Re Gareau

IN THE MATTER OF:

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

and

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

and

Kenneth Gareau

[2011] IIROC No. 53

Investment Industry Regulatory Organization of Canada
Hearing Panel (Saskatchewan District Council)

Hearing: May 30, May 31, June 1, June 2 and June 3, 2011 in Saskatoon, Saskatchewan
Written Submissions Completed: July 11, 2011
Decision: September 26, 2011
(158 paras.)

Hearing Panel:
Daniel Ish, Q.C. (Chair), William Welton, Eric Wray
Appearances:
Paul Smith, Gil Gauthier, for IIROC
William Howe, for the Respondent
Kenneth Gareau, the Respondent

DECISION AND REASONS

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1. INTRODUCTION

¶ 1 The Respondent, Mr. Kenneth Gareau, on April 15, 2011 was given notice of a hearing before the present panel to determine whether he contravened certain by-laws, rules and regulations of the Investment Industry Regulatory Organization of Canada (IIROC). At all material times the Respondent was a Registered Representative (RR) working at a sub-branch of Dundee Securities Corporation in Regina, Saskatchewan. IIROC designated the hearing as being in the standard track. The Notice of Hearing and the Hearing are pursuant to Part 10 of Dealer Member Rule 20 of IIROC and to Section 1.9 of Schedule C.1 to Transition Rule No. 1 of IIROC. A hearing was conducted in Regina, Saskatchewan over five consecutive days from May 30 to June 3, 2011. IIROC was represented by Senior Enforcement Counsel and the Respondent, Mr. Gareau, who was in attendance, was represented by legal counsel. Written submissions were completed on July 11, 2011.

¶ 2 The allegations brought by IIROC were linked to the period of time from approximately May 2006 to early 2009. Although part of this relevant time period includes June 1, 2008, when the Investment Dealers' Association of Canada transitioned into IIROC, there is no dispute that, at all material times, the Respondent was continuously registered with the IDA and IIROC and was subject to the same regulatory requirements of

both organizations.

2. ALLEGATIONS

¶ 3 The allegations against the Respondent relate to his dealing with two client families: Bob and June Howden and Jean and Emilie Raimbault. Specifically the contraventions that are alleged by IIROC are:

> **Count 1**
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> Between May 2006 and June 2008 the Respondent acted contrary to IDA By-law 29.1 and IIROC Dealer Member Rule 29.1 by recording inaccurate income, risk tolerance, and investment knowledge of two separate client families on their client account forms.
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> **Count 2**
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> Between July 2006 and October 2008, the Respondent acted contrary to IDA Regulation 1300.1(q) and IIROC Dealer Member Rule 1300.1(q) by failing to ensure recommendations he made for two client families to purchase and hold securities were suitable for the clients.
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> **Count 3**
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> In September 2007 the Respondent acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by selling an income producing bond against the express wishes of a client.

¶ 4 There is no dispute between the parties with respect to a burden of proof. IIROC must establish on a balance of probabilities that the elements of each count are established before this panel can conclude that there has been a contravention as alleged in the count. The degree of proof is the civil standard (on a balance of probabilities) and not the criminal standard (beyond a reasonable doubt). The courts have found that in disciplinary proceedings the tribunal must be reasonably satisfied that the alleged facts occurred and in making this finding must take into account the totality of the circumstances including the nature and consequences of the facts to be proved, the seriousness of an allegation made and the gravity of the consequences that will flow from a particular finding. The consequences of finding that a Registered Representative was in contravention of IIROC's by-laws, rules and regulations are potentially severe. Thus, it has been held that, "the degree of proof required must be nothing short of clear and convincing based upon cogent evidence which is accepted by the tribunal". (*Re Boulieris* (2004), 27 O.S.C.V. 1597, affirmed [2005] O.J. No. 1984 (Ont. Div. Ct.)

3. BACKGROUND

A. The Howdens

¶ 5 Bob and June Howden were born in 1942 and 1946 respectively. In early 2006 they sold their family farm and equipment with the result that they had in excess of $1 million in liquid, or relatively liquid, assets. They decided to build a house in the town of Fort Qu'Appelle, Saskatchewan, at a cost of approximately $250,000.00. It was their intention to invest their remaining assets and to live off the income from those assets together with any CPP and OAS income that they may receive.

¶ 6 In May 2006 the Howdens met the Respondent for the first time and discussed with him their retirement finances. In the period between May and July 2006 four accounts were opened.

¶ 7 Each time an account was opened a new client application form was completed, commonly known as an "NCAF". The NCAFs for all the accounts recorded the Howden's investment knowledge as "good", their investment objective as "100% capital appreciation", and their risk tolerance as "100% medium". The Howden's income was reported on one of the NCAFs as $40,000.00 per year, and on others as $30,000.

¶ 8 The Howdens signed the NCAFs and specifically acknowledged, by affixing their initials, the characterization of their investment knowledge as good, their investment objective as 100% capital appreciation and their risk tolerance as 100% medium. They deposited funds or transferred securities into their five accounts for a total of nearly $1.2 million.

¶ 9 The Respondent made a number of recommendations of investments beginning in July 2006 through to

May 2008. The preponderance of investments was in Dynamic equity mutual funds. Other investments included a Dynamic Power Hedge Fund, Canada Dominion Resources 2006 II (flow-through shares), CMP Resource 2008 Limited Partnership (flow-through shares), Dundee REIT and Dundee Wealth Inc. common shares.

¶ 10 The Howdens opened more than one margin account, which were increasingly utilized. In May 2008 the Howdens held approximately $1.7 million in investments and owed approximately $552,000 in their margin account, thus a net investment of approximately $1.2 million at that time. In addition to $552,000 drawn on margin, the Howdens established a Home Equity Line of Credit (HLOC) secured by a mortgage on their newly acquired home and borrowed $200,000 on the line of credit to invest with the Respondent. The evidence was that the recommendation to establish the line of credit was made by the Respondent and the mortgage was arranged through a mortgage brokerage company owned by the Respondent.

¶ 11 It is common knowledge that the overall market fell in the fall of 2008 triggered most particularly by the failure of Lehman Brothers in the United States. In October and November 2008 the Howdens moved their investments out of equity mutual funds into money market funds. The losses incurred by the Howdens were approximately 60% of their net investment. As a result of a complaint filed with the Saskatchewan Financial Services Commission and with Dundee Securities, the Howdens received a payment of $500,000 from Dundee in settlement of any claim that they may have had against Dundee but without any acknowledgment of liability or wrongdoing on Dundee's part.

B. The Raimbaults

¶ 12 Jean and Emilie Raimbault were born in 1936 and 1939 respectively. They retired from farming in 2003 and had approximately $200,000 to be invested, which they did with another firm. In August 2007, based on a recommendation, they met with Mr. Gareau to discuss their investments. As a result of that meeting they opened three accounts at Dundee and transferred the approximate $200,000 investments held with another firm to Dundee. In addition to the $200,000, the Raimbaults held a ten year Bell Canada bond with a face value of $51,000 and a coupon of 5%.

¶ 13 As is standard practice, an NCAF was completed for each of the three Raimbault accounts. In the NCAFs the Raimbault's investment knowledge was stated to be good, their investment objective as 100% growth and their risk tolerance as 100% medium.

¶ 14 The Raimbaults transferred, on the advice of the Respondent, the investments held with another firm, which consisted mainly of securities that paid interest or dividend income, some Canadian bank shares and approximately 26% of the investment was in mutual funds. Of that 26%, only about 6-7% was in equity funds and the remainder was in balanced funds.

¶ 15 In October and November 2007, upon the recommendation of the Respondent, the Raimbault's sold their previous investments and invested in three Dynamic Mutual Funds. The three funds were Dynamic Focus and Wealth Management Fund, Dynamic Value Fund of Canada and Dynamic Focus and Resources Fund. All three are equity-based mutual funds. At the time of these purchases the Raimbault's would have been 71 and 68 years of age respectively. Mrs. Emilie Raimbault testified that their only other real asset was their home in Lumsden, Saskatchewan and their only other source of income was CPP and OAS income.

¶ 16 Mrs. Emilie Raimbault testified that she and her husband sought the advice of the Respondent after he was recommended to them. She said that because of their modest investment portfolio they were concerned not to lose money although she acknowledged that they also indicated to the Respondent that they wanted assets that increased in value. She said that all meetings with the Respondent, including telephone communications, involved both her and her husband, Jean Raimbault. She testified that on numerous occasions, prior to the major market decline in the fall of 2008, she and her husband made clear to the Respondent that they had a very low tolerance for risk.

¶ 17 The Respondent, and the members of his staff, utilized a sophisticated system to record virtually all interactions with clients. Virtually every meeting and telephone conversation with a client resulted in an entry in "Maximizer notes" briefly indicating the nature of the communication. As will be discussed in more detail later

in this decision, Ms. Raimbault's evidence concerning the communications of her and her husband with the Respondent about risk tolerance is supported by entries in the Maximizer notes.

C. The Respondent's Professional History

¶ 18 Mr. Gareau joined Mutual Life of Canada as an Insurance Advisor in 1991 and subsequently acquired a license to sell mutual funds. Between 1995 and 1997 he was a mutual fund salesman with DataPlan, which later became Assante Wealth Management. Mr. Gareau later joined Fortune Financial, which was taken over by Dundee Securities in 1997. He completed the Canadian Securities course in 1999 and became licensed as a broker in 2000.

¶ 19 In 2001 Mr. Gareau moved from Saskatoon, Saskatchewan to Regina, Saskatchewan to open an office for Dundee Securities. Initially he was Branch Manager but in 2007 management of the Regina office occurred out of Saskatoon, and at the time of the hearing the Regina office was being managed by an individual in Dundee's Calgary office. Mr. Gareau has always been an independent contractor of Dundee and not an employee.

¶ 20 Mr. Gareau has taken a number of courses including a branch manager's course, option supervisor course, and courses leading to certification both as a financial planner and as a chartered life underwriter. At the time of the hearing, Mr. Gareau testified that he had over 400 families as clients and had approximately $150 million under management. In 1999 the Insurance Council of Saskatchewan fined Mr. Gareau and required him to rewrite the insurance examination following an investigation. At that time he also reimbursed a client $20,000, was suspended by the Investment Dealers Association for two weeks and was required to rewrite an IDA examination.

4. APPLICABLE PRINCIPLES AND THE EVIDENCE

A. Count 1

¶ 21 The essence of the allegation in Count 1 is that Mr. Gareau recorded inaccurate income, risk tolerance and investment knowledge for both the Howden family and the Raimbault family when he completed their NCAFs. The count further alleges that in so doing he breached IDA By-law 29.1 and IIROC Deal Member Rule 29.1. Both of these are identical and state:

> 29.1 Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.
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> For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be compiled with by the Dealer Member.

¶ 22 There are two necessary elements that must be proved to establish a breach of Rule 29.1 as articulated in the count. The first is a factual matter. Did the Respondent record inaccurate income, risk tolerance and investment knowledge? If these facts are established, then do they amount to conduct that is unethical, unbecoming, or detrimental to the public interest?

¶ 23 In total eight new client account forms (NCAFs) were completed for the Howden family and three were completed for the Raimbault family. Five of the NCAFs for the Howdens were completed when they first opened accounts with Mr. Gareau in 2006. In each of the five NCAFs the investment objective was recorded as 100% capital appreciation and risk tolerance was recorded as 100% medium. Also, the Howdens in response to a question on the NCAF that asked: "How would you rate your investment knowledge", responded "Good".

¶ 24 Three other NCAFs were completed. Two of the NCAFs were dated September 14, 2006 to update information for the Howdens on their corporate margin account and their joint margin account. Investment objectives were changed to 70% growth and 30% aggressive growth and risk tolerance was changed to 70% medium risk and 30% high risk. Shortly after this change the Howdens purchased Canadian Dominion Resources 2006 II Limited Partnership (flow through shares).

¶ 25 An NCAF dated June 2, 2008 was completed by the Howdens for their joint margin account. Investment objectives were changed to 60% growth and 40% aggressive growth and risk tolerance was changed to 60% medium risk and 40% high risk. Prior to the date of this NCAF, on May 2, 2008, Mr. Gareau recommended the purchase of $100,000 of the Dynamic Power Hedge Fund which was placed into the joint margin account.

¶ 26 In the first NCAF the Howden's annual income was recorded as $40,000, and in the other four initial NCAFs was recorded as $30,000. In one of the NCAFs completed on September 14, 2006 annual income was "100k" and in the other one of that date as "30k". In the NCAF dated June 2, 2008 annual income was recorded as $30,000.

¶ 27 In August 2007, shortly after retaining the services of Mr. Gareau, Mr. and Mrs. Raimbault completed three NCAFs. In each the investment objectives were recorded as 100% growth and risk tolerance as 100% medium.

¶ 28 The evidence surrounding the completion of the NCAFs by both the Howdens and the Raimbaults is reviewed later in this decision in dealing with Count 2. In summary, it was the evidence of both Mr. Howden and Mrs. Raimbault that the NCAFs were completed in their presence by Mr. Gareau in a rather quick fashion. It was acknowledged by both of them that they had signed the NCAFs and initialed in a number of places, including the section dealing with objectives and risk. Mr. Howden testified that he did not pay much attention to the NCAF documents but, as was his practice, rarely read documents (including contracts) before he signed them. It was Mrs. Raimbault's recollection that in the early meetings with Mr. Gareau when the NCAFs were completed she and her husband Jean were somewhat overwhelmed by the documentation and did not fully appreciate their contents.

