a particular client; and
  - (iii) disclosing negative as well as positive attributes of the proposed investment product.

*Re Yahn* 2017 MFDAC, File No. 201746 at para 23

*Marchment & MacKay Ltd. (Re)*, 1999 LNONOSC 319 OSC

*Lamoureux (Re)*, [2001] ASCD No. 613 at pp 19, 20, appeal dismissed [2002] AJ No. 1300 (CA) at p 19

*Re Daubney*, 2008 LNONOSC 338 at para 22

*Re Gareau* 2011 IIROC 53 at para 31

*Re Locke* 2020 IIROC 14 at paras 22, 27 and 90

*Re Phillips* 2013 IIROC 52 at para 56

¶ 25 The analysis of the evidence and law on whether Mr. White failed to “use due diligence to ensure [each of] his investment recommendations were suitable” on the “balance of probabilities” for MS and the Js in breach of Rule 1300.1(q) will consider, inter alia, the following factors:

- (a) credibility and accuracy of the witnesses;
- (b) the quality of their testimony;
- (c) the documents produced;
- (d) consistency with the preponderance of probabilities in the context of documents, existing conditions and chronology of events;
- (e) financial circumstances of the clients;
- (f) investment knowledge and risk tolerance of MS and the Js, respectively;
- (g) accounts investment portfolio composition and risk level;
- (h) completion and content of various New Account Application Forms (“NAAFs”), KYC forms, and other required investment forms measured against client investment objectives and knowledge; and
- (i) professional judgment for each client investment, due diligence and disclosure of negative and positive aspects of each investment recommended by Mr. White.

**(iii) Credibility**

¶ 26 The test to be applied in assessing the credibility of witness testimony is:

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 current 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.

*Faryna v. Chorny*, [1951] 2 BCJ No 152 at para 11

**(iv) Evidence Overview**

¶ 27 Direct testimony was given by MS, RJ and FJ, Mr. Fitzpatrick (CIRO Investigator), and Mr. White. The witnesses were cross-examined.

¶ 28 Mr. White has admitted liability under Rule 1300.1(q) as regards the investments recommended to the Js, but there remains an issue regarding advice allegedly given by Mr. White regarding whether the Js qualified as accredited investors under *the Securities Act*.

¶ 29 The evidence is rife with contradictions. The Panel will resolve those contradictions based on our analysis of the oral testimony, the documents produced, which corroborate certain versions of the events put forward by the parties, including the private placement subscription documents, the NAAF's and the KYC's, and the contemporaneous notes of Mr. White.

**III. ALLEGATIONS**

**(i) Statement of Allegations**

¶ 30 The evidence led and analyzed by the Panel must be measured against the requirement that CIRO Enforcement prove on the balance of probabilities the allegations set out in the Statement of Allegations as follows:

- 1) Between January 2017 and January 2020, [Mr. White] failed to use due diligence to ensure that his recommendations were suitable for certain clients, contrary to Dealer Member Rule 1300.1(q), in particular:
  - a) Between January 2017 and January 2020 [...], [Mr. White] failed to ensure his recommendations were suitable for two sets of clients: MS and her corporate account DSHI, and FJ and RJ [...];
  - b) During the relevant period, [Mr. White] recommended and purchased unsuitable investments for these clients including Exempt Market Products; and
  - c) In the case of FJ and RJ, Exempt Market Products were not suitable in part because these clients did not meet the requirements of being accredited investors.

#### **IV. EVIDENCE**

##### **(i) Evidence of MS**

##### **(a) Direct Evidence**

¶ 31 MS portrayed herself as inexperienced in investments over the eleven years during which she took advice from Mr. White on over \$10-million worth of investments. MS retired in 2017 from her job and was over the age of 65.

¶ 32 MS gave testimony that she did not clearly remember initialling and signing various private placement documents and investment forms (the “MS Private Placement Documents” and the “MS Forms”, collectively, the “Documents”). She testified that she had never signed Documents based on or intended to invest in investments which were high risk or highly aggressive.

¶ 33 MS testified that she wanted low risk investments and never changed that investment direction to Mr. White throughout the decade of investment with Mr. White. MS characterized her meetings with Mr. White as peremptory. MS testified that she was not informed as to the risk of her investment strategy, in particular with respect to private placement investments.

¶ 34 MS testified that she did not appreciate the significance of the “Warning” contained in MS Private Placement Documents indicating that as an investor she could lose all of her money in these investments because they were high risk.

¶ 35 MS testified that Mr. White did not discuss investments with her in any meaningful way, and that she did not discuss the investments with Mr. White nor give any instructions to him regarding investments.

¶ 36 MS continued to invest with Mr. White until 2019. In October 2019, MS told Mr. White that she was suing him for investment losses in a civil action. She also informed Mr. White that she was ending the investor/client relationship.

