November 18, 2015

IN THE MATTER OF: THE SECURITIES ACT

- and -

IN THE MATTER OF: RAVINDRA KUMAR SUPPAL

REASONS FOR DECISION
OF
THE MANITOBA SECURITIES COMMISSION

Panel:

Panel Chair:	Mr. J.W. Hedley
Member:	Mr. G.J. Lillies
Member:	Mrs. D.L. Janovcik

Appearances:

S. Gingera	)	Counsel for Commission Staff
R.K. Suppal	)	On his own behalf
T. Godfrey A. Clark	)	On behalf of IIROC

By a Notice of Hearing issued by staff of the Investment Industry Regulatory Organization of Canada ("IIROC") dated June 26, 2012, Ravindra Suppal was alleged to have contravened certain IIROC dealer member rules:
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 1300.1A (IDA Regulation 1300.1(a) prior to June 1, 2008 ("Know Your Client");

Count 2: From May, 2007 until April, 2010 the Respondent made unsuitable trades in the Account of the Trust contrary to IIROC Rule 1300.1Q (IDA Regulation 1300.1(q) prior to June 1, 2008) ("unsuitable trades"); and

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 ("unauthorized trades").

Following a four day hearing in Winnipeg the IIROC panel concluded that IIROC had made out its case in respect of all three counts. A separate penalty hearing followed resulting in the imposition of these penalties:

1. A global fine in the amount of $150,000.00 in respect of all charges, inclusive of disgorgement of commissions earned in the amount of $127,000, payable upon such terms as IIROC may permit;
2. A one year suspension from registration with IIROC, provided that Mr. Suppal shall not thereafter be registered until successfully re-writing the Conduct and Practices Examination;
3. A three year period of close supervision upon becoming registered and returning to the industry following the expiration of the period of suspension, and during such three-year period, Mr. Suppal shall not hold the position of branch manager or compliance manager with any Member Firm; and
4. Costs in the amount of $20,000.00 to IIROC upon such terms as IIROC may permit.

The IIROC panel issued written reasons regarding both the liability and penalty phases of this matter. The reasons in respect of liability (the "Liability Decision") were issued on June 10th, 2013 and in respect of penalties (the "Penalty Decision") on September 30th, 2014.

Mr. Suppal brings an appeal of both the Liability Decision and the Penalty Decision (although not expressly making the distinction) to this Commission pursuant to the Manitoba Securities Act (the "Act").

Preliminary to Mr. Suppal's appeal is this motion before us for an order permitting him to present both oral and documentary evidence at his appeal hearing that was not presented at the IIROC hearing.

The oral evidence he proposes to present is in the form of the testimony of 16 individuals. If permitted to appear as witnesses, he submits that they would testify on various subjects:

1. Permission for trades was duly obtained;
2. The relationship between the First Nations Trustees and the Corporate Trustee (as defined further in these reasons);
3. The decision making process among the Chief, Band Council and the First Nations Trustees;
4. Regarding the credibility of one of IIROC's witnesses;
5. Regarding directions given by the compliance department of Mr. Suppal's employer;
6. Suitability of investments;
7. Other miscellaneous matters affecting Mr. Suppal's defence.

He also seeks to file as documentary evidence a large number of documents broken down into the following categories:

1. Documents in relation to suitability;
2. Documents relating to suitability and essential facts – T.E. Wealth Investment Counsel and Portfolio Managers;
3. Documents relating to First Financial Securities Inc., account approval, supervision, compliance, suitability and unauthorized trades;
4. Documents relating to unauthorized trades;
5. Documents relating to essential facts of the Trust;
6. Trust Account profitability;
7. Poor chemistry of the new Corporate Trustee Officer;
8. Credibility of the new Corporate Trustee Officer;
9. Corporate Trustee's concerns not ignored.

Mr. Suppal is so far not represented by counsel in the matter of his appeal to the Commission and was unrepresented at this preliminary motion. We note that he was represented by a lawyer at the IIROC liability phase hearing, but not at the penalty phase hearing. On the surface, the task presented to him would appear to be onerous even with the assistance of legal counsel. Aside from the number of witnesses and the sheer volume of documentation proposed, his motion for permission to present new evidence is not unprecedented. There are useful authorities for our consideration, presented by IIROC and Mr. Suppal, and we have had the benefit of written and oral submissions by both parties.

