Ontario

Capital Markets Tribunal | Tribunal des marchés financiers | 22nd Floor 20 Queen Street West Toronto ON M5H 3S8 | 22e étage 20, rue Queen ouest Toronto ON M5H 3S8

Citation: *Odorico (Re)*, 2023 ONCMT 34
Date: 2023-10-13
File No. 2022-18

IN THE MATTER OF
MARK ODORICO

REASONS AND DECISION

(Sections 21.7 and 8 of the *Securities Act*, RSO 1990 c S.5)

Adjudicators:	Andrea Burke (chair of the panel) Sandra Blake Dale R. Ponder	
Hearing:	By videoconference, March 7 and July 18, 2023	
Appearances:	Mark Odorico	For himself
	Kathryn Andrews Marie Abraham	For Staff of the Canadian Investment Regulatory Organization
	Erin Hoult	For Staff of the Ontario Securities Commission

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REASONS AND DECISION

1. OVERVIEW

[1] This is an application under ss. 8(3) and 21.7 of the *Securities Act*[1] (***Act***) by Mark Odorico for a hearing and review of two decisions of the Canadian Investment Regulatory Organization (**CIRO**, formerly the Investment Industry Regulatory Organization of Canada, **IIROC**) dated April 7, 2022[2] and August 15, 2022[3] (collectively, the **CIRO Decisions**).

[2] Pursuant to the CIRO Decisions, Odorico, a former registered representative and portfolio manager, was disciplined for certain conduct, including misappropriating client funds, effecting unauthorized trades in a client account, and failing to cooperate with Staff of CIRO (**CIRO Staff**) in its investigation. Sanctions imposed included a fine of $125,000, disgorgement of $579,000 and a permanent ban from registration.

[3] Odorico asks that the Tribunal set aside the CIRO Decisions and make a finding that the permanent registration ban and financial penalties ordered against him were excessive and unfair in the circumstances.

[4] CIRO Staff opposes the application. Staff of the Ontario Securities Commission (**OSC Staff**) takes no position.

[5] We considered various preliminary matters. Odorico requested an adjournment of the hearing of his application. We denied his adjournment request with reasons to follow. We also considered and addressed Odorico's request for confidentiality of a portion of his submissions at the hearing of the application. We agreed to proceed with portions of Odorico's submissions (and testimony) in the absence of the public and for the related non-public hearing transcript to be kept confidential until the parties received a copy and had an opportunity to make further written submissions on which parts of the transcript, if any, should remain confidential. Finally, we also considered whether certain items of fresh

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[1] RSO 1990, c S.5

[2] *Re Odorico* 2022 IIROC 6 (**Merits Decision**)

[3] *Re Odorico* 2022 IIROC 21 (**Sanctions Decision**)

evidence raised by Odorico should be admitted and we concluded that they were not admissible.

[6] As to the review of the CIRO Decisions, we have determined that there are grounds to warrant setting aside one aspect of the Merits Decision and a portion of the Sanctions Decision attributable to that aspect of the Merits Decision, and to seek written submissions from the parties regarding any further appropriate corresponding adjustments to the Sanctions Decision.

[7] The one aspect of the Merits Decision we have determined to set aside is the CIRO panel's finding that Odorico misappropriated funds from clients JR and MR. We have concluded that the CIRO panel overlooked or misapprehended material evidence in this finding and expressed a supporting rationale for finding that Odorico's evidence lacked credibility that was inconsistent with the overlooked or misapprehended material evidence. In particular, we find that the CIRO panel overlooked or misapprehended material documentary evidence relevant to the fundamental question of whether the funds were advanced to Odorico as a personal loan.

[8] In the circumstances, we decide that CIRO Staff shall be entitled to decide whether the allegation of misappropriation of JR's and MR's funds shall be re-heard in a new hearing (or hearing *de novo*) before a different CIRO panel. The reasons for our conclusions are set our below.

2. BACKGROUND

[9] Mark Odorico was a registered representative with CIBC World Markets and regulated by CIRO (then-IIROC). He ceased to be registered with CIRO on April 30, 2019.

[10] The CIRO disciplinary hearing took place on March 1 and 2, 2022, after Odorico was granted a number of adjournment requests between 2021 and 2022.