B. Count 2

(1) Applicable Principles Concerning "Suitability"

¶ 29 The essence of Count 2 is that Mr. Gareau's recommendations of investments were not suitable for the clients and as such he breached IIROC Dealer Member Rule 1300.1(q) which reads as follows:

> **Suitability Determination Required When Recommendation Provided**
>
> (q) Each Dealer Member, when recommending to a customer the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance.

¶ 30 There is considerable Canadian jurisprudence dealing with the "suitability" obligation of a registrant to determine whether an investment is appropriate for a client. The Alberta Securities Commission reviewed much of the law in an extensive decision in *Re Lamoureux* [2001] A.S.C.D. No. 613. We will not repeat here all that was said in the *Lamoureux* decision concerning the "suitability" obligation; nevertheless, we will review *Lamoureux* and other authorities which set out the principles that must guide this panel in making its determination.

¶ 31 In *Lamoureux* the Commission made reference to two obligations imposed on registrants that are separate concepts but practically interwoven. The first obligation is to "know your client" and the second is the "suitability" obligation, which is the obligation to determine whether an investment is appropriate for a particular client. The Commission commented on the relationship between the New Client Application Form (NCAF) and the obligation to provide suitable recommendations. The Commission stated:

> Neither the "know your client" obligation or the "suitability" obligation can be fulfilled merely by completing poorly-constructed forms or by following a procedure in a perfunctory fashion. Forms and procedures are merely tools that can assist in performing a task and that may provide reminders or evidence of efforts undertaken or not undertaken. (at Part IV(B)(3)(b))

¶ 32 The Alberta Securities Commission in *Lamoureux* provided an overview of the "suitability" obligation that has evolved as a result of various decisions of Securities Commissions in Canada. The following paragraphs from the *Lamoureux* decision, found at Part IV(B)(3)(d), provides that overview:

> We agree with these descriptions of the suitability obligation.
>
> The obligation to ensure that recommendations are suitable or appropriate for the client rests solely with the registrant. This responsibility cannot be substituted, avoided or transferred to the client, even by obtaining from the client an acknowledgment that they are aware of the negative material factors or risks associated with the particular investment.
>
> The obligation on a registrant to ensure that each investment recommended to a client is suitable is a particularly important protection for those clients whose investment experience and sophistication may be insufficient to enable them to fully recognize or assess the risks inherent in an investment. As noted below, disclosure to the client of the negative material factors of an investment, however important, is not necessarily relevant to a suitability determination and cannot replace a registrant's obligation to assess suitability. Acknowledgment on the part of an investor of awareness of the material negative factors or risk does not convert an unsuitable investment into a suitable one.
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> Our view is consistent with the OSC's decision in Marchment & MacKay, supra. There, the OSC considered whether the respondents, who had sent a variety of documents to their clients, could rely on this documentation to satisfy their obligation to ensure that securities sold to their customers were suitable and that they had adequately disclosed to the clients the risks associated with investing in the securities recommended. The OSC, in deciding that the obligation to determine suitability rests with the registrant and cannot be transferred to the client, stated [at p. 4735]:
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> > We reject this attempt to rely on these procedures as an effort to transfer to the customers the burden of determining whether the high risk investments being recommended to them by Marchment salespersons were suitable for purchase by them. The obligation to determine suitability clearly rests with the registrant.

The suitability of an investment product for any prospective investor will be determined to a large measure by comparison of the risks associated with the investment product with the risk profile of the investor. This comparison is probably the most critical element in the registrant's suitability obligation.

Understanding an investor's risk profile is not a simple matter of looking at numbers on an NCAF. Some of the assessments recorded in the NCAFs can have a range of meanings, depending on the context. For example, a wealthy investor indicating a tolerance for "medium risk" might contemplate a tolerance for a larger dollar risk than another investor with a small net worth who selects the same risk category. In neither case does the term make clear what probability of loss is acceptable to the investor. A registrant must truly "know his client".

A risky investment may fit nicely with an investor who has an appetite for risk, the ability to understand the risks associated with an investment product and the capacity to withstand the potential additional outlays or losses associated with the investment. The same product would, however, be inappropriate for an investor with less appetite for risk, less investment sophistication or less capacity to withstand the potential loss.

During this hearing, it was suggested that these Partnership investments failed as a result of fraud and that, but for that fraud, they would have been successful and, therefore, suitable investments. There was insufficient evidence for us to reach any conclusion as to what led to the failure of these Partnerships, but

we reject any suggestion that the subsequent performance of an investment or the actual reasons for its success or failure are relevant to the suitability assessment.

As the OSC stated in Re Dime, supra, [at p. 2693]:

> It is no answer to say that none of the intended customers lost any money. The credibility of the securities markets is damaged - perhaps irrevocably, as to each of the complaints in this case - by conduct such as Dime's.

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

¶ 33 The salient points concerning the "suitability" obligation can perhaps be stated as follows:

(1) The obligation rests solely with the registrant and cannot be transferred to the client.

(2) The obligation is a particularly important protection for clients whose investment experience and sophistication is limited.

(3) An investor's risk profile is not simply a matter of looking at numbers on an NCAF.

(4) The "know your client" and "suitability" obligations must be measured at the time the investment is contemplated. It is not measured in light of subsequent unforeseeable events of either a positive or negative nature.

In addition to the *Lamoureux* decision, we reviewed numerous other authorities including: *Re Daubney* (2008), 31 OSCB 8185; *Re Marchment & MacKay Ltd. et al.* (1999), 22 OSCB 4705; *Re Balanko* [2007] IDACD No. 10; *Re Janiewicz* [2006] IDACD No. 3; *Re Yanor* [2005] IDACD No. 46; *Re Balinski* [2002] BCSCD No. 127; and *Rhoades v. Prudential-Bache Securities Canada Ltd.* [1992] 2 W.W.R. 630 (B.C.C.A.).

¶ 34 In determining the obligations of investment advisors the courts and regulatory bodies have not limited themselves only to a consideration of the rules of the respective regulatory body. In addition, fiduciary obligations imposed by general common law have been relied upon. Again, the *Lamoureux* case addressed this issue by reference to a Supreme Court of Canada decision. The ASC panel stated, at Part IV(B)(2) the following:

> Determining whether a registrant has satisfied their regulatory obligations in relation to an individual client depends upon the particular circumstances of each case. It requires close analysis of the client's situation and the relationship between the registrant and the client. Both the fiduciary and the regulatory obligations of a registrant may be more or less onerous depending upon the extent of the client's reliance upon the registrant.
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> The Supreme Court of Canada discussed the issue in *Hodgkinson v. Simms et al.* (1995) 117 D.L.R. (4th) 161 saying [at p. 183]:
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> > …in Varcoe v. Sterling (1992), 7 O.R. (3d) 204, …in an effort to demarcate the boundaries of the fiduciary principle in the broker-client relationship. Keenan J. stated, at pp 234-36:
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> > > The relationship of broker and client is not per se a fiduciary relationship…Where the elements of trust and confidence and reliance on skill and knowledge and advice are present, the relationship is fiduciary and the obligations that attach are fiduciary. On the other hand, if those elements are not present, the fiduciary relationship does not exist…The circumstances

> can cover the whole spectrum from total reliance to total independence. An example of total reliance is found in the case of Ryder v. Osler, wills, Bickle Ltd. (1985), 49 O.R. (2d) 609, 16 D.L.R. (4th) 80 (H.C.J.). A $400,000 trust for the benefit of an elderly widow was deposited with the broker. An investment plan was prepared and approved and authority given to operate a discretionary account…At the other end of the spectrum is the unreported case of Merit Investment Corp. v. Mogil, Ont. H.C.J., Anderson J., March 23, 1989 [summarized at 14 A.C.W.S. (3d) 378], in which the client used the brokerage firm for processing orders. He referred to the account executive as an "order-taker", whose advice was not sought and whose warnings were ignored.
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> …
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> The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. When the broker seeks or accepts the client's trust and confidence and undertakes to advise, the broker must do so fully, honestly and in good faith. …It is the trust and reliance placed by the client which gives the broker the power and in some cases, discretion, to make a business decision for the client. Because the client has reposed that trust and confidence and has given over that power to the broker, the law imposes a duty on the broker to honour that trust and respond accordingly.
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> In my view, this passage represents an accurate statement of fiduciary law in the context of independent professional advisory relationships, whether the advisers be accountants, stockbrokers, bankers, or investment counselors. Moreover, it states a principled and workable doctrinal approach. Thus, where a fiduciary duty is claimed in the context of a financial advisory relationship, it is at all events a question of fact as to whether the parties' relationship was such as to give rise to a fiduciary duty on the part of the advisor.

¶ 35 The British Columbia Court of Appeal in *Rhoades*, *supra*, said:

> A stockbroker who merely makes sales and purchases on the instructions of clients may well have no responsibility for the wisdom of the transactions involved. The broker may, if asked, agree to give opinions on purchases or sales, and may make it apparent to the client, if not already well understood between them, that these constitute no more than personal opinions, and are not in the nature of considered investment advice. Where, however, as here, the firm and its employees seek to enhance their business by offering guidance to would-be investors - on "growing and managing retirement wealth" and "keeping investments safe," and to serve in "ways that no one else can" through the advice of "two financial advisors with 22 years of combined investment and taxation experience" - they must expect that their advice may be relied on as that of skilled, independent professional advisors. Stockbrokers who carry on business in this way accept responsibilities beyond those involved in bringing together buyers and sellers. They undertake the duty of providing careful, competent, considered professional advice of a sort in which clients, especially those who have no experience of their own to guide them, may well place their complete reliance.
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> …
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> In such circumstances a financial advisor must be taken to assume duties similar to those of any other professional advisor – doctor, accountant, engineer, lawyer – in the sense of being obliged to take reasonable steps to ensure that customers or clients are aware of the available options, and of the main potential benefits and risks associated with them. (at page 635)

And finally, on this point, the Ontario Court of Justice (General Division) in *Nesbitt Thompson Deacon Inc. v. Haupt* [1992] O.J. No. 552 addressed the duty of care owed by a registrant in advising a client. The court stated:

> The relationship between a stockbroker and customer is one of simple agency in the first instance. The broker's primary duty is to carry out the instructions of his client. His remaining obligations are few and

simple: like any agent, he has a duty to act in the interests of the principal and is not permitted to allow personal interest to conflict with the interest of the principal unless this is done with the full consent of the principal. But, like any relationship it can evolve into more varied or complex duties and responsibilities, both in scope and intensity.

If a stockbroker, in his arrangements with his customer, undertakes to provide advice or does provide advice with respect to transactions within a customer's account, the stockbroker then has imposed on him a duty to advise fully, carefully and honestly and will be liable if he does not, although this is qualified to the extent that he will not be liable for honest errors in judgment.

Securities regulatory authorities have often referred to these common law principles in considering the regulatory obligations owed by registrants to their clients. See In the Matter of E.A. Manning Limited et al., (1995) 9 C.C.L.S. 231; In the Matter of Bruce Russell Foerster ("Foerster") (1997) 13 C.C.L.S. 274 [at p. 292]; In the Matter of Marchment & MacKay Limited et at. ("Marchment & MacKay") (1999) 22 OSCB 4705 [at p. 4707] and In the Matter of Dino P. Delellis, William R. Kennedy and the Height of Excellence Financial Planning Group Inc. (1998) 21 OSCB 305 [at p. 312].

We noted that fiduciary and regulatory obligations are not identical. A registrant who would not be in a fiduciary relationship at common law is, nonetheless, generally obliged to conform to Policy 3.1 unless formally relieved of that obligation. Grounds for such relief may parallel the common law assessment of the fiduciary nature of a relationship. For example, some limited service "discount brokers" have recently obtained discretionary regulatory exemptions from some of the obligations imposed by Policy 3.1 in cases in which those registrants and their clients have agreed that the registrants will not provide advice or recommendations to their clients.

In the circumstances more likely to prevail between registrants and typical "retail" clients, the extent of the regulatory obligations imposed by Policy 3.1 will vary according to the degree to which clients reasonably place their reliance upon and trust in the registrant. In our view, the regulatory obligations imposed by Policy 3.1 are at least as extensive as the fiduciary duties imposed by the common law in these circumstances. (at page 6)

(2) The Investments

(i) The Howdens

¶ 36 Bob Howden testified at the hearing; his wife June did not. Mr. Howden said that he and his spouse sold their family farm in 2006 for approximately $1.2 million in total. Prior to the sale of the farm he estimated the annual income from the farm in recent years to be in the $60,000-$70,000 range. He testified that he never borrowed very much money for his farming business. He did borrow money when he bought the farm, and again he borrowed in the 1970s when he built a barn for a pig operation. He estimated that at any one time he would not have owed more than $100,000 and more likely the maximum amount would have been in the $60,000-$70,000 range.

¶ 37 The farm was sold in 2006 when Mr. Howden was 64 years of age and Mrs. Howden was 60 years of age. The immediate reason for the sale was related to Mr. Howden's health. They had some investment experience prior to dealing with the Respondent. The Howdens had money with CIBC and later with an investment firm, Wellington West. Most of the money was in RRSPs and Mr. Howden estimated the total amount to be in the $250,000-$300,000 range.

¶ 38 The Respondent was recommended to Bob and June Howden by a neighbor who said he had benefited from Mr. Gareau's advice. Mr. Howden said he had become a bit impatient with Wellington West because on three occasions he had received incorrect statements.