Mr. Suppal's written and oral submissions were replete with facts and opinions, some of which were more in the nature of evidence than submissions. If he had been represented by counsel some of his assertions (for example, as to the availability of witnesses at the IIROC hearing), might have been in affidavit form, giving IIROC counsel the option to cross examine. We will be careful in our consideration of the "evidence" included in Mr. Suppal's submissions.

The Trust.

Mr. Suppal was registered with IIROC as a Registered Representative and later Branch Manager with First Financial Securities Inc. ("FFS") in Winnipeg. He continues to be an IIROC registrant pending the outcome of his appeal.

The "Trust" referenced above is a monetary fund belonging to the Chemawawin First Nation ("CCN" or the "First Nation") established for the purpose of supporting the

future development of the First Nation and the First Nation members. The Trust was established by Trust Indenture in November of 1990. Mr. Suppal began his involvement with it in June of 2005 when he met with three CCN Trustees and opened a new account on behalf of FFS in the name of "Chemawawin First Nation Development Trust". That was the beginning of the material time frame for the purposes of Mr. Suppal's appeal; the end was April of 2010 when the funds of the Trust were sent elsewhere for management.

References to the "Corporate Trustee" in these reasons and the Liability Decision and the Penalty Decision are to Peace Hills Trust Company, one of the trustees named in the Trust Indenture. References to the "First Nations Trustees" are to three members of CCN including, at all material times, Chief Clarence Easter.

The rules governing the Trust contain certain provisions which were central to the case against Mr. Suppal, to his appeal and to this preliminary motion. Quoting from the Liability Decision:

> "The Trust Indenture governing the operation of the Trust contained certain guiding principles which required that the initial settlement amount (the initial monetary contents of the Trust) 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 Corporate Trustee, as one can see from the wording of the Trust Indenture had, in effect, veto power over trades on behalf of the Trust. That veto power was not in obvious evidence until the latter part of 2009 when steps were taken by the Corporate Trustee, in the form of written communications to Mr. Suppal, to prohibit further trades.

Also central to the case against Mr. Suppal was the new account application form completed by the First Nations Trustees and Mr. Suppal in June of 2005 for the purpose of opening an account for the Trust with FFS. The form, signed by Mr. Suppal and Chief Easter, listed three First Nations Trustees as having trading authority and named Chief Easter as contact person. The Corporate Trustee was named as the bank and "Corporate Trustee for this account", however the Corporate Trustee was not listed as having trading authority.

The motion.

The issue for consideration in this motion is a narrow one: Are we going to allow Mr. Suppal to present the evidence we have described, evidence which was not presented to the IIROC appeal panel.

Reduced to simple terms, Mr. Suppal's position is that this panel has, and should exercise, the discretion to admit new evidence. He is aware of IIROC's position that the introduction of fresh evidence must pass a certain series of tests about which there will be more later, but says that even, though he believes he is able to meet the criteria set forth in the test proposed by IIROC, cases decided in Manitoba establish

a far more liberal test and a lower standard for the admissibility of fresh evidence. In saying that he relies upon two decisions of this Commission:

a) *In the Matter of Jory Capital Inc. and Patrick Michael Cooney* (October 10, 2007) ("Jory"); and

b) *In the Matter of Jose Antonio Pereira* (September 26, 2001).

Chief Clarence Easter.

Although, as mentioned, Mr. Suppal is asking us to allow in-person testimony from 16 individuals, the focus of his motion is Chief Clarence Easter, to whom Mr. Suppal refers as the "architect of the Trust". His position is that Chief Easter spoke for the Trust, made decisions for the Trust and was singularly responsible for harmonizing the various individuals involved with the Trust. He wants the panel to know "did he or did he not give instructions to me…….". (from his oral submission)

His position is that the absence of evidence from Chief Easter represents a material flaw in the IIROC panel proceeding. He states that he had made several attempts to convince Chief Easter to attend. He believes, although unsupported by evidence, that Chief Easter was influenced by IIROC partisans not to attend and that backroom politics thereby deprived Mr. Suppal of a fair and complete hearing. Whatever the cause of his failure to attend the IIROC hearing, Mr. Suppal states that there can be no fair and complete hearing without the testimony of Chief Easter.