¶ 37 In the context of the November 2019 statements by MS that she was terminating her relationship with Mr. White, Mr. White testified that MS became verbally abusive, which MS denies. MS said to him that he was either ignorant or incompetent, and complained that she did not understand she was investing in risky stocks and did not know that she had lost money in some of her investments. According to Mr. White, these statements were made for the first time in November 2019. Mr. White gave testimony that he was shocked by the decision of MS, and told her of his concerns, to which MS said: “It’s just business”. MS denies this statement.

¶ 38 The complaint to CIRO was made after the relationship between MS and Mr. White had ended. The lawyer for MS sent a letter to CIRO setting out the detailed complaint against Mr. White after the civil litigation had been commenced on behalf of MS and DSHI.

¶ 39 MS suffered losses of approximately \$200,000, which amounted to 2.2% of her investment portfolio, calculated over three of the seven investment years relevant to this proceeding.

¶ 40 MS testified that she sued Mr. White and Echelon in a civil action, which has not been resolved.

¶ 41 MS has counsel, who appeared as an observer in this proceeding and made comments from time to time. Her counsel wrote an extensive and legally sophisticated letter to CIRO, which was one of the foundations of the prosecution of this case.

**(b) Cross-Examination**

¶ 42 MS testified about the passing of her husband and her involvement with her husband's company. In spite of being on the board of directors and participating in the sale of the shares of the company leading to her wealth, she declared that she knew nothing about a 'liquidity event'. MS did not remember having any discussions for the sale of the shares of her husband's company. While she did not discuss the share value with Mr. White, she did discuss the share value with her husband. While she had a vote on the board of directors, she testified that she just listened.

¶ 43 When describing why she first asked Mr. White to advise her on investments, she indicated, among other reasons, that she left her previous broker because he was about to soon retire. When cross-examined upon the evidence about her previous broker's retirement and faced with the proposition that he was still at RBC ten years later, MS stated that she did not remember.

¶ 44 MS indicated she did not remember her first conversation with Mr. White, nor did she remember visiting the second firm that Mr. White joined, namely Richardsons. She said there was no talk of investments. She complained about the signing of documents, in that the portion of the document which required her initials or signatures were disguised by Mr. White, folded over with a signature flag indicating where to sign and in a manner that she could not see the top of the page she was signing. MS stated she had no recollection of the documents signed.

¶ 45 In cross-examination, MS did admit there were certain general discussions about investments but no discussions about any particular investment or their risks.

¶ 46 MS did agree that she asked Mr. White to buy Starbucks, Canopy, and Tweed. She testified that Canopy came to her attention at work in the context of discussing medical marijuana.

¶ 47 MS stated she did not know anything about stocks or private placements.

¶ 48 MS was cross-examined on details of the relationship as drawn from certain documents. MS was presented with a NAAF signed when she became a client of Dundee Goodman. She did not recollect who wrote the numbers beside her investment objectives. She stated she had no recollection but added she had instructed Mr. White that she was not interested in high-risk investments and her instructions were to keep her money safe.

¶ 49 MS testified that Mr. White attended her office while she was employed to give investment advice and take instructions. She stated that conditions in her office were always chaotic. She testified that none of the discussions regarding investments, which took place in her office over the years, were ever lengthy discussions with Mr. White. She characterized these discussions as a "quick in and out". She testified that there was no discussion of an investment objective that was 100% aggressive growth. She stated that in a check mark beside a box on one of the forms which indicated she had good investment knowledge was not her mark. With respect to her TFSA account, she said that she would never have agreed to an investment objective, which was 70% risk and 30% conservative.

¶ 50 When questioned about meeting with one of the executives at Echelon, MS indicated that she did not know him. She said, "If I had met him, I would have remembered".

¶ 51 When questioned about a NAAF, which indicated a 100% aggressive strategy initialled by her, she testified she did not discuss that strategy with Mr. White and declared that if it had been so "... I would have remembered".

¶ 52 When cross-examined on her intended investment objectives, MS testified that the objectives never changed, saying that "... I would have remembered the changes ...".

¶ 53 MS stated that she did not discuss any of the private placement subscription agreements with Mr. White. With respect to any new investment, Mr. White presented the subscription agreements for private

placement investments in such a way that she had no opportunity to read the pages. She said that Mr. White was always in a hurry and never gave an explanation about the investments. She stated that she simply trusted Mr. White. MS did not remember any discussion about the investment in Medicare.

¶ 54 On the documents, MS signed over eight subscription agreements for MS Private Placement Documents. Each of the subscription agreements contained warnings about the risk of the private placements and the fact she was required to be an accredited investor. MS applied her initials to the warnings in each of the documents and the agreement that she was an accredited investor. She testified that Mr. White told her not to read the documents as she signed them. She indicated Mr. White did not tell her that these investments were risky. MS testified she did not understand the investments were risky.