¶ 39 Mr. Howden described his knowledge of investments as "not very good". For instance, he testified that he did not know the difference between a growth stock and a value stock, and that he did not know the difference between a common share and a preferred share. He did, however, previously invest in a limited

partnership which he understood provided him with an income tax advantage. This was on the advice and recommendation of a previous advisor. Also, he had purchased shares in Saskatchewan Wheat Pool and testified that he would track the value of his shares, and the market generally, by watching a business program on television nearly every day at noon.

¶ 40 Mr. Howden testified that his investment income, together with CPP and OAS for he and his wife, was to be their only source of income. Their objective was to have a monthly income for life and toward this end he discussed with the Respondent the possibility of holding his investments in an interest-bearing account. He was advised by the Respondent that if he were to do this his investments, based on an annual income of approximately $60,000, would run out when he was in his 80s. As a result, the Respondent discussed with Mr. and Mrs. Howden investing in mutual funds and Mr. Gareau suggested the Dynamic Family of funds. Mr. Howden said they did not challenge the Respondent's recommendations.

¶ 41 Mr. Howden testified that all the NCAFs he signed and initialed, eight in all, were completed by Mr. Gareau in his office. He said that he and Mrs. Howden signed and initialed the NCAFs without reading them. He said it was not uncommon for him to sign documents without reading, particularly where he was relying on the advice of professionals.

¶ 42 Mr. Howden said he understood the notation "DN" to mean "Deferred/No Commission". However, he also testified that he did not completely understand deferred sales charges. He said all of the purchases he made through the Respondent were recommended and initiated by the Respondent and not by him. He did say that before any purchases were made the Respondent would show and discuss with him and his wife the performance records for the particular investment.

¶ 43 Mr. Howden maintained that he did not fully understand the nature of a margin account. He said his first full realization of the effect of the margin account occurred when he read one of his monthly statements that showed a negative figure on a monthly statement. When he called the Respondent's office he was told that it was interest charges on borrowed money. He testified that he and his wife were "surprised" but that the overall "bottom line" for his portfolio was quite satisfactory; thus, he was not overly concerned. It was his testimony that at no point did the Respondent suggest a reduction in his margin account even after the liability in it had grown into the hundreds of thousands of dollars.

¶ 44 Mr. Howden testified that the Respondent initiated the idea of a home-equity line of credit (HLOC). He said the Respondent asked him about it several times. Although he testified that he was reluctant to do so, in the spring of 2007 he placed a mortgage on the family's principal residence and, based on that mortgage, invested a further $200,000 in the market. This money was invested with Mr. Gareau and placed in securities recommended by him (Mr. Gareau).

¶ 45 In the hearing, Mr. Howden was asked about his knowledge of the Dynamic Power Hedge Fund that was recommended to him by the Respondent. He recalls that approximately $100,000 was invested in the fund but he testified that he did not know the nature of a hedge fund and the risks associated with it.

¶ 46 Mr. Howden testified about numerous calls and meetings he had with the Respondent once he realized that the market was dropping and his portfolio was reducing in value. The Maximizer notes maintained by the Respondent's office corroborate Mr. Howden's testimony that he was nervous about the market as early as August 2007 and repeatedly called Mr. Gareau explicitly stating his concerns.

¶ 47 Mr. Howden also testified about a life insurance policy that was recommended to him by Mr. Gareau**.** He purchased a life policy paying $120,000 in premiums. It was a product that Dundee's Senior Compliance Officer deemed not to be suitable for the Howdens. In an email dated July13, 2009 Mr. Gareau was advised that the product was not suitable, that purchasing it on margin was not suitable and that it appeared that the Howdens did not understand the product.

¶ 48 In late 2008, the Howdens transferred their account from Dundee to another firm. Mr. Howden then initiated a series of complaints to the Saskatchewan Financial Services Commission, IIROC and Dundee. His complaints were centered on the significant losses he had suffered in his portfolio. In response to the

complaints, Mr. and Mrs. Howden received a letter on August 12, 2009 that included the following two paragraphs:

> As indicated above, we conducted a suitability review and we have determined that the assets purchased in all of our accounts were suitable. Any losses you sustained in these accounts represent market loss, for which Dundee does not provide compensation.
>
> With respect to your complaints about the use of margin accounts and the line of credit you obtained, our review has indicated that Mr. Gareau did spend time with you to explain both the benefits and the potential risks of borrowing to purchase investments. In addition, your file contains a written explanation on borrowing to purchase investments together with an acknowledgment that you have signed.

Notwithstanding these two paragraphs, the letter offered compensation to the Howdens of $271,315.63. The Howdens retained legal counsel and ultimately settled with Dundee for a payment of $500,000.

¶ 49 The testimony of Mr. Gareau conflicted with that of Mr. Howden in several respects. Mr. Howden said that the NCAFs were completed summarily by Mr. Gareau and presented to him and his wife for signatures. Mr. Gareau, on the other hand, said that he went through each and every NCAF with the Howden's in considerable detail before they were signed off. It was also Mr. Gareau's testimony that each and every one of the 51 investments that he made for the Howdens were discussed with them in detail and made at their direction. He said that each of the investments were entirely suitable because they were consistent with his client's informed instructions and consistent with their risk tolerance and investment knowledge.

¶ 50 The Respondent testified that on numerous occasions he advised Mr. Howden that if he had concerns with his portfolio, and the market generally, he could transfer the entire portfolio into a money market fund. It was his testimony that he discussed a transfer to a money market fund on August 16, 2007, and January 18, 2008. On each occasion he was advised by the Howdens that they did not wish to liquidate their portfolio when the market was down.

¶ 51 Mr. Gareau testified that on September 30, 2008 he strongly recommended to the Howdens to redeem their entire investment portfolio and to put the funds into a money market fund. It was his evidence that Mr. Howden declined his advice indicating that he wished to speak to his son first before making such a move. Mr. Howden telephoned the Respondent's office on October 10, 2008 indicating that he had talked to his son who had recommended that he should leave his investments in the market. This communication was supported by a Maximizer note. Also, in cross-examination, Mr. Howden did not deny that such a conversation had taken place or that he had taken the advice of his son to stay in the market. He questioned the date upon which those communications were made but did not provide an alternative version of events, although perhaps implicitly he was suggesting that the conversations and communications may have occurred earlier than October 2008. However, on October 6, 2008 approximately $460,000 was moved into a money market fund at the direction of Mr. Howden. It was the Respondent's evidence that Mr. Howden received from him a strong recommendation at that time to transfer the family's entire portfolio into a money market fund but that he chose only to transfer $460,000, an amount sufficient to secure the balance in the margin account at the time. It was not until November 13, 2008 that the entire balance of the portfolio was transferred into a money market fund and about one month later, in December 2008, the Howdens transferred their entire portfolio to a different financial advisor in another firm.

¶ 52 Mr. Gareau also testified that Mr. Howden was fully aware and knowledgeable about margin accounts from the very outset of their professional relationship beginning in May 2006. He said the utilization of margin accounts was discussed in detail with the Howdens as part of an investment strategy to enhance investment opportunities. As a result, margin accounts were created for the Howdens and for their corporation on July 26, 2006 and September 12, 2006 respectively.

¶ 53 Mr. Gareau also referred to monthly statements from his firm, provided to the Howdens, going back to September 2006 which indicated an interest charge on the margin debit balance as well as the debit balance itself. Mr. Gareau said that he was aware that Mr. Howden reviewed his accounts almost daily on the internet

and that Mr. Howden's nature was to raise any questions or concerns without hesitation. Mr. Howden was able to check his portfolio on the internet by using Dundee's "Wealth Tracker" software.

¶ 54 It was Mr. Gareau's testimony that Bob Howden first raised with him the possibility of utilizing a margin account. He told him that leveraging through a margin account was risky but there was a good possible upside. The first use of the margin account was to purchase flow-through shares. Mr. Gareau said that Mr. Howden wished to purchase the flow-through shares to obtain an income tax advantage. He had similar investments in his previous portfolio with another firm and he had been advised of the advantages of them by his income tax advisor. Mr. Gareau said he discussed the use of margins for the purchase of the flow-through shares or alternatively to sell some other investments to buy them. It was his evidence that Mr. Howden did not want to redeem any other investments but wanted to use the margin account at least until he received some expected income from deferred grain cheques. It was Mr. Gareau's testimony that every time a purchase was made utilizing the margin account, the implications were discussed with Mr. Howden but Mr. Howden insisted on using the margin accounts because "he did not want to sell anything". Mr. Gareau said that generally the portfolio was doing well and that Mr. Howden wished to continue the growth of the portfolio through the margin account.

¶ 55 It was also Mr. Gareau's testimony that on numerous occasions he recommended to Mr. Howden that the margin accounts be paid down. The first occasion was when Mr. Howden received approximately $100,000 in proceeds from deferred grain sales. Mr. Gareau testified that notwithstanding his advice, Mr. Howden instructed him to invest the money in a high-yield savings account. At the time the yield on the savings account was less than the interest charged to Mr. Howden on the margin account; thus, it would have been to Mr. Howden's advantage, at least in the short term, to pay down the margin account. This was an interesting strategy for Mr. Howden because on a previous occasion he was very concerned about receiving only 3.75% on an investment. As a result, it was Mr. Gareau's testimony that he (Mr. Gareau) cut his commission so that Mr. Howden would receive 4%.

¶ 56 Mr. Gareau also said that he discussed paying down the margin on another occasion when Mrs. Howden received an inheritance. Again the Howdens declined. It was his testimony that he never met with the Howdens individually but that on all 27 meetings both Bob and June Howden were in attendance. He did discuss the portfolio with Mr. Howden only on the telephone on numerous occasions.

¶ 57 In December 2007 the Howden's wanted to gift to their children $10,000. Mr. Gareau testified that it was Mr. Howden's suggestion to take the money out of a margin account because he did not want to sell any investments.

¶ 58 The margin accounts were also accessed to purchase approximately $100,000 of the Dynamic Power Hedge Fund. Mr. Gareau said that at the time there was a lot of "margin room" available. It appears Dundee's policy was to loan on margin up to 50% of the value of securities in the portfolio.

¶ 59 Mr. Gareau also testified about the Home Equity Line of Credit (HLOC). As previously stated, the Howdens wanted to build a new house in Fort Qu'Appelle. Mr. Howden indicated that he was going to mortgage the property to pay for the house because, according to Mr. Gareau, he did not want to redeem any investments but to keep that money (investments) in his portfolio. Mr. Gareau suggested that rather than mortgaging the property to build the house he pay cash and then establish an HLOC and invest those funds. This strategy would allow the interest on the HLOC to be tax deductible whereas interest on a loan secured by a mortgage for the purposes of building the home would not have been tax deductible. As a result of this advice, the HLOC was established. Mr. Gareau also said that in June 2007 he suggested to the Howdens to use the money available from the HLOC to pay down their margin accounts. It appears that, according to Mr. Gareau, Mr. Howden initially agreed but when he received the $200,000 on the line of credit he decided to leave the margin accounts intact and buy shares "because the market was down a bit".

¶ 60 The upshot of Mr. Gareau's testimony is that Mr. Howden fully appreciated the nature and characteristics of a margin account and fully appreciated the increasing amounts he owed on the margin accounts. The motivation for utilizing margin to the extent that he did (over $550,000 at its maximum, in

addition to the HLOC of $200,000) was that Mr. Howden wanted to continue investing in the market with the hope of profiting therefrom. It was Mr. Gareau's view that the use of the margin was entirely suitable because Mr. Howden fully appreciated the situation the use of the margin account placed him in. Mr. Howden, on the other hand, testified that he only had a cursory knowledge of the upsides and the downsides of using a margin account and that he never fully appreciated the extent of the liability he had incurred in the margin accounts. He did acknowledge that he checked his portfolio almost daily through the use of Dundee's "Wealth Tracker" system. Mr. Howden's explanation was that he routinely checked his bottom line only. There is an obvious conflict of evidence in the testimony of Mr. Gareau and Mr. Howden.

¶ 61 Mr. Gareau testified to several more general matters. He indicated that approximately 98% of his clients who buy mutual funds utilize a deferred sales charge. Also, he said it was his practice when filling out an NCAF that he ask his clients each question on the form, that there be a discussion of risk and objectives and that he carefully goes through the form with the clients. In the case of Mr. Howden in the initial meetings he (Mr. Howden) said, "I want to grow my money". Mr. Gareau also said that he establishes a risk factor for each investment that he recommends and discusses this with clients. When the NCAF for the Howdens was being completed he rated their knowledge as "good" because that is what Mr. Howden told him and Mr. Gareau believed him. He did acknowledge that the flow-through shares were high risk and that this was discussed with Mr. Howden. He also noted in his testimony that the purchase of the flow-through shares was approved by Dundee's Compliance Department. Mr. Gareau did acknowledge that too many flow-through shares were purchased because the Howden's tax preparer had made a mistake concerning a rollover of assets to their corporation.

¶ 62 Finally, Mr. Gareau said that the Howden's wanted $5,000 per month net to live on and that he was attempting to manage their portfolio and make recommendations with respect to investments to achieve that amount.

(ii) The Raimbaults

¶ 63 Emilie Raimbault testified at the hearing; her husband Jean did not. Ms. Raimbault said that she and her spouse sold the family farm in 2003 and have been retired since. Their farming operation was quite modest.