[11] The Merits Decision found that Odorico engaged in the following misconduct:

a. between March 2014 and October 2018, Odorico misappropriated funds from three clients, contrary to Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400 (after September 1, 2016);

b. between January 2016 and February 2019, Odorico effected unauthorized trades in a client's account, contrary to Dealer Member Rule 29.1 (prior to September 1, 2016) and Consolidated Rule 1400 (after September 1, 2016); and

c. in May 2020, Odorico failed to co-operate with CIRO Staff's investigation, contrary to section 8104 of the Consolidated Rules.

[12] In the subsequent Sanctions Decision, following further adjournment requests, only one of which was granted, the CIRO panel ordered that Odorico:

a. pay fines totalling $125,000;

b. disgorge the amount of $579,000;

c. be permanently banned from registration with CIRO in any capacity; and

d. pay costs of $25,000.

[13] On August 13, 2022, Odorico filed his application with the Tribunal for a review of the CIRO Decisions.

[14] On October 27, 2022, Odorico filed a motion to stay the CIRO Decisions pending the disposition of the application. The Tribunal dismissed the motion and provided its reasons for doing so on March 1, 2023.[4]

[15] Prior to the hearing of this application, the Tribunal made several decisions regarding Odorico's requests for confidential treatment of hearing documents, including with respect to medical records,[5] certain documents contained in the records of the original CIRO proceeding,[6] and hearing transcripts.[7]

[16] The hearing of the application was held on March 7, 2023, and was reconvened at the panel's request on July 18, 2023, to have the parties address some additional questions raised by the panel. Subsequent to the March 7, 2023 hearing of the application we also received written submissions from the parties addressing: (i) Odorico's request that certain portions of the transcript of the

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[4] *Odorico (Re)*, 2023 ONCMT 10 (***Odorico Stay Decision***)

[5] (2022) 45 OSCB 8313

[6] *Odorico (Re)*, 2022 ONCMT 36, (2023) 46 OSCB 503

[7] *Odorico Stay Decision* at paras 32-45

March 7, 2023 hearing be kept confidential, and (ii) CIRO Staff's identification of certain portions of Odorico's submissions which CIRO Staff asserted was fresh evidence that we should not admit.

3. PRELIMINARY MATTERS

3.1 Adjournment request

[17] We declined Odorico's request for an adjournment of this hearing and proceeded with hearing the merits of the application. Our reasons for denying the adjournment request are set out below.

[18] Approximately a week before the scheduled start of the review hearing, Odorico made a request to the panel for a postponement of the hearing for at least 30 days to allow him extra time to prepare. We heard Odorico's request for an adjournment at the start of the review hearing on March 7.

[19] Odorico submitted that he needed more time to prepare for the hearing because of various health challenges he was facing. He advised us that reviewing and responding to his earlier confidentiality request about redactions to transcripts had taken a toll on his health due to stress. Additionally, he submitted that the process for preparing for this proceeding is different than for CIRO's proceeding. He wanted to ensure that he put things in a proper order and clarified his specific concerns with the CIRO Decisions.

[20] When asked, Odorico confirmed that he did not have any medical notes to support his submissions regarding his health as his doctor was on vacation. In any event, Odorico believed that his earlier medical notes had been disregarded by CIRO and any further medical notes would be of limited utility as a result. Odorico did advise that if a medical note would be of assistance, he would get one.

[21] CIRO Staff opposed the adjournment request, citing rule 29(1) of the Tribunal's *Rules of Procedure and Forms* (**Rules**), which states that every hearing of an application shall proceed on the scheduled date unless a party satisfies the panel that there are exceptional circumstances requiring an adjournment. CIRO Staff submitted that no compelling reasons had been put forward to satisfy this high bar. CIRO Staff conceded that this was Odorico's first adjournment request of

the hearing. However, it pointed to the pattern of Odorico's adjournment requests through the merits and sanctions hearings before CIRO.

[22] OSC Staff agreed with CIRO Staff's submissions and reiterated that Odorico's request for extra preparation time fell far short of exceptional circumstances to warrant an adjournment. Additionally, the lack of a prior request for an adjournment in this proceeding was not a factor in favour of granting an adjournment.

[23] CIRO Staff submitted that Odorico received the record of the CIRO proceeding in August 2022 and the supplementary CIRO record in December 2022. Odorico had been aware of the March 7 hearing date for five months, since it was set by order of the Tribunal dated October 7, 2022.[8] CIRO Staff submitted, and we agree, that Odorico had been given ample time to prepare for the review hearing.