¶ 55 MS was cross-examined on her evidence that it was her idea to invest in Tweed. She testified she discussed the investment with Mr. White, and he indicated he would look into it. When it was suggested in cross-examination that it was Mr. White who brought the investment in Tweed to her, she testified that she did not remember. She also did not remember discussing the Tweed term sheet with Mr. White. She testified there was no discussion with Mr. White about the investments and added that "... I would remember an in-depth discussion". MS agreed that she made over \$1 million in profits on her \$400,000 investment in Tweed. MS stated she did not know that Tweed was a risky investment.

¶ 56 In cross-examination, an issue arose whether MS knew what a liquidity event was. When faced with the evidence of a liquidity event that occurred while she was a director of her husband's company, MS testified that she understood a liquidity event in that context but not in the context of private placements.

¶ 57 MS testified that her investment knowledge did not increase over the eleven years during which she participated in selling her husband's company, received investment advice and invested with an advisor at RBC and Mr. White. She stated she did not know about preferred shares, bonds, IPOs, flow through shares, with their attendant tax advantages, or common shares.

¶ 58 MS testified under cross-examination that Mr. White only mentioned the idea of risk once in eleven years, and that he never discussed a business opportunity or that he spoke to the managements of companies in which he was recommending investments. Under cross-examination, she did admit that Mr. White may have spoken to the management of Arc Stainless. In regard to the investment in Arc Stainless, MS remembered visiting the plant.

¶ 59 MS testified she did not purchase any stock independently, including Arc Stainless.

¶ 60 MS testified under cross-examination that she never received investor packages, brochures, financial statements or newspaper articles from Mr. White. When it was suggested that Mr. White would give testimony to the contrary, MS said she did not remember the discussion with Mr. White about investment issues.

¶ 61 MS testified she did not know what a financial plan was. When confronted with the fact that her sons had done a financial plan with Mr. White and that he had recommended such a plan to her, she testified that she did not know what it was.

¶ 62 MS testified she did not remember Mr. White discussing commissions received by him and Echelon for investments made. She stated that she did not remember reviewing any of the Echelon or other firm accounts, and that she did not understand them. In this context, MS admitted that she had received statements from Echelon as the president and sole shareholder of DSHI. Again, she said that she seldom looked at the accounts, did not read them, and did not look at each page. When confronted with a pie chart of assets, MS testified she did not understand it and that she never asked about stocks that had declined in value. She simply did not recall it.

¶ 63 MS stated that she did not remember investing \$385,155 in Steel Reef, declaring she knew so little, and she did not understand.

¶ 64 When confronted with details of the notes which had been prepared by Mr. White for the years 2017 and 2018, MS stated she did not recall the events recorded in the notes, including the conversations described therein. MS testified that the conversations did not happen.

¶ 65 When confronted with the notes of the review between Mr. White and MS for the year 2016, MS stated she had no idea and that while the event may have happened, she did not remember. In the face of the notes, she admitted she could not deny them. When confronted with the notes about the investment in Medicare, MS said she could not recall the information contained in the notes.

¶ 66 When confronted with Mr. White's note about MSL and a meeting concerning it, she testified that she did not know about it and said, "I think I would have remembered". Under cross-examination, she admitted she could not deny it had happened.

¶ 67 Under cross-examination on the notes from February to April 2017, MS stated with respect to a number of the entries "I do not remember, but I cannot deny" or "I do not recall".

¶ 68 At the end of her cross-examination, MS was asked in a summary form about her testimony. She agreed that risk was only discussed once with Mr. White; her investment experience did not increase over the eleven years; she never discussed with Mr. White how he would be paid; she never agreed to any high risk investments; she never knew that any of her investments were high risk; she never knew anything about stocks except Tweed and Starbucks; she received only some of her monthly statements; she did not know what private placements were; she never discussed any reasoning for investments with Mr. White; when receiving advice either at the office or at home, she never had time to review the investment documents; she does not recall Mr. White ever saying that he spoke to managements of companies which he was recommending or that he had done research for each company; she did not know that Mr. White had prepared financial plans for her sons; she did not recall signing certain documents; she invested \$800,000 in Turtle Creek without knowing there was any risk of loss warning in the document and on the basis that there was no discussion with Mr. White about the investment in Turtle Creek; she had no recollection of any annual review; she denied ever saying that investments in Valiant and pSvidia were "on her"; did not recall Mr. White saying he discussed the MS Private Placement Documents with managements of the various companies; and on various occasions said that she could not remember it but she could not deny it when faced with the cross-examination on the notes of Mr. White.

**(ii) Evidence of the Js**

**(a) Direct Evidence**

¶ 69 The Js were over the age of 70, married for 50 years and both retired in 2018 when they met Mr. White in person for the first and only time. All other communications were completed by e-mail, phone calls and courier delivery until the relationship was ended in 2020.

¶ 70 The Js first met with Mr. White on January 10, 2018 at his office for their initial investment meeting. The Js had approximately \$400,000 in liquid assets for investments. \$200,000 of these liquid assets were proceeds from the sale of their residential home. On their NAAF completed in January 2018, they indicated that they had an average investment knowledge, were retired, had an annual income of \$35,000 and total liquid assets of \$885,000 and fixed assets of \$525,000 for a total net worth of \$1,410,000. The NAAF indicated their investment objectives were 20% growth and 80% aggressive growth. Their risk tolerance was 20% medium and 80% high.