¶ 64 Mr. and Mrs. Raimbault met Mr. Gareau in August 2007. Mr. Raimbault was 71 years of age and Mrs. Raimbault was 68 years of age. At the time they had investments with another firm worth just under $200,000, held in three separate accounts. In their portfolio approximately 59% of their investments produced interest or dividend income, approximately 14% were dividend paying Canadian bank shares, approximately 20% was balance mutual funds and approximately 6% were equity mutual funds. In addition to income received from these investments, the only other sources of income for Mr. and Mrs. Raimbault were CPP and OAS and interest received on units of a Bell Canada bond with a face value of $51,000.

¶ 65 The Raimbault's opened three accounts with the Respondent in August 2007 and three separate NCAFs were completed. In each their investment knowledge was rated as "good", investment objective was "100% growth" and their risk tolerance was "100% medium". The securities from the former firm were transferred into the new accounts and sold. All of the funds were used to purchase Dynamic family equity funds distributed among the three accounts.

¶ 66 Mrs. Raimbault testified that from the outset she and her husband made known to Mr. Gareau that they required a stable monthly income and could not put at risk any of their quite modest portfolio. Mr. Gareau, on the other hand, assessed their risk tolerance as moderate. He also testified that he completed the three NCAFs in three separate meetings and, as he did with the Howdens, thoroughly went through each document asking the Raimbaults the very specific questions in the NCAFs. At the end of each, they signed the NCAF and initialed several of the paragraphs, including those indicating their investment knowledge and risk tolerance. Mrs. Raimbault did not recall that there were three separate meetings to discuss and sign the NCAFs.

¶ 67 One of the assets that the Raimbaults transferred to the Respondent's firm was a Bell Canada bond that had a 5% coupon. It was Mrs. Raimbault's testimony that early on in their relationship with the Respondent

they told him that they did not want to sell the Bell Canada bond. The Respondent sold the bond on October 9, 2007. It was Mrs. Raimbault's testimony that he sold the bond without either knowledge or approval by her or her husband. The Respondent testified that he had their approval. Mrs. Raimbault also testified that they told Mr. Gareau that the Bell Canada bond suited them very well because it was secure and paid 5% interest.

¶ 68 There were no Maximizer notes indicating a call or any communication between Mr. Gareau and the Raimbaults concerning the sale of the bond. Mr. Gareau testified that he did receive approval to sell the bond a few days before it was sold (October 9, 2007). It was his testimony that there was a problem with the sale of the bond. Mr. Gareau could not recall precisely the problem but he believed it had something to do with an incorrect entry for the sale. Although there was no record of the approval, Mr. Gareau testified that he believed the bond came into the account on September 21 at which time he contacted the Raimbaults about selling it and received their approval.

¶ 69 In addition to several oral communications with Mr. Gareau, Mrs. Raimbault wrote him a letter dated March 7, 2008 which clearly underscored Mr. and Mrs. Raimbault's general intolerance for investment risk and their very specific anxiety at the time the letter was written. In its entirety it states:

March 7, 2008

Dundee Securities

Kenneth Gareau

Ken,

Just to let you, that our lifes are falling apart. With little interest income from our investments is putting different things in a serious situation. First our health, Jeans is having serious problems, with high blood pressure with worry and concern with the above other health problems are developing…With Jeans past he had, a lot of stress worry and abuse as a young person. That is why we said our tolerance for mutual funds and risk funds was 0 or near 0. I'm getting a fallout from Jeans condition. Something needs to be done, I'm not sure what – Jeans need a BAHa hearing device so his hearing doesn't completely go. The cost 4-6 thousand dollars….We need a income other than we have with our pensions. Please Please Help. The uncertainty is almost intolerable. (not from principal income) (with investments).

Jean & Emilie Raimbault

¶ 70 Prior to the receipt of this letter, there are records in the Maximizer notes indicating that both Mr. and Mrs. Raimbault contacted Mr. Gareau with concerns about their accounts dropping in value. Maximizer notes for December 20, 2007, January 15, 2008 and February 15, 2008 read as follows:

Page A 10 – December 20, 2007 – "Jean is very concerned…he has never seen the value of his account drop before. He has very little tolerance for this kind of thing and for him that may not be the best investment for him."

Page A 10 – January 15, 2008 – "Jean called…transferred to Trista…Went over the current values of his accounts. They have dropped some more since I spoke with him last. He had spoken to Ken before hand and he had mentioned to Jean that it was nothing to worry about. Jean said he trusted Ken…Let him know I would speak with Ken about the accounts and if Ken was concerned we would give him a call back.

Page B 5 – February 15, 2008 – "Emilie phoned because she is not comfortable with their investments…They have no interest in risking dollars.

¶ 71 Mrs. Raimbault testified that they sought the services of Mr. Gareau because he was recommended to them. She also testified that she trusted and relied upon him to look after their investments. Similar to the Howdens, she testified that they told Mr. Gareau that they would like to see their investments grow in value.

¶ 72 Mrs. Raimbault presented herself as a credible and modest witness. Her testimony was internally consistent and not inconsistent with any of the records submitted in evidence, although it was inconsistent with Mr. Gareau's version of the events particularly surrounding the sale of the Bell Canada bond.

C. Count 3

¶ 73 Count 3 alleges that the Respondent acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by selling an income producing bond against the express wishes of a client. The allegation relates to the sale of the Bell Canada bond units by Mr. Gareau. Member Rule 29.1 was reproduced earlier in this decision (see paragraph 20) but for ease of reference it will be reproduced again. It says:

> 29.1 Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of their business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.
>
> For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all Rules required to be compiled with by the Dealer Member.

¶ 74 Similar to the issue dealt with in Count 1, there are two necessary elements that must be proved to establish a breach of Rule 29.1 as articulated in the Count. The first is a factual matter. Did the Respondent sell an income producing bond against the express wishes of a client? If in fact this occurred, does it amount to conduct that is unethical, unbecoming or detrimental to the public interest?

¶ 75 The evidence surrounding the sale of the bond was set out earlier in this decision in paragraphs 67-72, which is incorporated here by reference.

5. THE SUBMISSIONS - Summary

A. IIROC's Submissions on Count 1

¶ 76 The core of IIROC's submissions appear to be that the Howdens "presented themselves" as obviously income oriented, low risk investors. It is not clear from IIROC's submissions precisely what evidence is being relied upon to arrive at that conclusion. The submissions incorporated by reference the allegations contained in the Notice of Hearing which state that Mr. Gareau knew, or should have known, that the Howdens communicated clearly in their first meetings with Mr. Gareau that they could not tolerate losses in their investment accounts. In addition, they were in their 60s and had sold their major asset, a farm, and it was their intention that their investments would provide them with the means to support themselves assisted by both CPP and OAS.

¶ 77 It was further submitted that when updated NCAFs were completed in September 2006 and June 2008, which changed investment objectives to a more aggressive profile and risk tolerance was increased, it was submitted that the Respondent knew, or ought to have known, that when he completed the NCAFs, particularly the June 2, 2008 NCAF, he was recording the Howdens "know your client" information inaccurately and making it more difficult for Dundee supervisors to determine whether purchases in the Howden's accounts were suitable for them.

¶ 78 IIROC made similar submissions with respect to Mr. and Mrs. Raimbault. The Raimbaults completed three NCAFs early in their relationship with Mr. Gareau. Based on the situation of the Raimbault family, it was submitted that the Respondent knew, or ought to have known, that their investment knowledge was not good but rather was minimal and that their investment objective was preservation of capital rather than 100% growth. The particular circumstances of the Raimbaults was that they were 71 and 68 years of age, had a very modest portfolio of approximately $250,000 in total and had very limited past experience with investments.

B. Respondent's Submissions on Count 1

¶ 79 Mr. Gareau submitted that implicit in the allegation under Count 1 is that he inaccurately recorded

income, risk tolerance and investment knowledge on each and every NCAF completed in relation to both the Howden family and the Raimbault family. With respect to the allegation that the Respondent inaccurately recorded the Howden's estimated income at $40,000, it was pointed out that Robert Howden's 2004 and 2005 CRA Notice of Assessment confirmed his income at approximately $40,000.

¶ 80 The risk tolerances on the NCAFs were recorded as medium, which is defined on the form as being the "ability to accept moderate market fluctuations with potential for loss". It was submitted that the evidence disclosed that the Howdens had been investing for a considerable period of time (at least ten years) and their previous joint portfolio with Wellington West contained 23% low risk, 34% medium risk and 42% high risk. It was submitted that Robert Howden was familiar with business because, aside from his successful hog operation, he ran a grain operation and had an operating corporation created for tax purposes.

¶ 81 It was submitted that Mr. Howden, in his testimony, acknowledged that the characterization of his risk tolerance as medium was correct. Particular reference was made to the following questions and answers:

887 **Q:** Okay. Now let's turn to risk. Mr. Gareau recorded risk as being 100 percent medium?

A: Mmhmm.

888 **Q:** You saw that?

A: Yeah.

889 **Q:** You knew that?

A: Yeah.

890 **Q:** Was that a mistake made by Mr. Gareau, or is that an accurate statement at the time?

A: It was an accurate one as what he wrote in. I never told him where to put it.

891 **Q:** Was it an accurate statement at the time?

A: yes.

892 **Q:** Yes. So at -- therefore on that day and the date before your objective was 100 percent growth and your risk tolerance was 100 percent medium, correct?

A: Correct.

¶ 82 With respect to investment knowledge it was submitted that the characterization of "good" was correct. Reference was made to the Canadian Securities Institute Textbook for Conduct and Practices Handbook, which is a mandatory course required to obtain a securities license. It states that investment knowledge is one of the five most important factors in assessing a client's situation because: "it indicates the amount and type of information that the registrant must provide to the client when making recommendations" (at page 80). It was suggested that the purpose of knowing a client's investment knowledge has nothing to do with the client's particular knowledge of investments, stock markets, indices or securities but rather pertains to the volume of information that would be required to be provided to a particular client with respect to the making of a particular recommendation. Accordingly, as the evidence supported, the Respondent provided to his clients a plethora of information. The Howdens would have been provided a fund fact sheet in relation to each investment which clearly indicated that each was of a moderate risk and which indicated the past five year performance. In the submissions reference was again made to the Conduct and Practices Handbook which states that the three main purposes of completing an NCAF are:

(1) To determine the client's investment objectives and risk tolerance;

(2) To judge the credit worthiness of the client;

(3) To identify any industry regulations that apply to the client for the particular account.

¶ 83 In the Respondent's submissions, considerable weight was placed on the acknowledgment of the

information in the NCAFs by the Howdens. The Howdens signed each NCAF and each contained an acknowledgment clause. While it appears that not all the NCAFs were identical, one set of them contained a clause which was a declaration that each client:

> …acknowledge that the information on this client application form accurately represents my/our personal financial situation and my/our understanding of the information disclosed, as at the date noted below. I agree to notify Dundee Securities Corp. of any changes to information recorded in the application including changes to investment objectives, risk tolerance or investment timeframe…

It was strongly argued that the NCAF established a contract that the Howdens and the Raimbaults agreed to and that their advisor, Mr. Gareau, is legally entitled to rely on the representation and statements made in the contract. Thus, the clients and IIROC are legally estopped from claiming the contrary.

¶ 84 Essentially the same submissions were made with respect to each of the NCAFs that were signed by the Howdens with particular reference to the NCAFs for the accounts that contained a margin agreement. The panel was directed to the portion of the NCAFs where it states that, "It is also understood that a Margin Account involves the borrowing of money for account transactions". Because the Howdens signed and acknowledged each and every part of the NCAF and at no time contacted either Mr. Gareau or Dundee Securities to indicate that any portion of the form had been completed in error or inaccurately, IIROC cannot now maintain that the NCAFs were improperly or inaccurately completed.

¶ 85 The submissions with respect to the NCAFs of the Raimbaults were quite similar to those of Mr. and Mrs. Howden. In short, it was submitted that risk tolerance, investment knowledge, and investment objectives were properly recorded. It will be recalled that investment knowledge was recorded as "good", investment objective was "100% growth" and risk tolerance was recorded as "100% medium".

¶ 86 The submissions made reference to the wishes of the Raimbault family to receive more income from their investments. It was in response to this that Mr. Gareau suggested that if they wanted to draw more cash from their portfolio they would have to restructure the investments to produce a greater return. Because fixed investments would not give them their desired return, the only way to accomplish such a return would be for them to place their investments in a higher risk portfolio.

¶ 87 It was also submitted that Mr. and Mrs. Raimbault had invested money over more than ten years with three separate investment firms. Their most recent previous joint portfolio contained 67% full risk investments and 32% medium risk investments.

¶ 88 It was submitted that the Raimbaults recognized and accepted that in order to obtain their desired goal they required alternative investments carrying a moderate risk and they understood if they elected to move their portfolio to the Respondent their funds would be invested in equity funds all rated as a moderate risk.

C. IIROC's Submissions on Count 2

¶ 89 IIROC's written submissions were 53 pages in total. The core argument was that the total investment package the Respondent oversaw and recommended to the Howdens was unsuitable for them. They were a retired couple, age 64 and 60, when they first retained Mr. Gareau. Their future income was going to be limited to CPP, OAS and income (possibly including principal withdrawals) from their investment portfolio. It was argued that to recommend a portfolio totally of equity investments, through mutual funds, in itself was unsuitable. The point at which the suitability of an investment is measured is when the purchase is made and subsequent positive or negative activity of the investments, or the market generally, does not impact upon the determination of suitability. Thus, it was submitted, that knowingly placing the Howden family totally in equity funds was most unsuitable. It was submitted that the unsuitability was exacerbated considerably by the utilization of the margin accounts to an amount of $552,000, almost 50% of the net value of the portfolio. This was in addition to the $200,000 HLOC that the Respondent was aware of and assisted to put in place; thus, in effect increasing the margin debt to approximately $772,000. It was submitted that regardless of what occurred after the investments were made, and the margin account and HLOC were utilized, Mr. Gareau failed to ensure his recommendations were suitable for the Howden family taking into account their financial situation,

investment knowledge objectives and risk tolerance. In addition to the entire amount of the portfolio being invested in equity, some of the investments were extremely high risk such as the Dynamic Power Hedge Fund and the flow-through share investments.