We note here that, although there are 15 other witnesses whom Mr. Suppal would like to call, because of the pivotal role apparently played by Chief Easter in the Trust's decision-making process there was a tendency at the hearing of Mr. Suppal's motion to bring Chief Easter into the discussion more than anyone else.

As well, the IIROC panel made the following comments in the Liability Decision regarding the non-appearance of Chief Easter:

> "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 affect 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……. 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 panel drew a "negative inference" from Mr. Suppal's failure to have the Chief testify.

Jory.

Mr. Suppal's position is that Jory created a standard unlike that of any other securities jurisdiction by stating that this Commission (to quote from Jory) "may exercise broader decision making powers when reviewing a Decision made by IDA (now IIROC), not tempered by the usual restrained approach under which other appellant panels must conduct their reviews. This is because the Securities Commission's mandate is to frame its analysis around what it perceives as the public interest. Moreover, this imbues the Securities Commission with an enhanced ability to quash or vary decisions made in prior instances partly because it will have a better degree of familiarity with local markets, local participants and, in general, the public interest." In the Jory Decision, the Commission panel concluded, regarding certain of the aspects of the case by IDA, now IIROC, that "in this area the Commission's perception of public interest differs from that expressed by the IDA panels".

According to Mr. Suppal's argument, the Jory Decision opens the door to a much different definition of the test for the admissibility of fresh evidence – merely that such evidence be relevant.

To this, IIROC responds that Jory does not "in any way set out the parameters of the new evidence test and the section of Jory to which Mr. Suppal referred in argument was "a discussion of what is the standard of review that a commission should use when it's looking at an SRO decision" (from IIROC counsel's oral argument). Finally, the standard employed in Jory should only be invoked in situations where the Commission and an SRO do not agree on the essential or over-arching issue of public interest in reaching a particular conclusion.

IIROC's position regarding Jory, as we have indicated, is that Jory simply addressed "the questions of whether a fully deferential standard of review should be applied to its review of an SRO decision", not in any sense the test for admitting fresh evidence.

Palmer.

In IIROC's submission, the tests for admitting new evidence are the four set down in the case of *R. v. Palmer* (Supreme Court of Canada 1979):

1. The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases;

2. The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;

3. The evidence must be credible in the sense that it is reasonably capable of belief; and

4. It must be such that if believed it could reasonably when taken with the other evidence adduced at trial, be expected to have affected the result.

We will refer to these as the "Palmer Tests". IIROC submits that it has been applied in Manitoba and must be applied by this panel notwithstanding Jory. Indeed, the Manitoba Court of Appeal in *Shier v. Manitoba Public Insurance Corporation* ("Shier") (Manitoba Court of Appeal 2008) stated that:

> "These principles, while first articulated in an appeal of a criminal case, have expanded, with some modification, to appeals in civil matters….. The principles have been applied to administrative tribunals when reviewing decisions of a decision maker."

The Court went on to state that:

> "These principles offer logical and reasonable considerations when exercising discretion……to make a fresh decision because of new information, whether that exercise of discretion is by MPIC (the Appellant), at first instance, or by the Commission on the hearing of an appeal."

We agree with IIROC counsel that the panel in Jory did not intend to create a standard for the introduction of fresh evidence which diverges from the Palmer Tests. The Manitoba Court of Appeal has made it clear, for example in Shier, that the Palmer Tests are applicable in administrative forums such as ours. We see no overriding issue of the public's interests which would cause us to look elsewhere for the appropriate criteria for introduction of fresh evidence. Mr. Suppal, in other words, must establish to our satisfaction that his motion meets the Palmer Tests.

Authorities presented by IIROC counsel have "compressed" the Palmer Tests to the effect that the proposed evidence must be "new and compelling". We accept that this is a useful paraphrasing of the Palmer Tests for our purposes.

Applying the Palmer Tests.

Is it "new"?

As mentioned, Mr. Suppal argued that he had made many attempts to produce Chief Easter at the IIROC appeal hearing: "We tried at least 20, 30 calls..." In his Motion Brief he stated that "although I wanted to present his testimony, Chief Easter declined and I had no power to force him to testify".

IIROC counsel confirmed that IIROC panels only have subpoena powers to compel IIROC registrants or employees to appear at IIROC hearings. This would not apply to potential witnesses such as Chief Easter. Mr. Suppal in fact did not have power to force him to testify. On the other hand, this Commission does have the ability to subpoena witnesses on behalf of litigants.