¶ 71 The Js already owned high risk marijuana investments when they asked Mr. White to be their investment advisor. According to Mr. White, these investments were held in their account and necessitated the investments being designated as high risk in their investment objectives in their KYC and NAAF forms.

¶ 72 The Js gave evidence that they were inexperienced investors when they first met Mr. White. They testified that they did not want high risk or aggressive growth investments.

¶ 73 Mr. White made investment recommendations for the Js from 2018 to 2020. On Mr. White's investment advice, the Js signed private placement subscription agreements to complete investments in Livewell, Clean Seed, Vitality CBD, Natura Naturals, Tilt Holdings, and 1167411 B.C. Ltd.

¶ 74 Mr. White recommended and presented subscription agreements accordingly. These agreements contained warnings that the investments were high risk, and that the investor could lose all of their money. The agreements required the Js to initial the document in several places, including where the warning was spelled out and initial that part of the agreement where the Js declared that they had over \$1 million in liquid assets in

order to qualify as accredited investors entitled to invest in private placements as required under the *Securities Act*.

¶ 75 The Js testified that they did not understand the risks attendant upon investing in private placements (the “Js Private Placements”) and that they did not accept that their investment objectives were aggressive growth and high risk.

¶ 76 The Js testified that Mr. White told them that they could include their home, worth approximately \$400,000 in the liquid asset calculation required to qualify as an accredited investor for private placement investments. The Js testified that Mr. White told them that the \$1 million necessary to be an accredited investor was just a “government thing”.

¶ 77 Regarding the investments made by Mr. White for the Js, Mr. White has admitted that he “failed to use due diligence to ensure the investment recommendations were suitable” under Rule 1300.1(q).

¶ 78 In spite of Mr. White’s admission, there remains an issue for the Panel to decide from conflicting testimonies, namely whether Mr. White gave advice to the Js to declare themselves accredited investors holding \$1 million in liquid assets when they did not strictly meet the criteria.

¶ 79 The Js have been reimbursed for some of their investment losses after settling a civil action brought by the Js against Mr. White and Echelon and have given a full release accordingly.

**(b) Cross-Examination**

¶ 80 Under cross-examination, the Js admitted that they questioned the 80/20 assessment of risk contained in the NAAF but accepted it.

¶ 81 When signing the Livewell private placement subscription application, RJ did not remember seeing the warning. RJ admitted signing the acknowledgement that he had \$1 million in liquid assets. He did not raise the issue with Mr. White, but his wife FJ did.

¶ 82 RJ stated that he did not remember e-mails sent in February 2018 by Mr. White or conversations with Mr. White about investing. RJ remembered having concerns about losses but did not remember the discussion about investing.

¶ 83 Under cross-examination concerning the \$1 million liquid assets accreditation requirement, RJ admitted that he was not truthful in the document but justified the dishonesty by saying that Mr. White had indicated there was no problem in including his house as if it were a liquid asset in the calculation. RJ testified that Mr. White said it was just a formality. RJ testified he took Mr. White’s word.

¶ 84 When commenting upon the January 10, 2018 NAAF, RJ said that everything was true except for the objectives and risk profile.

¶ 85 Under cross-examination, RJ testified that he did not know what an ETF was. When RJ was confronted with an e-mail that he had sent to Mr. White saying that “I have been reading about a new ETF”, RJ stated he did not remember the e-mail, saying “I guess I read about it”.

¶ 86 In cross-examination, RJ characterized himself and his wife as inexperienced investors who depended entirely upon Mr. White’s advice. Other evidence indicated that RJ was knowledgeable in investments and interested in speculative stocks. In a separate e-mail, RJ admitted that he wrote to Mr. White about investing in B.C. and Alberta liquor stores.

¶ 87 When confronted with the proposition that RJ was swearing a falsehood in the Livewell subscription agreement, RJ variously said that he knew it was not true, but he did not remember.

¶ 88 FJ, RJ’s wife, was separately cross-examined. FJ did not recognize her initials on the January 10, 2018 NAAF. FJ did not recall Mr. White discussing any fee-based arrangements and did not recall her investment objectives being discussed at 80/20.

¶ 89 When confronted with the fact that she and her husband invested in risky cannabis stocks before they met Mr. White, FJ could not answer. FJ was of the opinion that she did not know that four cannabis stocks, which she had purchased, were high risk. FJ gave testimony about her concerns in late January 2018 and

February 2018 about losses in her portfolio. FJ did acknowledge that the February 2018 Echelon investment report showed investments in low-risk dividend stocks such as Manulife and Sunlife and the account, which had \$100,000 in cash.