¶ 90 Implicitly acknowledging that there may be situations where a retired sophisticated investor might be totally invested in equities, including some fairly high risk ones and may make purchases on margin, it was submitted by IIROC that that was not the situation with the Howdens. It was submitted that Mr. Howden's testimony should be preferred over that of Mr. Gareau where the evidence is in conflict. Mr. Howden's knowledge of the characteristics and risks associated with buying on margin was, it was submitted, minimal. His testimony was that he never tracked the margin accounts and always only looked at the bottom line, and that Mr. Gareau never suggested reducing the margin. This, of course, is in direct conflict with Mr. Gareau's testimony that he suggested, sometimes strongly, on several occasions to reduce the margin accounts.

¶ 91 In support of the argument that Mr. Howden's testimony should be preferred, IIROC pointed to two examples, supported by the Maximizer notes, which demonstrate that Mr. Howden's knowledge of margin accounts was minimal. On March 20, 2007, Mr. Howden called the Respondent's office to ask how much interest he would get on a $100,000 deposit. He was told the interest he would receive was 3.85%. At the time he had more than $257,000 in margin debt and was paying approximately 5.5% interest on that debt. It was submitted that had Mr. Howden understood that he was paying such significant interest on a relatively large debt he would not have opted for investing at 3.85% as opposed to saving 5.5% on the margin debt. It was suggested that he eventually deposited the money to savings because he did not know he had a margin. Another example occurred on April 24, 2007 when Mr. Howden called the Respondent's office to inquire about a $1,244 expense reflected in his monthly statement. Mr. Howden testified that he verbally questioned why there would be interest payable by him. It was submitted that there is no doubt that Mr. Howden questioned the interest because Mr. Gareau's office took action on his inquiry and called him back the next day to tell him that the interest was on the money that was on margin. The Maximizer notes support this. These two examples were put forward in support of IIROC's submissions that the Howdens accumulated $320,000 in margin debt without even the most basic understanding that interest was charged on margin debt.

¶ 92 It was also argued that Mr. Gareau never fully discussed or explained the margin accounts to Mr. Howden. IIROC made reference to handwritten notes of Mr. Gareau from February 2007 (February 5/February 20) and April 17, 2007 taken by Mr. Gareau for meetings with the Howdens to discuss their portfolio. The notes in effect show a breakdown of the investments and the "bottom line", in the sense that the net amounts are shown. However, no reference is made to margin accounts. It was submitted that this occurred despite the fact that it was Mr. Gareau's evidence that at this time he was trying to convince Bob Howden to reduce his margin account. It was argued that if Mr. Gareau was truly trying to convince Howden to reduce his margin debt, at the very least one would expect to see some reference to the margin debt in the notes.

¶ 93 IIROC also made reference to Mr. Gareau's evidence that Mr. Howden wished to maintain a margin account because he wanted to keep certain investments separate for his own accounting purposes. It was argued that in fact there was nothing separate about the various investments in the account and if correct, this would be a further indication of the Howden's financial naivety.

¶ 94 It was submitted that Mr. Gareau should have been fully aware of the risk averse nature of Mr. Howden. It was suggested that the mere number of telephone calls made by Mr. Howden to Mr. Gareau clearly demonstrated that he and his wife could not tolerate risk. IIROC made reference to no fewer than seven such calls over approximately a one-year period as recorded in the Maximizer notes which, it was submitted, should have convinced Mr. Gareau that the Howdens were indeed risk-averse. The calls included the following ones, as written in the Maximizer notes:

> Page B23 – August 14, 2007 – "call him about the market going down like a rock"
>
> Page B23 – August 14, 2007 – "worried about the market and had called three times in the last 24 hours"

Page B16 – January 18, 2008 – "Bob phoned because he is very worried about the market…and he wants to talk to Ken…Trista and myself tried to explain and calm Bob down."

Page A1 – February 13, 2008 – "They are concerned about the market and want an appointment with Ken…"

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Page B9 – August 19, 2008 – "Bob called…unsure of the markets and wants to talk to ken about it…"

Page B8 – September 5, 2008 – "Bob called as he was concerned with the market. Wondering…if they should be pulling out. Really worried about the markets…"

¶ 95 In summary, IIROC argued that the investments recommended by the Respondent for the Howdens were very inappropriate and unsuitable. They were clients who lived their entire lives without ever taking on a significant amount of debt and they had enough money to enjoy a comfortable retirement but on the Respondent's advice they were invested totally in equities, accumulated over $552,000 in margin debt and owed another $200,000 on a Home Equity Line of Credit.

¶ 96 The general submissions of IIROC with respect to the Raimbaults is very similar to what was put forward with respect to the Howdens. It was that Mr. Gareau recommended entirely unsuitable investments when he advised the Raimbaults to invest only in equity mutual funds. The Raimbaults were retired and in their late 60s and early 70s thus, it was submitted, Mr. Gareau knew, or should have known, that capital preservation would be paramount and that the volatility of all equity investments would not be suitable for clients in their position.

¶ 97 In addition, aside from the allegation contained in Count 3, even assuming Mr. Gareau had recommended and received authority to sell the Bell Canada bond, selling the bond and purchasing equity funds further exacerbated the unsuitability of the Raimbault's portfolio. IIROC concluded its submissions on the suitability issue by indicating that the Raimbaults wanted income to secure their retirement but they received a portfolio composed of 100% equity funds, which were further encumbered by deferred sales charges.

D. Respondent's Submissions on Count 2

¶ 98 The Respondent's written submissions were 97 pages in length together with a 12 page response to IIROC's submissions. We will attempt to summarize the essential points.

¶ 99 The starting point was that implicit in the allegation under Count 2 is that Mr. Gareau failed to ensure recommendations made to purchase and hold each and every security for the entire Howden family were suitable. This initial statement was followed by a review of each of the 51 investments recommended by Mr. Gareau for the Howden family. The point was made that the determination of suitability is a question of fact and must be made at the time of the investment as opposed to a later date with the benefit of hindsight (See *Daubney, supra,*) where at page 4 it was stated "…his investment recommendations must be judged as at the time they were made, and not with the benefit of hindsight after a Market downturn…".

¶ 100 It was submitted that the evidence disclosed that for each investment, the Howdens were provided a Fund Fact Sheet in relation to the investment, which indicated that each of them were of moderate risk. They were also provided the relevant prospectus and the most recent annual report with respect to the investments. It was also submitted that the Respondent testified that he thoroughly reviewed and discussed each investment with the Howdens prior to acquisition.

¶ 101 The Respondent described what he deems to be the singular and fundamental issue in this case. It is whether the Respondent advised the Howdens to redeem their investments and move the funds into a money market fund or whether he ignored the Howden's instructions to do so. The submissions state "...the actual version of events is that it was the Respondent, who mid-September of 2008, at the inception of the Market Collapse did everything within his power to attempt to convince the Howdens to in fact follow his recommendation and to transfer their portfolio into the Money Market Fund."

¶ 102 It was further submitted that had the Howdens followed Mr. Gareau's advice their losses would have been much less significant. They, however, did not immediately accept his advice but sought input from their son before deciding to move part of their portfolio into a Money Market Fund, and then later all of it.

¶ 103 It was submitted that with respect to the margin accounts that the Respondent assessed the Howdens circumstances and properly determined that it was suitable for them. Reference again was made to the *Daubney* decision, previously quoted, to the effect that a registrant must only recommend leveraging after an assessment of whether the client's circumstances are such that they have the ability to meet debt obligations and tolerate losses under different market scenarios. The *Daubney* decision goes on to state at page 6:

> Because leveraging can magnify losses it is critical that the registrant ensures the client understands the risks of borrowing to invest, in particular the risks of using collateral, including investments made with monies borrowed, as security for loans.

¶ 104 In addition to submitting that Mr. Gareau properly made the assessment of his client's ability to meet the debt obligations, it was argued that there was no doubt that the Howdens fully understood the risk associated with borrowing to invest and the security for such a liability. It was suggested that this panel should prefer the testimony of Mr. Gareau on this point over that of Mr. Howden.

¶ 105 It was argued that it is simply not credible that Mr. Howden did not understand the nature of the margin account and that any negative balance in it represented a debt payable by him. Aside from the investments that were purchased on margin, it was submitted that the Howdens also used the margin account to access $10,000 for a Christmas present and $25,000 for payment of personal income tax. Further it was submitted that it was Mr. Howden who was reluctant to reduce his margin account even though it was recommended several times by Mr. Gareau that this be done.

¶ 106 Similar submissions were made with respect to using the $200,000 on the Home Line of Credit for investments. It was submitted that it was Mr. Howden's wish to have that money to invest in the market. In summary on the issue of the margin accounts and the HLOC the following was set out in the written submissions of Mr. Gareau:

> For all of the above reasons and based on the factual evidence over the Timeframe of approximately twenty eight months the use of leveraging was not unreasonable and it was not until the Market Collapse in late Fall of 2008 when it actually became a problem. As set forth above in this Brief, had the Howdens followed the Respondent's recommendation to move their portfolio to the Money Market Fund either on September 30th, 2008 or October 6th, 2008, there would have not have been an issue with respect to the use of leveraging. Accordingly the use of Leveraging was in fact suitable at that time under the factual circumstances.

¶ 107 The submissions specifically address the investment in the Dynamic Power Hedge Fund which Mr. Gareau agreed was high risk. At the time the investment was made it had the best performance of hedge funds in Canada. Because of this, Mr. Gareau thoroughly reviewed the Offering Memorandum and Subscription Agreement with the Howdens and provided to them a Fund Fact Sheet and an Annual Report. It was submitted that the Howdens were well aware of the nature of the investment, and that it was speculative and as such high risk. It was urged upon us to consider the Respondent's testimony that he advised the Howdens that the purchase should be made by utilizing switches from existing funds but that the Howdens did not want to redeem any investments because the markets were down. Therefore, they opted to complete the investment in the Power Hedge Fund by using the margin with the intention of paying it down as soon as the market recovered Mr. Gareau properly updated the NCAF on this account because of the increased risk that the hedge fund represented.

¶ 108 The Respondent's submissions also address the issue of the age of the Howdens. While it was conceded that age is a factor to be considered, according to the Conduct and Practices Handbook Course, it assists "in order to give an indication of the client's time horizon and income needs". It was submitted that at their age a reasonable life expectancy was at least 20 years which is considered long term in the NCAFs. "Long term"

defined as being more than three years.

¶ 109 The Panel was asked to consider the testimony of the Respondent that he does not discriminate because of age but it is a factor to consider in recommending investments. It should not preclude a person over 60 years of age from investing in something other than GICs. It was submitted that there is no evidence to suggest that the investments were not suitable because of the age of Mr. and Mrs. Howden.

¶ 110 In summary, the submission of the Respondent is that each and every investment he recommended to the Howdens was appropriate and suitable and that the overall mix of investments were suitable as well. In addition, because of the Howden's ability to meet the debt and understand the use of margins, the utilization of the margin account to the extent that it was used was also suitable.

¶ 111 The Respondent's submissions with respect to the Raimbault family investments began by referring to 12 individual investments made on behalf of Mr. and Mrs. Raimbault by Mr. Gareau. It was submitted that each of the investments were classified as medium risk and thus suitable in accordance with the NCAF signed by the Raimbaults for each account which indicated that their risk tolerance was 100% medium.

¶ 112 In addition, the Respondent provided the Raimbaults with a Fund Fact Sheet for each investment which indicated that they were of moderate risk. The Panel was asked to carefully consider the Respondent's evidence to the effect that he thoroughly reviewed and discussed each of the investments as well as the compensation structure, namely deferred sales charges, with the Raimbaults before he made any recommendations and executed any purchases.

¶ 113 It was pointed out that Mrs. Raimbault in her testimony acknowledged that it was Mr. Gareau, who in mid-October 2008, recommended that their entire portfolio be transferred into a money market fund. Mr. and Mrs. Raimbault accepted this recommendation and the transfer was effected. It was submitted that the Respondent did exactly what he was supposed to do in recommending a course of action to the Raimbaults which was to transfer their portfolio into a money fund; accordingly, there was no evidence that the Respondent's actions were unsuitable.

¶ 114 It was also submitted that Mr. and Mrs. Raimbault clearly knew how deferred sales charges operated. Mr. Gareau testified that he explained it to them in their earliest meeting and that deferred charges are the most predominant form of fees for mutual funds. Mr. Gareau also testified that the impact of deferred sales charges would be minimal if the Raimbaults, or any other client, held a family of funds for a long term, since deferred funds are ultimately exhausted on a declining percentage basis over time.

¶ 115 Finally, we were urged to consider that the Raimbaults, at the date of the hearing, continued to keep the exact same Dynamic mutual funds that they held with Mr. Gareau, albeit with another advisor at another firm. It was underscored that Mrs. Raimbault acknowledged that the current value of the funds was approximately $200,000 thus, the Raimbaults experienced no loss on their investment and in fact would have gained since there would have been continual withdrawals over the past years. It was asked by the Respondent, "why if the Dynamic mutual funds were considered unsuitable when recommended by Mr. Gareau in 2007/2008, do Mr. and Mrs. Raimbault feel that the same funds are suitable today?"