In reference to the first Palmer test (or the "new" test) and whether the evidence could have been adduced at trial by due diligence, it seems to us that any due diligence on the part of Mr. Suppal would have been thwarted by the lack of subpoena powers on the part of IIROC. Although such due diligence has not been established irrefutably by evidence, it seems to us that a strong argument could be

made that Chief Easter's potential testimony could be perceived as "new" under the first Palmer Test.

Is it compelling?

a) **The Liability Decision**

In their new evidence motion factum IIROC counsel have understandably argued that all, not some, of the Palmer Tests must be met in order for new evidence to be considered.

Mr. Suppal submits that Chief Easter would provide evidence that there was in fact a clear consensus among voting Trustees regarding trades made on behalf of the Trust and that such consensus included the Corporate Trustee, at least until August September of 2009 when the Corporate Trustee expressly prohibited further trading by Mr. Suppal in the form of letters and emails to him.

That, to IIROC, would not alter at all the unauthorized trading aspect of the matter:

> "Thus, even if Chief Easter were to testify that he had told Mr. Suppal that the Corporate Trustee had approved his trading instructions, any reliance on such statements would be unreasonable in the face of the letters received from Peace Hills. Any such testimony from Chief Easter could not negate Mr. Suppal's obligation to ensure that the Corporate Trustee was a part of the decision making process relating to the Trust Account."

We note here that Ms. Villeneuve, who assumed responsibility for the account in August, 2009, gave evidence to refute any suggestion that the Corporate Trustee was part of any consensus regarding trading by Mr. Suppal after September, 2009 and was found by the IIROC appeal panel to be credible in her testimony. We have concluded that any evidence regarding the post-September, 2009 period is not lacking in any material respect. We do not believe that any further compelling evidence is available for that period, including the proposed oral testimony of Chief Easter.

Turning to the period between June, 2005 and September, 2009 we have given consideration to the likelihood that Chief Easter's evidence, if its content is what Mr. Suppal expects, might alter the facts as they were found by the IIROC panel. In our view, the proposed evidence would have its most profound effect on the Know Your Client (count 1). That is, "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 established for the Chemawawin First Nation Development Trust…..". The panel's decision in respect of count 1 discloses that the concern over Mr. Suppal's management of the Trust began in 2005 with the drafting of the account opening document. IIROC Rule 1300.1A (Identity and Credit Worthiness) states that: "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."

The following passages in the Liability Decision are indicative of where Mr. Suppal was found by the panel to have misunderstood or misapplied the Trust Indenture:

13. The Trust Indenture requires that investment decisions be made by a majority of the Trustees and that the Corporate Trustee must be one of the majority.

17. Neither the Corporate Trustee nor any representative of the Corporate Trustee was specified on the NAAF (the New Account Application Form dated June 8, 2005) 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 Avenue address."

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.

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 and when asked whether he verified that the Corporate Trustee was part of the decision making process, he stated in his interview "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, 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."

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 request 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".

85. 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 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 counsel of the First Nation as early as one year before opening the account, which lead 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.

The above citations demonstrate that the appeal panel considered evidence concerning the dynamics among the Chief and his Council and the Corporate Trustee. Plainly speaking, did it matter to the IIROC appeal panel that the First Nations Trustees may have informed Mr. Suppal that the Corporate Trustee had no interest in the Trust?

The following excerpts appear to us to indicate the appeal panel's conclusion that, even if Mr. Suppal was guided by the instructions of the First Nation's Trustees and if Chief Easter were to appear before us and corroborate the correctness of that belief, the IIROC appeal panel reached its conclusions based on the essential definition of "due diligence" as set out in IIROC Rule 1300.1A:

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 Nation 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 First Nation Trustees alone, in obvious contravention of the terms of the Trust Indenture.

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 1300.1A and IDA Regulation 1300.1A.

Finally, we note as indicated by counsel for IIROC that, in paragraph 176, the IIROC appeal panel, while expressing concern over the failure of Mr. Suppal to call Chief Easter and expressing a "negative inference" as a result, the IIROC appeal panel

stated that the failure was “not determinative”. The IIROC panel recognized the acquiescence of Peace Hills Trust for trades occurring before August, 2009:

> 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. While dealing with this instance with count 3, the IIROC appeal panel goes on to say: 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.