¶ 90 Regarding a TFSA application, FJ stated she did not remember signing the document believing that she was not required to read it. FJ acknowledged that the TFSA required her to sign a declaration that the contents of the TFSA were true and complete. FJ was cross-examined on the January 2018 NAAF stating that the 80/20 numbers were not on the document when she signed it, acknowledging that she might be wrong.

¶ 91 FJ acknowledged that when she signed the private placement subscription agreements, she knew that she did not have the required \$1 million in liquid assets. FJ stated that in the Livewell subscription agreement she noticed the warning about the risks of any investment and acknowledged that she signed the form declaring that she understood the risks.

**(iii) Evidence of Mr. White**

**(a) Direct Evidence**

¶ 92 By direction of the Panel and on consent, Mr. White gave the bulk of his testimony in chief in two affidavits (Exhibits 74 and 75).

¶ 93 Mr. White advised MS and the Js on their respective investments, MS from 2008 and the Js from 2018.

¶ 94 Beginning in 1985, Mr. White was a full-time financial and investment advisor at several brokerages including, *inter alia*, BMO, Dundee Goodman, Richardson Partners, and Echelon. In those 36 years in the industry, Mr. White has never been the subject of a complaint or disciplinary action.

¶ 95 Mr. White gave affidavit evidence and oral testimony regarding the conduct of his day-to-day investment recommendations and relationships with his clients generally and with MS and the Js in particular. Mr. White's handwritten notes for the years 2017 and 2018 were reviewed in detail supporting Mr. White's oral testimony that MS was given regular reviews of her portfolio, had opportunities to make decisions about investments, gave instructions concerning her investments, was enthusiastic about high-risk investments, understood investments in the marijuana sector, energy sector and food sector, and made investments contrary to the advice of Mr. White.

¶ 96 The details are as follows:

- (a) Mr. White ensured that all of his clients were made fully aware of the unpredictability of investing in the stock market;
- (b) MS and Mr. White worked together for over a decade and became family friends, visiting her home on numerous occasions and conducting business in her office and home;
- (c) prior to recommending an investment, Mr. White always did due diligence on the companies considering the business opportunities, the review of management, the capitalization of the company, the news surrounding the company, the risk level of the investment and liquidity, the nature of the investment and, in particular, whether it was a private placement;
- (d) the process was followed regardless of the value of any particular client's portfolio;
- (e) over the eleven years of her relationship with Mr. White, MS signed a NAAF whenever Mr. White changed his employer and MS signed KYC forms at each of the various employers from time to time, as appropriate;
- (f) MS had over \$10 million to invest, received after her husband passed away in 2007;
- (g) MS was Mr. White's biggest client;
- (h) Mr. White would give MS extra time at home or at office to consider investments and to sign the requisite forms as a standard administrative procedure;
- (i) MS was never rushed to approve any investment and had ample time and took the time after questions to consider each investment before purchases were made;

- (j) MS had experience in holding private investments through her husband's shares, understood what a liquidity event was, recommended investments from time to time;
- (k) MS listened attentively to details of investments and would indicate that she understood comments being made to her;
- (l) MS frequently said that her investment objectives were aggressive growth;
- (m) Mr. White sought out investments that would best suit her financial objectives as she directed;
- (n) MS took the position that she could not spend all the money that she had in her lifetime and that her financial well-being was never in jeopardy;
- (o) MS did not suggest the investment in Tweed (in which she made a \$1-million profit) but the investment was recommended by Mr. White to her in 2014;
- (p) Mr. White testified that MS gained increasing confidence in her high-risk investment strategy buoyed by her continuing understanding of the market over eleven years and by successes such as Tweed;
- (q) the risk profile of MS was increased to aggressive growth to accommodate her interest in high-risk investments and her directions to Mr. White;
- (r) MS was advised by Mr. White to have a financial plan prepared for her on Mr. White's proposition that it would help her understand the risks in her investment strategy in the context of her estate planning;
- (s) in 2014, MS invested in Arc Stainless against the advice of Mr. White by withdrawing money from the Echelon account and using some of that money to buy stock in Arc Stainless outside the Echelon account;
- (t) MS was excited to have access to private placements when Mr. White first moved to BMO;
- (u) MS knowingly invested in at least eleven private placements over the years and understood that these were high risk investments with lack of liquidity;
- (v) Mr. White testified about several investments and the details by which MS was informed of the investments, made decisions concerning the investments and ultimately advised her three sons as their investment advisor on her recommendation;
- (w) after MS retired, all of the meetings were at her home; and
- (x) MS constantly raised questions about her investments indicating an increased investment knowledge over time and showing she was informed about stock market and industries including sophisticated techniques of short-term trading, crossing of stocks and the relationship between returns on bonds and risk.

¶ 97 The handwritten notes by Mr. White had been kept in the custody of Echelon until Echelon produced them at the request of CIRO. Mr. White had no opportunity to change the notes before they were produced. Mr. White gave oral testimony that there were personal notes for other clients and other years made as a matter of practice, but Echelon could not locate any of these other notes.