E. IIROC's Submissions on Count 3

¶ 116 IIROC made reference to Mrs. Raimbault's testimony which was that she and her husband, early in the relationship with the Respondent, specifically told him not to sell their 51,000 units of a Bell Canada bond that was paying 5% annually. She testified that they wanted to keep the bond because it was a secure investment and provided a secure source of income. Mrs. Raimbault also testified that Mr. Gareau did not seek or get the approval of her or her husband for the sale of the bond.

¶ 117 IIROC submitted that there were no Maximizer note entries of any phone calls or communications with the Raimbaults on or around the date of October 9, 2007, the day when the Bell Canada bond was sold. Reference was made to Mr. Gareau's testimony when he said that the Maximizer notes in his office were 98% to 99% accurate, and very complete. On cross-examination he was asked, "So anything significant is in the

Maximizer notes, correct?" To which he responded, "Correct, with the exception of the call at Sunday night at 10:00." It was submitted that Mr. Gareau portrayed the Maximzer notes as accurate and thorough yet there was no entry indicating that he had spoken to either Mr. or Mrs. Raimbault about the sale of the bond or that he had received their prior approval.

¶ 118 IIROC made reference to a series of questions asked of Mr. Gareau on cross-examination. It was suggested that Mr. Gareau was being less than truthful on cross-examination when he suggested that he had received approval from the Raimbaults to sell the bond a few days before it was actually sold. He maintained in cross-examination that he did get the approval but not on the day it was sold but "a day or two" before the sale. IIROC relied on the following specific line of questions in its submissions:

1675Q Well, did you – did you get their consent to sell the Bell Canada Bond on the day that it was sold?

A No, actually it was a few days before.

1676Q Oh. Are you changing your evidence now because you realize that there's no Maximizer note to support your story?

A No, I'm not changing the evidence. We had an issue with the bond trade, we didn't enter it properly and it didn't happen. We had to send an e-mail to the bond department.

1677Q Where are those papers? You put in, I think your lawyer has indicated, 18,000 pages of documents and you don't have those documents?

MR. HOWE: I never said I put that into evidence, I said there's 18,000 pieces of paper.

MR. SMITH I stand corrected. I stand corrected.

1678Q But you don't have an paper to support this?

A It would have been deleted. The e-mail would have been deleted. Everything happened okay, three years had passed by potentially –

1679Q So you thought –

A - and –

1680Q You thought it was important for Mr. Howden, I remember we were here at one point yesterday and you put in – evidence went in through you about when the Howdens changed their address from a street address to a rural post office box, and you thought it was important to put that into evidence, but you didn't think it was important to put something like this about the Bell Canada Bond into evidence?

A The Bell Canada – the question in the Bell Canada Bond was whether or not I had attained their approval, which I had.

1681Q When did you do that? When did you obtain their approval? How many days before you sold it?

A I don't know the exact days.

1682Q Give me a rough estimate of how many days?

A A day or two.

1683Q So you got their consent a day or two before; is that what your evidence is?

A Yes.

1684Q You got your – you got consent –

A I'd have to look at the dates.

1685Q Well, okay. No, I'm not – you don't need to look at dates, you need to look at when the trade was made and how many days before you got their consent. How many days before the trade did you get your consent – their consent?

A I'm not sure.

1686Q Can you give me a rough estimate, Mr. Gareau? Is it not your practice as an advisor to get consent from a client to do the trade, and then to do the trade on the same day? In fact, within minutes? Isn't that – isn't that proper trading conduct for a registered person?

A Yes. And if a trade doesn't happen we contact our head office and there would be an error account adjustment if there was a negative to the client.

1687Q You knew that – you knew that happened before this hearing, correct?

A Knew that –

1688Q You knew that when you first entered – according to your evidence, which I'm sure you can gather that I don't accept, but according to your evidence you made a trade of the Bell Canada Bond first, it was somehow rejected or something happened to it, it came back, there was an error, it went into the error account and then you made the trade again?

A I didn't say there was an error that went into the error account. If the client had a loss because the trade happens late, then there would be an error to the error account. If the bond didn't adjust price-wise up or down, then there's not a loss to the client.

1689Q okay. So tell me then when – how – when you first got your consent – when you first got the Raimbault's consent to sell the Bell Canada Bond, did you sell the Bell Canada Bond on that day?

A It hadn't transferred yet. We started – we first talked about selling the Bell Canada Bond.

1690Q Mmhmm.

A When we talk about selling something, they agree to it.

1691Q Mmhmm.

A Then when the transfer comes in, then we have contact with the client to confirm whether or not they still want to go ahead with it.

1692Q Yeah.

A And then we do the transaction.

1693Q That's what I'm looking for then. I'm not looking – I'm looking for that day the trade was made because I don't – I don't think it would be – you know, I'm not worried about – you can't get consent to sell something before – if you don't even have it in your account, can you? You're going to agree with me, right? You can't, you can't get consent to sell something before it –

A I can't sell it before it gets in their account.

1694Q Right. So after it comes into the account, boom, it's in the account, right? You then call the Raimbault's, get their consent to sell it, and you make the trade on that day, correct?

A That would be my normal practices, yes.

1685Q Well, no, I'm asking you if you have a present day recollection? I'm not asking for a normal practice. This is a very specific case which you've known about for quite a few months now –

A Yes.

1696Q - that there's an issue with this Bell Canada Bond and how it was sold. So my question to you is, the day that you spoke to Jean and Emilie Raimbault and obtained their consent to sell the Bell Canada Bond, did you execute the trade on that day?

A We would have attempted to, yes.

1697Q No. I didn't ask you – are you saying that you did an then it came – is this the day we're talking about and it came back in error?

A We entered the sell of the Bell Canada Bond inaccurately or incorrectly.

1698Q What was incorrect about it?

A I – I can't recall.

1699Q But you did it, right, because nobody else does the trades because you're doing the trades, right?

A On this bond?

1700Q Yeah.

A Yes, I did it inaccurately. I can't –

1701Q It came back – it came back, what did they tell you was inaccurate?

A Well, I – I tried to enter it onto – I tried to enter it into a system or sent the e-mail the wrong place, I can't remember exactly what the –

1702Q How many days did it take for you to get notified that it came back improperly?

A Probably a day or two.

1703Q A day or two?

A Yeah.

1704Q Okay. And then you executed it again properly.

1705Q On the same day you found out that it was inaccurate, it failed or it was done inaccurately, you entered it again accurately and you did that?

A I may have found out towards the end of the day and did it the next day.

1706Q Did it the next day?

A Yeah.

1707Q And you don't have any – of all the paper evidence we've seen, you don't have any – any paper about this trade, about the failed trade?

A I have the discussion I had with Mr. Raimbault the date, September 21st I think it was, when the funds had transferred in, and I contacted them about selling the Bell Canada Bond. And it happened on that day that the trade was entered, September – I believe it was September 21st.

THE CHAIRPERSON: What date did you say, I just didn't hear?

A I believe it was September 21st.

1708Q And with all of this stuff happening there's not one entry on Maximizer about it. Is that another incident where Maximizer just missed it, one of those? I mean, it would seem to me that would be something you would just run off to Trista. Hey, Trista, just sold Canada Savings Bond, it came back failed, entered it again. Simple note. You didn't make a note like that in Maximizer, did you?

A I didn't.

¶ 119 IIROC submitted that Mr. Gareau's explanation was simply not credible. He remembered few significant details around the sale of the bond and he produced no records to support his version of the events. Given the thoroughness and accuracy of his Maximizer note system, it was suggested that it would have been highly unusual not to have at least one note referring to the sale of the bond units, which was a significant part of the portfolio of the Raimbaults.

F. Respondent's Submissions on Count 3

¶ 120 The Respondent submitted that from the outset of the relationship between him and the Raimbaults it was understood that the former entire portfolio would be liquidated and placed into mutual funds because the Raimbaults wanted him to "make them more money". It was suggested that the Raimbaults never directed their mind to the Bell Canada bond until March of 2009, 17 months after it was sold, when they wrote a letter of complaint to the Saskatchewan Financial Services Commission. Also, a complaint was filed with the Commission on March 7, 2008 and there was no mention of the improper disposition of the bond at that time.

¶ 121 In summary, the Respondent's submissions were that his testimony, to the effect that he did sell the bond with the approval of the Raimbault's, should be accepted over the testimony of Mrs. Raimbault.

6. DECISION

A. Count 1

¶ 122 The previous decisions of other tribunals referred to us by IIROC in its submissions did not directly address the issue of a registrant inaccurately completing an NCAF on behalf of clients. There are references to NCAFs in a number of the decisions that we surveyed, but those references were in the context of the obligations to "know your client" and to provide recommendations of suitable investments and not particularly directed at the obligation to complete accurate NCAFs. For instance, in the *Lamoureux* decision, *supra*, case the following is stated in Part V(B)3(b):

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

This quotation is directed to the obligations placed on a registrant and do not address the precise purpose or nature of an NCAF; rather, the authorities make clear that the obligations imposed upon a registrant to know their client and to provide suitable investment advice are distinct from the information that may or may not be included in an NCAF.

¶ 123 Guidance can be found in another observation provided by the Alberta Securities Commission in the *Lamoureux* decision. In Part VI(B)2 the Commission said:

> Similarly, the probative value of a signed acknowledgment may vary greatly. Depending upon the sophistication of the investor, the content of the acknowledgment and the circumstances under which it was signed. In this case, most of the investors were not sophisticated and the Acknowledgment's description of the risks is far from clear or complete. The description of the securities as "speculative" is not adequate to make an unsophisticated investor aware of the various and complex risks involved in these investments.

¶ 124 We do not accept the suggestion of the Respondent that, to find that Mr. Gareau inaccurately recorded information on the NCAFs, it must be shown that he did so on each and every NCAF with respect to each and every element. We are of the view that inaccurate information may be recorded on some of the NCAFs and on some of the elements of the NCAFs which would provide grounds for a breach of Rule 29.1. Obviously, the extensiveness of recording inaccurate information may have an impact on ultimate penalty but one such instance may still be grounds to find a breach of Rule 29.1.

¶ 125 It is difficult to conclude, as submitted by IIROC, that the information recorded on the initial NCAFs with respect to the Howdens was inaccurate. Indeed, since NCAFs are completed very early on in the relationship between an advisor and a client it is understandable that there may be some inaccuracies until more knowledge and information is gathered by the advisor through further communications with the clients. Clearly there are situations which should alert an advisor to the fact that a particular characterization about investment knowledge, risk tolerance or investment objectives are likely inaccurate even if insisted to by the client. One such situation might be previous investment knowledge taken together with the size of the portfolio, the age of the clients and their general sophistication.

¶ 126 It is our conclusion that the surrounding factors of previous knowledge, portfolio size, age and general investment sophistication would lead the reasonable advisor to the conclusion that the characterizations or ratings on the NCAFs for the Raimbaults were incorrect and inaccurate. This conclusion is supported by the quotation from the *Lamoureux* case that signing and acknowledgments in an NCAF in themselves do not remove the responsibility on an advisor to ensure, as far as possible, that the information provided is accurate. In the present situation, Mr. Gareau ought to have known that the acceptance of a moderate risk in the market and the emphasis on capital growth as opposed to capital preservation was an inaccurate record of the Raimbault's situation. His responsibilities toward the Raimbaults as clients began upon first contact and they presented themselves as relatively elderly and unsophisticated investors. Mr. Gareau had fiduciary-like duties toward them which, based on their particular situation, should have alerted him to record in the NCAF information that more closely represented their situation. The *Lamoureux* case, *supra*, addressed this issue by reference to a Supreme Court of Canada decision. The ASC panel stated, at Part IV(B)(2) the following:

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

And the British Columbia Court of Appeal in *Rhoades*, *supra*, said:

> A stockbroker who merely makes sales and purchases on the instructions of clients may well have no responsibility for the wisdom of the transactions involved. The broker may, if asked, agree to give opinions on purchases or sales, and may make it apparent to the client, if not already well understood between them, that these constitute no more than personal opinions, and are not in the nature of considered investment advice. Where, however, as here, the firm and its employees seek to enhance their business by offering guidance to would-be investors - on "growing and managing retirement wealth" and "keeping investments safe," and to serve in "ways that no one else can" through the advice of "two financial advisors with 22 years of combined investment and taxation experience" - they must expect that their advice may be relied on as that of skilled, independent professional advisors. Stockbrokers who carry on business in this way accept responsibilities beyond those involved in bringing together buyers and sellers. They undertake the duty of providing careful, competent, considered professional advice of a sort in which clients, especially those who have no experience of their own to guide them, may well place their complete reliance.

It is our conclusion that Mr. Gareau inaccurately recorded information in the NCAFs completed by the Raimbaults because they did indeed present themselves as requiring careful, competent, considered professional advice" which, if provided, would certainly have led to the NCAFs being completed differently.

¶ 127 The situation with respect to the Howdens concerning the initial five NCAFs completed by them, in our view, is different. Their past experience and general sophistication was not insignificant, the size of their portfolio would allow more risk generally and their ages allow for investment objectives that might not be weighted as strongly toward capital preservation. It is reasonable to conclude that Mr. Gareau would not know, or not necessarily should have known, that the characterizations in the five initial NCAFs were inaccurate for the Howdens.