The test regarding new evidence is not whether this panel would consider it to be persuasive or relevant as Mr. Suppal urges us to find but rather whether it appears to be likely or even possible that the panel below would have altered its decision with the new evidence at hand. A reading of the panel’s decision leaves us with no doubt that even with the new evidence Mr. Suppal proposes the panel’s decision would not change the course of the IIROC panel’s thinking. The IIROC panel concluded that, even though the failure by Mr. Suppal to produce Chief Easter was troubling, 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”.

In our view, the IIROC panel reached its conclusions in the Liability Decision, notwithstanding any suggestion, corroborated by testimony or not, that the First Nation Trustees had the implied authority to bind the Corporate Trustee when they consented to or directed trades by Mr. Suppal. We believe we are entitled to treat the likely or anticipated evidence of Chief Easter to be superfluous as regards the Liability Decision. The IIROC appeal panel expressly reached its conclusions as to liability on different facts and considerations, even conceding that an argument could be made that there was an implied consent on the part of the Corporate Trustee regarding trades up to September, 2009.

Other witnesses and documents.

We have indicated that Mr. Suppal's submissions emphasized the potential value of Chief Easter's evidence with little or no mention of the remaining 15 witnesses and volumes of documents set forth in his written brief. Counsel for IIROC made mention of the remaining witnesses and as to whether the Palmer Tests apply favourably to them. We accept his submissions and have found that none of them provides an opportunity for new and compelling evidence. We have found the same for the documents Mr. Suppal included with his hearing brief.

It is relevant to note again that Mr. Suppal was represented by legal counsel at the hearing before the IIROC hearing panel. Mr. Suppal's counsel was more than adequately versed in the subject matter before the panel and in the nature of the IIROC hearing, having herself served as an IIROC compliance lawyer.

b) The Penalty Decision

Although the issue of penalties is not literally a “decisive” issue as set out in Palmer, it is an essential phase of the case against him.

At the December 5, 2013 penalty hearing, the IIROC appeal panel was provided with the IIROC Member Disciplinary Sanction Guidelines which included general principles for assessing the gravity of offences by IIROC members as well as 14 “Key Considerations” for the assessment of penalties and recommended sanctions. The panel canvassed decisions on the subject of the purpose of the guidelines and the principles of general deterrence and expectations of the industry.

They did a thorough analysis of the facts as they found them within the framework of the 14 key considerations. The panel, also thoroughly, considered both mitigating and aggravating circumstances in connection with Mr. Suppal's conduct and his background.

We have determined that Chief Easter's testimony can be considered to be new evidence. In the context of the Penalty Decision, can it be considered compelling or more particularly as stated in Palmer: “relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial” and “when taken with other evidence adduced at trial be expected to have affected the result”?

We believe that the evidence of Chief Easter, if it should take the form which Mr. Suppal expects it to and if believed, could realistically affect the nature and extent of the sanctions imposed by the IIROC panel. Having reviewed the Penalty Decision we consider it relevant. In other words, it would pass the Palmer Tests.

There are numerous passages in the Penalty Decision Reasons from which we have found that Chief Easter's testimony, to paraphrase Palmer, could potentially bear upon a decisive issue in this matter and that it could be expected to affect one or more results of this matter's penalty phase. These passages, taken in the context of the penalties imposed, tend to us to illustrate conclusions reached by the appeal panel which might take on a different tone if Chief Easter were to testify as Mr. Suppal hopes him to. We should make it clear here that, in citing excerpts from the Penalty Decision Reasons, we are not implying that the penalties imposed on Mr. Suppal are now open to criticism nor are we taking issue with findings of facts made by the appeal panel. We are stating that, given the wide latitudes afforded the appeal panel on the subject of penalties, there exists the potential for impressions to be formed which can be altered or distorted by evidence or the absence of evidence. Even where culpability is absolute, the imposition of penalties can be a matter of degree.