¶ 98 Mr. White gave testimony about his relationship with the Js, including:

- (a) before retaining Mr. White on a recommendation of a business associate of RJ, the Js had achieved large gains in stocks chosen by RJ;
- (b) RJ was interested in continuing his gains in the market and was particularly interested in the marijuana sector;
- (c) after the first meeting, RJ contacted Mr. White via e-mail messages, phone calls and voicemails suggesting investments that he had read about and wanted to bring to Mr. White's attention, being high risk and speculative stocks;

- (d) RJ indicated his desire to invest as an accredited investor;
- (e) RJ indicated that he and his wife had over \$1 million in liquid assets, sufficient to qualify him as an accredited investor;
- (f) Mr. White testified that he at no time suggested that the Js could qualify by using their home as part of the \$1 million in liquid assets;
- (g) Mr. White testified that the Js' main instructions were to purchase high risk stocks; and
- (f) Mr. White admitted in testimony that he "[...] should have been more diligent in explaining that the purchase of the Private Placements was too risky based on their age, employment status, income and asset levels".

**(b) Cross-Examination**

¶ 99 In cross-examination, Mr. White gave an account of his daily work life, including how he kept notes about his interaction with clients. Mr. White testified that he did not take notes of all conversations but, in his notes, was as factual as he judged required in the circumstances. Mr. White testified that, from time to time, Echelon checked whether he was keeping notes in that they were required for compliance purposes.

¶ 100 Mr. White was cross-examined on his final conversations with MS. Mr. White reiterated that the final conversations were unpleasant. He testified that MS changed the reality of their relationship during those discussions in a manner that rendered her statement untruthful.

¶ 101 Mr. White was cross-examined about his professional obligations, requiring him to review investments before he recommended them. He testified that he reviewed the management, capitalization, news and risk levels of investments made in all companies in which he recommended his clients to invest.

¶ 102 Mr. White was cross-examined about his relationship with MS and the opposing narratives between him and MS. Mr. White maintained that his narrative was the correct one.

¶ 103 Mr. White indicated in cross-examination that MS did invest in Arc Stainless using money that she had taken from the Echelon account.

¶ 104 Mr. White was cross-examined on his professional relationship with MS and indicated that MS had a high tolerance for risk; she understood the nature of the investments that had been recommended to her; she had time to consider each of the investments after they were explained to her; and he would never have put her into a financial position where the money she invested would have affected her financial well-being.

¶ 105 Upon cross-examination, Mr. White explained his investment recommendations for DSHI and in particular why the DSHI KYC indicated 100% growth. Mr. White testified that DSHI never achieved investments that qualified as 100% aggressive growth.

¶ 106 Mr. White explained some of the investment recommendations made to the Js. He did not send subscription agreements to the Js himself, but his secretary did. Mr. White explained that he spoke to the Js about the investments and had the documents sent to them so that they had to reflect upon them. This included subscription agreements and KYCs.

¶ 107 When cross-examined about the \$1 million liquid asset qualification regarding the Js, he stated he did not tell the Js to sign the documents when they did not have \$1 million in liquid assets. Mr. White testified that he had been told by the Js that they had \$1 million in assets and therefore qualified as an accredited investor. He did not cross-examine them on the point.

¶ 108 Under cross-examination, Mr. White repeated that RJ wanted high risk investments, in particular in the marijuana sector. When asked about private placements by the Js, Mr. White testified that he explained the private placement documents, the risks and the benefits of these investments.

¶ 109 Under cross-examination, Mr. White indicated that he had never revised his notes which had been produced to CIRO by Echelon and that he had added nothing to them.

**V. RESOLUTION OF CONTRADICTION EVIDENCE**

**(i) Introduction**

¶ 110 The twin pillars necessary to weigh evidence and resolve credibility issues are found in each witnesses' testimony and in contemporaneous documentation.

¶ 111 Memory or recollection is a frail tool for seeking the truth, but it remains a valuable tool.

¶ 112 The inherent probabilities analysis involves a subjective judgment on how people usually behave in a factual setting, knowing that human behaviour is diverse and the individual experiences of triers of facts has limits because of the breadth of human activity.

¶ 113 Contemporaneous documentation is an objective foundation for determining the truth, but it too requires care in the proof of contemporaneity and the accuracy of the documents when made.

¶ 114 Memory evidence must be examined for reliability against other testimony which either corroborates or contradicts that testimony. In this case, memory evidence included recent memory, memory refreshed, and memory revived, and negative inference or testimonial evidence characterized in the phrase "I do not remember, but if it had occurred, I would have remembered". Given the meeting notes of Mr. White and his oral and affidavit testimony of discussions and actions with and on behalf of MS, the Panel accepts the testimony of White regarding the day-to-day and overall relationship between Mr. White and MS on the balance of probabilities. The often-used phrases used by MS in her testimony that "I cannot remember", "I cannot deny", "I do not remember but had it occurred I would have remembered" caused the Panel to prefer the evidence of Mr. White, as corroborated by the notes, over the testimony of MS.