¶ 128 The knowledge of Mr. Gareau about the Howdens and their objectives, particularly, their risk tolerance had to have changed dramatically by the time the NCAF was completed on June 2, 2008. This NCAF changed the investment objective to 60% growth and 40% aggressive growth and risk tolerance was changed to 60% medium and 40% high risk. It is almost impossible not to conclude that in June of 2008 that Mr. Howden particularly was quite risk averse. By June 2008 Mr. Gareau knew that Mr. Howden was clearly a nervous investor. The Maximizer notes, previously reproduced in this decision, indicate the following communications to Mr. Gareau from Mr. Howden:

> Page B23 – August 14, 2007 – "call him about the market going down like a rock"
>
> Page B23 – August 14, 2007 – "worried about the market and had called three times in the last 24 hours"
>
> Page B16 – January 18, 2008 – "Bob phoned because he is very worried about the market…and he wants to talk to Ken…Trista and myself tried to explain and calm Bob down."
>
> Page A1 – February 13, 2008 – "They are concerned about the market and want an appointment with Ken…"
>
> Page B14 – March 4, 2008 – "Bob called to speak with Ken about the stock market going down…"
>
> Page B9 – August 19, 2008 – "Bob called…unsure of the markets and wants to talk to ken about it…"
>
> Page B8 – September 5, 2008 – "Bob called as he was concerned with the market. Wondering…if they should be pulling out. Really worried about the markets…"

¶ 129 In light of the two year investor/client relationship with the Howdens and the numerous calls and meetings he had with them, Mr. Gareau quite simply had to know, or he engaged in willful blindness, that a characterization in June of 2008 of investment objectives as 40% aggressive growth and risk tolerance as 40% high risk was inaccurate. Even though the Howdens signed the NCAFs, the NCAF cannot and should not have been accepted as being accurate. Moreover, the NCAFs signed in September 2006 and June 2008 indicated that no money had been borrowed to invest. This was clearly incorrect because by September 2006 the Howdens had drawn on margin approximately $220,000 and by June 2008 that number had risen to approximately $247,000 on the account to which the NCAF applied, in addition to approximately $50,000 on margin on their other joint account. This is tantamount to inaccurately reporting income.

¶ 130 It is our conclusion, therefore, that Mr. Gareau did record inaccurate income and risk tolerance on the NCAFs in several significant respects. More particularly he:

1. Inaccurately recorded the risk tolerance and investment objectives of Mr.and Mrs. Raimbault in each of the three NCAFs that they completed.
2. Inaccurately recorded the risk tolerance and investment objectives of Mr. and Mrs. Howden in the NCAF completed on June 2, 2008.
3. Inaccurately recorded in the NCAFs completed in September 2006 and June 2008 that no money had been borrowed to make investments.

The inaccurate recording constitutes a breach of Rule 29.1 because it was business conduct that is detrimental to the public interest.

B. Count 2

¶ 131 The starting point for our analysis is Rule 1300.1(q) which requires that each registrant "shall use due diligence to ensure that the recommendation is suitable for such customer based on factors including the customer's financial situation, investment knowledge, investment objectives and risk tolerance". As previously referred to in this decision, the "suitability requirement" as Rule 1300.1(q) is often referred to, has been fleshed out in some considerable detail by other tribunals. We saw that in the *Lamoureux* decision, *supra*, the Alberta Securities Commission said:

> We agree with these descriptions of the suitability obligation.

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

The obligation on a registrant to ensure that each investment recommended to a client is suitable is a particularly important protection for those clients whose investment experience and sophistication may be insufficient to enable them to fully recognize or assess the risks inherent in an investment. As noted below, disclosure to the client of the negative material factors of an investment, however important, is not necessarily relevant to a suitability determination and cannot replace a registrant's obligation to assess suitability. Acknowledgment on the part of an investor of awareness of the material negative factors or risk does not convert an unsuitable investment into a suitable one.

Our view is consistent with the OSC's decision in Marchment & MacKay, supra. There, the OSC considered whether the respondents, who had sent a variety of documents to their clients, could rely on this documentation to satisfy their obligation to ensure that securities sold to their customers were suitable and that they had adequately disclosed to the clients the risks associated with investing in the securities recommended. The OSC, in deciding that the obligation to determine suitability rests with the registrant and cannot be transferred to the client, stated [at p. 4735]:

> We reject this attempt to rely on these procedures as an effort to transfer to the customers the burden of determining whether the high risk investments being recommended to them by Marchment salespersons were suitable for purchase by them. The obligation to determine suitability clearly rests with the registrant.

The suitability of an investment product for any prospective investor will be determined to a large measure by comparison of the risks associated with the investment product with the risk profile of the investor. This comparison is probably the most critical element in the registrant's suitability obligation.

Understanding an investor's risk profile is not a simple matter of looking at numbers on an NCAF. Some of the assessments recorded in the NCAFs can have a range of meanings, depending on the context. For example, a wealthy investor indicating a tolerance for "medium risk" might contemplate a tolerance for a larger dollar risk than another investor with a small net worth who selects the same risk category. In neither case does the term make clear what probability of loss is acceptable to the investor. A registrant must truly "know his client".

A risky investment may fit nicely with an investor who has an appetite for risk, the ability to understand the risks associated with an investment product and the capacity to withstand the potential additional outlays or losses associated with the investment. The same product would, however, be inappropriate for an investor with less appetite for risk, less investment sophistication or less capacity to withstand the potential loss.

During this hearing, it was suggested that these Partnership investments failed as a result of fraud and that, but for that fraud, they would have been successful and, therefore, suitable investments. There was insufficient evidence for us to reach any conclusion as to what led to the failure of these Partnerships, but we reject any suggestion that the subsequent performance of an investment or the actual reasons for its success or failure are relevant to the suitability assessment.

As the OSC stated in *Re Dime, supra*, [at p. 2693]:

> It is no answer to say that none of the intended customers lost any money. The credibility of the securities markets is damaged - perhaps irrevocably, as to each of the complaints in this case - by conduct such as Dime's.

A registrant's obligation is to "know his client" and to ensure that any recommendations made by them are appropriate for the client based on the factors, both negative and positive, reasonably known to a

diligent registrant at the time the investment is contemplated. Only those factors that are reasonably foreseeable at the time the investment is contemplated are relevant to the suitability determination. If a suitable investment actually fails due to some unforeseeable circumstance, that does not retroactively make it an unsuitable investment. If an unsuitable investment is recommended by a registrant, the fact that the investment is in fact proven to be successful does not retroactively make it suitable. It would be improper and unreasonable to assess a registrant's performance of his duties, which arise at the outset, in light of subsequent unforeseeable events.

¶ 132 And in the *Daubney* decision, *supra*, the Ontario Securities Commission said:

> [211] In any event, there was no indication that Daubney's clients received suitable investment advice from him which they disregarded. Instead, we heard consistent evidence from the investors that they depended on Daubney for his recommendations. …Also, we find that these investors told Daubney everything he needed to know to assess their risk tolerances and yet his recommended investment approach was entirely unsuitable for them.

¶ 133 It is clear that the obligation upon a registrant to determine suitability of recommended investments is very high. Where certain factors exist, it is equivalent to that which exists in a fiduciary relationship. As previously quoted, the Supreme Court of Canada cited with approval a decision of the Ontario High Court of Justice where it said:

> The relationship of the broker and client is elevated to a fiduciary level when the client reposes trust and confidence in the broker and relies on the broker's advice in making business decisions. (See *Hodgkinson v. Simms et al.* (1995) 117 D.L.R. (4th) 161, at p. 183).

¶ 134 Again we make reference to the *Rhoades* decision, *supra* at para. 29, where the court stated:

> Where, however, as here, the firm and its employees seek to enhance their business by offering guidance to would-be investors - on "growing and managing retirement wealth" and "keeping investments safe," and to serve in "ways that no one else can" through the advice of "two financial advisors with 22 years of combined investment and taxation experience" - they must expect that their advice may be relied on as that of skilled, independent professional advisors. Stockbrokers who carry on business in this way accept responsibilities beyond those involved in bringing together buyers and sellers. They undertake the duty of providing careful, competent, considered professional advice of a sort in which clients, especially those who have no experience of their own to guide them, may well place their complete reliance.

¶ 135 And in the *Haupt* decision, *supra* para. 29, the court stated:

> In the circumstances more likely to prevail between registrants and typical "retail" clients, the extent of the regulatory obligations imposed by Policy 3.1 will vary according to the degree to which clients reasonably place their reliance upon and trust in the registrant. In our view, the regulatory obligations imposed by Policy 3.1 are at least as extensive as the fiduciary duties imposed by the common law in these circumstances. (at page 6)

¶ 136 There is little doubt that the relationship between Mr. Gareau and both the Howden and Raimbault families was one where each of the four clients placed "their reliance upon and trust in" Mr. Gareau. Indeed, the evidence of Mr. Gareau itself strongly supports this conclusion and nothing he testified to would contradict a finding of considerable reliance on Mr. Gareau by the four clients. With perhaps one exception, all of the investments made by Mr. Gareau for the two families were recommendations he made to them. The one possible exception is the purchase of the flow-through shares by the Howden family since it appears that Mr. Howden had been advised by others, including possibly a tax advisor, that such securities would be advantageous to him from an income tax point of view. There were other situations where questions were raised by the clients and responded to by Mr. Gareau with a recommendation or recommendations. The HLOC was one such case. But still it was Mr. Gareau who recommended the securities to be purchased with the $200,000 raised from the HLOC. It is our conclusion, that there was a very high degree of reliance placed on Mr. Gareau

by both the Howden family and the Raimbault family to advise them and make recommendations that were suitable to them taking into account all of their personal circumstances.

¶ 137 After carefully considering the vast amount of testimony and documentary evidence provided in this case, it is our conclusion that Mr. Gareau did breach Rule 1300.1(q) and that he failed to ensure the recommendations he made for both the Howden family and the Raimbault family were suitable for them. More particularly, the portfolio for each family was composed of virtually 100% equity investments. This in itself we find to be unsuitable given the personal circumstances of each family and in particular their financial situation and risk tolerance.

¶ 138 Bob and June Howden and Jean and Emilie Raimbault were retired people intending to rely significantly on their investments to support themselves in their retirement years. The only other sources of income for both families were the government pension plans, OAS and CPP. Mr. Gareau clearly knew the ages of the clients and he knew in intimate detail their personal financial situation. To place all, or nearly all, of their investments in securities that are directly linked to the fluctuations in the financial markets in and of itself is, in our opinion, unsuitable. It is trite to observe that a portfolio intended to be relied upon for retirement should have a significant capital preservation element to it, resulting in a balance of investments including some fixed income, cash, dividend stocks and equity stocks. To hold only equity investments when the clients were in the 60s in the Howden's case, and late 60s and early 70s in Raimbault's case, is on its face highly unsuitable.

¶ 139 It is clear that both the Howden family and the Raimbault family were not sophisticated investors. Bob Howden certainly had more experience with the market, than did either Mr. or Mrs. Raimbault. However, the very high number of calls and meetings initiated by Mr. Howden to Mr. Gareau indicated a lack of confidence in his own abilities to assess his own situation in a fluctuating market, in addition to demonstrating that his ability to tolerate risk, even including a minor market movement, was very low. If this was not apparent to Mr. Gareau early on in the relationship with the Howdens, it had to be readily apparent to him later in the relationship. Similarly, the Raimbaults were unsophisticated investors even more so than the Howdens. The worried telephone calls from the Raimbaults to Mr. Gareau together with the almost plaintive letter by Mrs. Raimbault in March 2008 clearly demonstrated that they were unsophisticated investors who were anything but risk tolerant. Again, any misconceptions that Mr. Gareau may have had in his first and early meetings with the Raimbaults must have been dispelled by the later communications with them. Even if the NCAFs reflected Mr. Gareau's early assessment of his clients, later events should have changed that assessment. Regardless of the purpose and effect of an NCAF, it is merely a "snapshot" the accuracy of which can be affected by subsequent events and knowledge.

¶ 140 In the case of both families it appears that Mr. Gareau never addressed the overall package of investments of each family to advise them of the risk that a near 100% equity portfolio presented. It may be that he did explain in detail each of the investments, 51 in the case of the Howdens and 12 in the case of the Raimbaults, but he did not fully explain the overall impact of such a mix of securities in the portfolio and the impact that a fluctuating market, especially a negative market, would have on the portfolios.

¶ 141 The jurisprudence in this area makes clear, and it was accepted by both IIROC and the Respondent, that the time to assess suitability of an investment is at the time the investment was made and not later with the benefit of hindsight. Again as was stated in the *Lamoureux* case, "only those factors that are reasonably foreseeable at the time the investment was contemplated are relevant to the suitability determination". (See *Lamoureux*, *supra*, at Part IV(B)(3)(d)). Many of the specific securities recommended to each of these two families may have been suitable in a portfolio with a different mix of investments. However, it is our conclusion that the totality of the investment package recommended by Mr. Gareau for purchase by the Howden family and the Raimbault family were unsuitable at the time the purchases were made and would have been unsuitable regardless of the subsequent performance of the markets.