The excerpts mentioned above are:

> 18. ….(T)he misleading manner in which the Account was opened , in the opinion of the panel, went beyond oversight or innocent mistake and could not be considered unintentional or negligent , but rather, in the view of the Panel, constituted a carefully orchestrated scheme to open the Account in a manner that would avoid scrutiny and detection of the overriding effect the Trust Indenture had over the manner in which the Account was opened and the manner in which funds of the Trust were to be invested.
>
> 19. ….(W)e concluded that the Respondent proceeded with unauthorized trades throughout, knowing full well that the Trust Indenture required decisions of the Trust to be authorized by the Trustee (sic).
>
> 30. (W)e found that the NAAF and the supporting documentation prepared by the Respondent constituted misleading disclosure concerning the client and in essence was an attempt to justify not having to secure the approval of the Corporate Trustee for any trading instructions.
>
> 31. The Decision and Reasons of the Panel identifies numerous incidents of misconduct on the part of the Respondent throughout the period in question in relation to the Account and the Trust and the trading conducted on behalf of the Trust by the Respondent.....
>
> 54. The Panel found the Respondent's conduct to be egregious and found the Respondent's attempts to justify his conduct at the initial hearing and at the Penalty Hearing to be incredulous. His lack of insight into the impropriety of his conduct or the significance of its potential impact on the Trust and its beneficiaries and on the integrity of the securities industry as a whole is most disturbing. His refusal to accept responsibility and his persistent denial that he did anything wrong is of grave concern to the Panel and constitutes a significant aggravating factor. His failure to properly comply with the Know Your Client rule was calculated and deliberate and further aggravating factor.

Taken in context, the above citations make it clear to us that the appeal panel regarded Mr. Suppal as a serial offender, acting essentially alone and in his own best interests. He clearly did not leave a good impression with the panel. Without dealing specifically with the penalties imposed, we find that there is a clear and plain opinion on the part if the panel that Mr. Suppal had an adverse relationship with the Trust as a whole. Chief Easter's failure to appear, from which the appeal panel expressly drew a “negative inference”, obviously did nothing to dispel that opinion, if not reinforcing it.

If, on the other hand, Chief Easter is in fact to be regarded as the architect of the Trust and a man of significant influence and responsibility within the context of the Trust, is that impression not realistically subject to change if Chief Easter were to refute some of the findings made within the penalty phase of this matter?

The IIROC Guidelines provide recommendations for sanctions where breaches of the rules of which Mr. Suppal has been found guilty, namely the Know Your Client, suitability and unauthorized trading sections of the IIROC Rules. We note here that

the minimum fines recommended in respect of breaches in these areas are $10,000 for Know Your Client, $10,000 for suitably and $15,000 for unauthorized trading – or $35,000 cumulatively.

The recommendations further call for a period of suspension in the most “egregious” cases. More particularly they call for a period of suspension, in the case of unsuitable trades, “involving elements of deception and misrepresentation” and, in the case of unauthorized trading, “involving a large number of large value trades”.

The appeal panel ordered a fine of over four times the minimum (although expressly inclusive of disgorgement of commissions earned) and considered Mr. Suppal's conduct to be sufficiently egregious as to merit a one year suspension.

Again, it has been acknowledged by the appeal panel that finders of fact enjoy extensive latitude and discretion in assessing penalties in matters such as Mr. Suppal's. It is reasonably possible, in our view, for that latitude to work in Mr. Suppal's favour in the right circumstances. Perhaps, in the context of his suspension, his behavior could be seen a less egregious if new testimony refutes the presence of “deception and misrepresentation”, at least as regards the First Nations Trustees. One can also realistically envision the testimony of Chief Easter tipping the aggravating/mitigating factors scale in the Penalty Decision.

As such we believe that Chief's Easter's testimony could reasonably be expected to affect the result of such an essential phase and therefore order that it shall be allowed.

As to witnesses other than Chief Easter, Mr. Suppal, in his submissions regarding the Penalty Decision, has argued that such witnesses, along with new documentary evidence, should be allowed in support of his appeal of the penalties imposed. He submits that these witnesses and documents would contradict the IIROC panel’s findings on the subjects of suitability, Know Your Client and unauthorized trades as those findings affected the penalty phase of the matter. That is possible, but our view of those witnesses and documents in the context of the Palmer Tests is the same as it is in respect of the liability phase. In particular, the proposed evidence fails the “new evidence” test in that, by “due diligence, it could have been adduced at trial”. We see nothing in Mr. Suppal’s submissions to persuade us that the witnesses he has named could not have been called to testify with reasonable effort.

Lastly, we strongly advise Mr. Suppal to retain the services of legal counsel to have conduct of the examination of Chief Easter and to assist in the presentation of his appeal.

J.W. Hedley
Hearing Chair

G.J. Lillies
Member

D.L. Janovcik
Member