¶ 115 Memory of all types is evidence that must be examined and weighed for reliability by the triers of fact. Testimonial evidence requires an assessment of how an individual witness mind may work. Like all evidentiary analysis, it is based on inherent probabilities and an assessment of the witness' testimony in context of all the other evidence.

¶ 116 The final tool for finding truth is corroboration. The sources of this type of confirmatory evidence can either be other witnesses, documents exchanged by the parties, and/or contemporaneous notes.

*Law of Evidence in Canada, 5th Edition, Sopinka, Lederman & Bryant at paras 16.101 to 16.127*

**(ii) Allegations Made by and Burden of Proof of CIRO**

¶ 117 As outlined in Parts II and III of these reasons, the facts to be reviewed for their truth are relevant if and only if they logically relate to the allegations brought by CIRO Enforcement against Mr. White with respect to the breach of Rule 1300.1(q). CIRO must prove, on the balance of probabilities and on evidence that is clear, convincing and unambiguous, that Mr. White did not use due diligence to ensure his investment recommendations were suitable for MS.

¶ 118 As previously set out, Mr. White has admitted that investments recommended to the Js were not suitable for them and therefore in breach of Rule 1300.1(q). The Panel acknowledges that the number of private placements recommended to the Js were not based on sound judgment for a couple in retirement with limited means. There remains one issue for the Panel to decide regarding the Js, namely whether Mr. White intentionally encouraged the Js to execute private placement subscription agreements when the Js did not meet the required criteria of holding \$1 million in liquid assets.

¶ 119 Turning to the allegations involving investment decisions of MS, there are three stages in the suitability analysis set out above in subparagraph 24(e):

- (i) it is the Panel's finding that the evidence does not prove that Mr. White failed to carry out due diligence on the investment products that he recommended to MS. The only evidence on the issue was led by Mr. White himself. He gave convincing testimony, supported by his own notes, that he was duly diligent on analyzing companies, their management, their products and their future prospects before recommending them to any client;
- (ii) CIRO has led evidence that Mr. White did not exercise sound judgment in establishing suitability of certain high risk investment products for MS. The Panel will review the evidence to assess the testimony of MS and Mr. White as to whether Mr. White did or did not use sound judgment in

establishing suitability. This decision will require a finding of credibility between the fundamentally different narratives put forward by Mr. White and MS, respectively; and

- (iii) the third stage of the analysis is whether Mr. White disclosed the negative as well as the positive attributes of each proposed investment product sufficient to fulfil his suitability obligations to MS. Again, the determination of this issue requires an assessment of the narratives put forward by Mr. White and MS in their testimony and in the context of the documents produced. In this latter regard, the Panel agrees that merely completing KYC forms on investment objectives and risk tolerance are not sufficient to prove suitability. On the other hand, the number of KYC forms and private placement agreement documents setting out high risk tolerance and aggressive investments are an important factor in finding that the narrative put forward by MS is not clear, convincing and unambiguous evidence supporting CIRO's allegation.

### **(iii) Conflicting Narratives of MS and Mr. White**

¶ 120 Without repeating the evidence already set out in Part IV on the testimony of MS and Mr. White, the Panel has concluded that the evidence of Mr. White is to be preferred over the evidence of MS.

¶ 121 MS portrayed herself as an inexperienced investor for herself and DSHI over eleven years. The level of attested inexperience was combined with testimony that she did not understand the investments being recommended to her and did not read numerous private placement agreements, NAAFs, or KYCs which conflicted with her narrative of experience. She testified that Mr. White conducted his relationship with MS in such a fashion that the numerous places where she applied her initials and signature were covered up by Mr. White over the eleven years to avoid her reading the documents. MS claimed that her one successful investment in Tweed was entirely her idea. MS denied that she ever invested in Arc Stainless. MS testified she never received information of the investments being recommended and never read her monthly statements with understanding of what they entailed. This testimony does not carry with it inherent probabilities that would be attached to an active businesswoman who sat on the board of a company and inherited \$10 million to invest over more than a decade.

¶ 122 Mr. White provided a competing narrative to the testimony of MS. He was clear, convincing and unambiguous that he explained each investment to MS, that she had time to consider each investment as she saw fit, that she exercised her own investment judgment from time to time, that he recommended the highly successful Tweed investment and that over time MS became a sophisticated and active investor receiving advice from Mr. White and making her own investment decisions. Mr. White's testimony as an investment advisor with over 30 years of experience and a number of clients for many successful years appeared to be part of a continuing practice for all clients and therefore inherently probable.

¶ 123 As set out above, the number of documents signed by MS over a decade of their relationship indicating a desire for high-risk investments is a factor to be considered. The Panel acknowledges that signing forms and documents is not in itself final proof accepting a high-risk investment strategy, but in this case the number of documents over a number of years would indicate that, if nothing else, MS had numerous opportunities to say no.