¶ 142 Mr. Gareau's primary response to the allegations brought against him and the evidence presented was that the investments were suitable for each set of clients because each investment was explained to the clients and the individual risk of each investment corresponded with the classification of acceptable risk set out in the

NCAFs. This places too great an emphasis on forms completed by the clients, particularly the NCAFs. This issue was addressed in the *Lamoureux* case when the Alberta Securities Commission said:

> Neither the "know your client" obligation or the "suitability" obligation can be fulfilled merely by completing poorly-construction forms or by following a procedure in a perfunctory fashion. Forms and procedures are merely tools that can assist in performing a task and that may provide reminders or evidence of efforts undertaken or not undertaken.

¶ 143 We agree with the submissions of IIROC that the mere completion of the NCAFs and the providing of the information on each individual assessment does not remove the overall responsibility of the Respondent to recommend suitable investments throughout the entire relationship of advisor-client. In the case of the Raimbaults they had very modest assets and had very little investment experience. They are retired and can be described as seniors. These factors placed a very high responsibility on Mr. Gareau to act in their best interests. He was relied upon and trusted and in his capacity as a financial advisor had the responsibility of a fiduciary or near fiduciary to his clients. The jurisprudence makes this clear. This duty is so high that even if either the Raimbaults or the Howdens had instructed Mr. Gareau to create a totally inappropriate and unsuitable portfolio, he had a responsibility to warn them and to even protect them against themselves. The evidence in this case demonstrates that any such warnings were given or "educational" efforts made by Mr. Gareau were minimal.

¶ 144 This Panel must be careful not to conclude that it is improper or unsuitable for clients who are in situations similar to the Howdens and the Raimbaults ever to have an all equity portfolio or any high risk securities in their portfolio. This is not the case; however, where the indicators (age, sophistication, knowledge, risk tolerance, value of assets) point toward certain investments being unsuitable, the duty and obligation on a registrant to take positive steps is high. Those steps may include, but not be limited to, a full clear written risk assessment provided to the client, a possible reference to and assessment by the firm's compliance unit, a possible third-party assessment, and clear and unambiguous written instructions provided by the clients. Indeed, in some situations the duty upon a registrant may be so high as to require him or her to withdraw services because a client's instructions are so destructive to their self-interest.

¶ 145 It is our conclusion that there is no doubt that the recommendations of Mr. Gareau resulting in total equity positions of both the Howden and Raimbault families were unsuitable given the totality of their personal circumstances, including age, risk tolerance, investment knowledge and general sophistication with respect to investments and the market.

¶ 146 There were four particular recommendations made by Mr. Gareau that in themselves were, in our view, unsuitable, particularly given the nature of the overall portfolios held by these two clients. The first was the recommendation of the Dynamic Power Hedge Fund to the Howdens. According to the material published by Dynamic, the minimum investment requirement for this particular fund is $100,000 for accredited investors and sophisticated purchasers – the Howdens were neither. Although the hedge fund may have been managed by one of Canada's top hedge fund managers, by its very nature it is an extremely high risk and volatile investment. During the year 2008, the monthly ranges in the fund price went from +18.4% to -43.1%. The purchase of $100,000 of this fund by the Howdens on margin was undoubtedly unsuitable.

¶ 147 In 2006 the Howdens purchased $100,000 of the Canada Dominion 2006 II limited partnership for their numbered company and $40,000 for their personal accounts. In 2008 purchased $30,000 of the CMP 2008 Resource Limited Partnership for their personal accounts. The prospectus for the CMP 2008 Resource LP describes the offering as follows:

> THIS IS A SPECULATIVE OFFERING. The purchase of Units involves significant risks. There is no assurance of a return on a Subscriber's initial investment. The Units are more suitable for individuals whose incomes are subject to high marginal tax rates. There is no market through which the Units may be sold and purchasers may not be able to resell the securities purchased under this prospectus. Limited Partners may lose their limited liability in certain circumstances. The Flow-Through Shares and other securities, if any, of Resource Companies issued to the Partnership generally will be subject to resale restrictions. The Manager may not be able to identify a sufficient number of investments in Flow-

> Through Shares and other securities, if any, of Resource Companies to fully invest the Gross Proceeds by December 31, 2008. Therefore, the possibility exists that capital may be returned to Limited Partners and Limited Partners may be unable to claim anticipated deductions from income for income tax purposes. Fluctuations in the market price of securities acquired by the Partnership may occur for a number of reasons beyond the control of the Manager or the Partnership and there is no assurance that an adequate market will exist for such securities. The business activities of Resource Companies are speculative and may be adversely affected by factors outside the control of those issuers. Limited Partners who sell their Units may not realize proceeds equal to their pro rata share of the Net Asset Value because of their liability for tax on capital gains arising as a result of a disposition of Units. See ''Risk Factors'', ''Conflicts of Interest'' and ''Certain Canadian Federal Income Tax Considerations''. Subscribers should consult their own professional advisors to assess the income tax, legal and other aspects of this investment and, in addition to the tax benefits, should consider the investment merits of the Units.

These flow-through limited partnerships are investments in a pool of junior mining and/or oil and gas companies which may or may not have any assets other than prospective land positions. These are highly speculative investments. The shares in the limited partnerships are flow-through shares which are priced at a premium to the market. The amount invested in the limited partnership is written off against income and when the limited partnership is ultimately sold it is treated as having a cost base of zero so that any proceeds from the sale are taxed as capital gains. As an investment these are appropriate for sophisticated investors in the upper tax brackets who understand that they are buying a fund of volatile, generally illiquid companies and are prepared to speculate. We do not believe that the Howdens understood what they were buying and we find that the size of the investments ($170,000) were clearly unsuitable.

¶ 148 The third specific recommendation and action by Mr. Gareau that, in our view, clearly breaches the unsuitability rule as set out in Rule 1300.1(q) is the sale of the $51,000 Bell Canada 5% of 15 February 2017 bond and the purchase of equity funds with the proceeds. Given the personal circumstances of the Raimbaults, the recommendation to replace a fixed income bond with equities, in a portfolio that was otherwise 100% equities, is particularly unsuitable. In addition, the bond was sold on the recommendation of Mr. Gareau at a price of $82.89, which works out to a yield to maturity of approximately 6.7%. Quite aside from the issue of whether the sale of the bond was authorized by the Raimbaults, the recommendation to sell it without a full and clear warning and assessment of risk being provided to the Raimbaults (which certainly did not occur) was entirely unsuitable.

¶ 149 The fourth specific item which we conclude was an unsuitable recommendation was the extent of the utilization of the margin accounts by the Howden family. Again, aside from any question as to whether or not the Howdens understood the full impact of the negative leveraging consequences which are possible from a margin account, to allow and recommend the use of the margin account to over $550,000, in addition to the $200,000 borrowed on the HLOC, was not only unsuitable but entirely irresponsible. Mr. Gareau's response to this allegation was that he advised the Howdens on numerous occasions to reduce their margin. Mr. Howden in his testimony indicated that that was not the case. It is our conclusion that Mr. Howden's evidence is to be preferred over that of Mr. Gareau. By Mr. Gareau's own testimony, his Maximizer notes were about 98% accurate and complete. Yet, there is no reference in the notes to any recommendations made concerning the reduction of the margin. Also, in addition, the handwritten notes discussed at meetings with the Howdens in February 2007 and April 2007 make no reference at all to the amount of debt in the margin account but just include positive numbers arriving at the net "bottom line". Both of these factors point to a conclusion that more likely than not a margin account was never addressed by Mr. Gareau with the Howdens in a manner that clearly set out its negative risk factors, which were numerous. As the previous review of the judicial decisions and securities commission decisions indicate, there is a responsibility to fully discuss with clients the negative risk factors and that responsibility increases as the risks increase.

¶ 150 In the hearing in this matter, considerable evidence was surveyed concerning a recommendation by Mr. Gareau to the Howdens to purchase a large life insurance policy with quite significant premiums, and Mr.

Gareau testified that a sizeable commission was payable to him on the life insurance policy. In its submissions IIROC did not rely upon this transaction in support of its argument that Rule 1300.1(q) was breached. Therefore, it will not be addressed in this decision. Also, in the testimony there were many questions and answers about deferred sales charges. We have not discussed them in any great detail in this decision other than to note that because the portfolios of both families were composed virtually of all equity mutual funds with back end charges, if the clients were forced to sell early for whatever reason, including to satisfy a margin call, they would have been faced with significant commissions which would have reduced the value of their investments, which further supports the conclusion that portfolios composed of nearly 100% equity mutual funds were generally unsuitable for these two sets of clients.

¶ 151 With respect to Count 2, it is our conclusion that Rule 1300.1(q) was breached by the Respondent, Mr. Gareau, by:

(1) Recommending and overseeing portfolios composed virtually of all equity assets for both the Howden family and the Raimbault family, all four people who were retired and reliant on their investment portfolio.

(2) Recommending to the Howdens that they purchase $100,000 of a hedge fund on margin.

(3) Recommending to the Howdens that they purchase $170,000 in limited partnerships, some of it on margin.

(4) Recommending to the Raimbaults that Bell Canada bond units, a fixed income investment yielding as high as 6.7%, be sold to buy equity mutual funds.

(5) Recommending extensive use of margin accounts by the Howden family and failing to take extensive positive steps to reduce the margin once it reached excessive amounts.

C. Count 3

¶ 152 It is always a very difficult decision for a fact-finding tribunal to be required to choose the direct testimony of one witness over another. Rarely will the evidence establish that one version of events is absolutely certain and this case is not an exception. Our task, however, does not require absolute certainty. Rather, it requires us to determine on a balance of probabilities whether IIROC has met the burden of proof placed on it. In this particular context, has IIROC proved that the sale of the Bell Canada bond was in effect a discretionary trade by Mr. Gareau and not approved by the Raimbaults? Count 3 as drafted is even narrower than the discretionary trade situation since it alleges that the bond was sold against the express wishes of the client, Mr. and Mrs. Raimbault.

¶ 153 The oft-cited test for the assessment of credibility of a witness is set out in *Faryna v. Chorney*, [1952] 2 D.L.R. 354 (B.C.C.A.):

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

¶ 154 The *Faryna* approach suggests that a tribunal ought to test the evidence by considering all the surrounding circumstances. In *F.H. v. McDougall*, 2008 S.C.C. 53, at para. 49, the Court found that a trier of fact "…must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred."

¶ 155 We accept Mrs. Raimbault's testimony that she and her husband made known to Mr. Gareau early in the relationship that they valued the Bell Canada bond. Given the nervousness and anxiety about preservation of capital, surveyed in some detail earlier in this decision, it is quite logical that the Raimbaults would have told Mr. Gareau that they wanted to keep the bond.

¶ 156 As the Respondent submits, there is no doubt that the Raimbaults indicated to him when he was first retained that they wished to make money from their investments. It is hard to imagine that any client would say otherwise. However, the evidence simply does not support the proposition that such a simple statement gave Mr. Gareau full authority to transfer all of the assets of the Raimbaults to equity mutual funds, as he suggested in his written submissions. We simply do not accept that that was the case. We find, on a balance of probabilities, that the version of events as articulated by Mrs. Raimbault is the most acceptable one. It is consistent with the risk averse nature of the Raimbaults and not contradicted by any records maintained by Gareau even though, by his own count, his Maximizer note system was both accurate and thorough, especially with respect to any communications that occurred during the regular business day. It is our conclusion that Mr. Gareau did sell the Bell Canada bond fully knowing that the Raimbaults did not want it to be sold.

¶ 157 It is a relatively easy conclusion that the sale of a security against the express wishes of a client is certainly detrimental to the overall public interest. As a result, it is our conclusion that Mr. Gareau did act contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by selling the 51,000 units in the Bell Canada Bond against the express wishes of Mr. and Mrs. Raimbault.

7. SUMMARY AND CONCLUSION

¶ 158 In summary, for the foregoing reasons, we find that:

(A) The Respondent acted contrary to Dealer Member Rule 29.1 by inaccurately recording risk tolerance and investment knowledge in New Client Application Forms for Bob and June Howden and for Jean and Emilie Raimbault and thereby conducted business detrimental to the public interest. In particular the Respondent:

1. Inaccurately recorded the risk tolerance and investment objectives of Mr.and Mrs. Raimbault in each of the three NCAFs that they completed.
2. Inaccurately recorded the risk tolerance and investment objectives of Mr. and Mrs. Howden in the NCAF completed on June 2, 2008.
3. Inaccurately recorded in the NCAFs completed in September 2006 and June 2008 that no money had been borrowed to make investments.

(B) The Respondent acted contrary to Dealer Member Rule 1300.1(q) by failing to ensure recommendations he made to Bob and June Howden and to Jean and Emilie Raimbault were suitable investments for them. In particular the Respondent breached Rule 1300.1(q) by:

1. Recommending and overseeing portfolios composed virtually of all equity assets for both the Howden family and the Raimbault family, all four people who were retired and reliant on their investment portfolio.
2. Recommending to the Howdens that they purchase $100,000 of a hedge fund on margin.
3. Recommending to the Howdens that they purchase $170,000 in limited partnerships, some of it on margin.
4. Recommending to the Raimbaults that Bell Canada Bond units, a fixed income investment yielding as high as 6.7%, be sold to buy equity mutual funds.
5. Recommending extensive use of margin accounts by the Howden family and failing to take extensive positive steps to reduce the margin once it reached excessive amounts.

(C) The Respondent acted contrary to IDA By-law 29.1 (now IIROC Dealer Member Rule 29.1) by selling an income producing bond against the express wishes of his client, Jean and Emilie Raimbault and thereby conducted business detrimental to the public interest.

Dated at Saskatoon, Saskatchewan this 26th day of September, 2011.

Daniel Ish, Q.C., Chair
William Welton, Member
Eric Wray, Member