¶ 124 The Panel finds it inherently improbable that Mr. White would cover up documents for over a decade in order to hide the fact that he was engaged in a secret investment strategy that he did not want MS to know about.

¶ 125 The notes that Mr. White made (which notes corroborate Mr. White's narrative), combined with his oral testimony of the work and care that he put into his investment advice for all clients, including MS, in the context of a lengthy professional relationship with MS, tip the balance strongly in favour of Mr. White's narrative as opposed to the narrative of MS.

¶ 126 The Panel now turns to the evidence based on memory. The Panel recognizes the importance of memory in this case and accepts that all forms of memory, including recent memory, memory revived, and negative inference memory are worthy of consideration weighing the testimony of Mr. White and MS. The Panel finds that the lack of memory of MS alone on many details lends support to the testimony of Mr. White.

¶ 127 By reason of the above analysis, the Panel accepts the evidence of Mr. White and rejects the evidence of MS, wherever the evidence between the two witnesses conflicts.

#### **(iv) Conflicting Narratives of Mr. White and the Js**

¶ 128 The single issue to be determined between Mr. White and the Js involves the allegation that Mr. White told the Js that they could ignore the fact they did not have \$1 million in liquid assets when declaring themselves to be accredited investors under the *Securities Act*.

¶ 129 The actual conflict in testimony is between FJ and Mr. White, as RJ learned of the allegations from FJ and was not involved directly with Mr. White in the conversation.

¶ 130 The Panel noted that the evidence of both RJ and FJ lacked plausibility in some respects and in particular, with their claim that they were inexperienced investors and wanted to avoid high risk investments. Their own investing strategy before they engaged Mr. White to assist them was itself a high-risk strategy. At times, RJ and FJ were combative when faced with evidence that was contrary to the narrative they put before the Panel.

¶ 131 The Panel accepts the evidence of Mr. White in this regard. In any event, even if the evidence were evenly balanced, CIRO did not make out the allegation on the balance of probabilities.

#### **VI. OTHER ISSUES**

¶ 132 In their submissions, the parties raised three other issues, but the Panel believes, for reasons hereinafter set out, that they are not significant to the major credibility and liability findings which must be made.

¶ 133 The first issue is the role of counsel for MS. There is some suggestion that the role of counsel and his intervention on behalf of MS during the hearing without standing, and the fact that MS gave her testimony from her counsel's office was of consequence in this action. It is not. MS was permitted to have counsel (without standing). Counsel did not abuse his position or in any way negatively impact the decision in this proceeding.

¶ 134 The second issue is the commissions earned by Mr. White as a result of his investment recommendations and the notion that increased commissions arose from investments in private placements. The theory is that Mr. White would make recommendations solely based on his ability to earn higher commissions. There was also a suggestion that MS in particular did not know of the commissions that Mr. White and Echelon were receiving. Mr. White testified that he discussed the commission structure with MS. She testified that she did not recall. The Panel prefers the evidence of Mr. White in this regard and finds that MS knew of the commissions and accepted them.

¶ 135 The third issue is the conduct of the prosecution in what Mr. White's counsel characterized as tunnel vision. This issue arose because CIRO's Enforcement staff requested and received Mr. White's notes from Echelon. The suggestion is that those notes should have been used to reconsider the prosecution against Mr. White based on the allegations related to MS. The Panel does not find this concern about the exercise of prosecutorial discretion to be significant. The panel has stated that the investigator and Enforcement Counsel conducted themselves with fairness and integrity throughout the proceeding. We repeat that sentiment in these reasons.

¶ 136 The Panel concludes and decides that the above three issues do not impact our decision in this proceeding.

#### **VII. CONCLUSION**

¶ 137 The Panel accepts the admission of Mr. White that investment recommendations made by him to the Js were not suitable for them. The Panel concludes therefore that Mr. White is in breach of Rule 1300.1(q).

¶ 138 The Panel accepts the testimony and narrative of Mr. White that: (a) he carried out due diligence on the investment products that he recommended to MS; (b) he exercised sound judgment in recommending certain high risk investment products for MS on the basis that they were suitable for MS having regard to her wealth and financial situation, her investment knowledge, her investment objectives, the time horizon for her investments, her risk tolerance, and the composition of her investment portfolio; in this regard, Mr. White established the suitability of the investments recommended to MS; (c) Mr. White established that he disclosed

the negative as well as the positive attributes of each proposed investment for MS sufficient to fulfil his obligations to his client and concludes that Mr. White showed due diligence in recommending the investments to MS to establish suitability under Rule 1300.1(q). As a result, CIRO Enforcement did not prove that Mr. White breached Rule 1300.1(q) in his investment recommendations to MS.

**DATED** at Toronto, Ontario, this 12 day of August 2024.

“John A. Champion”

John A. Champion, Chair

“Daniel Iggers”

Daniel Iggers, Industry Representative

“Peter Gribbin”

Peter Gribbin, Industry Representative

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