[24] There are numerous procedural steps an applicant must take following the filing of their application for review. Among those steps is a requirement to provide notice of any intention to rely on documents or things not included in the record of original proceeding, serving and filing a witness list for any witnesses they propose to call at the review hearing, and serving a summary of each proposed witness's anticipated evidence on each other party.

[25] Odorico was first ordered to complete each of these steps by December 5, 2022. He subsequently received two extensions of time, first to January 18, 2023, and then to January 27, 2023. By the time we received Odorico's adjournment request, he had not provided notice of any additional documents, served or filed a witness list, served a summary of anticipated evidence of proposed witnesses or filed any written submissions.

[26] The standard to meet "exceptional circumstances" is a high bar that reflects the important objective that Tribunal proceedings be conducted in a just, expeditious and cost-effective manner. This objective must be balanced against the parties' ability to participate meaningfully in the hearing and to present their case. A determination as to whether an adjournment should be granted is necessarily

[8] (2022) 45 OSCB 8663

fact-based, and will include consideration of, among other things, how the requesting parties have conducted themselves in the case.[9]

[27] In *Debus (Re),* the Tribunal acknowledged that health issues presented challenging circumstances to the respondent, however in that case they did not meet the high bar contemplated by rule 29(1).[10]

[28] Odorico submits that he has had ongoing health issues for several years. We acknowledge that health issues may impact one's ability to prepare for a Tribunal hearing. However, we did not receive any new medical evidence to substantiate that his health had deteriorated to the point that he would be unable to participate meaningfully in the hearing.

[29] We questioned Odorico concerning how additional time would help him present his case. After considering Odorico's submissions, we failed to understand how further time would benefit Odorico.

[30] In balancing the objective to conduct proceedings in a just, expeditious and cost-effective manner against the parties' ability to participate meaningfully, we were not satisfied that Odorico demonstrated any "exceptional circumstances" that might warrant an adjournment of the review hearing.

[31] For these reasons, we declined Odorico's request for an adjournment of the review hearing and proceeded with hearing the merits of the application.

3.2 Request for confidentiality

[32] During the merits hearing, Odorico requested that some of his oral submissions (some of which verged into evidence) in support of both his adjournment request and the merits of his application be kept confidential and not be made available to the public. We agreed to proceed with portions of Odorico's submissions (and testimony), primarily on health-related matters, in the absence of the public and for the related non-public hearing transcript to be kept confidential until the parties received a copy and had an opportunity to make further written submissions on which parts of the transcript, if any, should remain confidential.

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[9] *Money Gate Mortgage Investment Corp (Re),* 2019 ONSEC 40 (***Money Gate***) at para 54

[10] *Debus (Re)*, 2021 ONSEC 22 (***Debus***) at para 70

[33] We followed this approach at the hearing of Odorico's stay motion on November 25, 2022, when Odorico made a similar request. We took this approach primarily because Odorico had not filed any materials in advance of the hearing and the scope of his intended submissions (and testimony) was not known, making it difficult to consider and make a ruling on confidentiality in advance.

[34] CIRO Staff proposed certain limited redactions to the non-public transcript. OSC Staff agreed that a limited confidentiality order based upon the redactions proposed by CIRO Staff was appropriate. Odorico agreed with the redactions proposed by CIRO Staff and proposed a few additional redactions.

[35] The Tribunal's authority to order that part of an adjudicative record (including a hearing transcript) be confidential arises under s. 9(1) of the *Statutory Powers Procedure Act*[11] (***SPPA***) and rules 22(2) and 22(4) of the Rules. We are also mindful of the Capital Markets Tribunal *Practice Guideline* which states that personal information relevant to the resolution of a matter is generally not treated as confidential.

[36] In applying s. 9(1) of the *SPPA* (as well as rules 22(2) and 22(4) of the Rules) it is helpful to consider the common law relating to confidentiality in court or administrative tribunal proceedings and, in that regard, we have taken into account the recent Supreme Court of Canada decision in *Sherman Estate v Donovan*[12] as well as the approach taken by the Tribunal in resolving Odorico's prior requests for confidentiality in this matter.

[37] We have concluded that some (but not all) of the redactions proposed by CIRO Staff will be marked confidential, on the basis that they offend the personal dignity of Odorico and the public interest in privacy outweighs the public interest in the open court principle. We have also concluded that the additional redactions sought by Odorico are not appropriate.

[38] The redactions that we agree should be marked confidential focus on the type of doctor Odorico visited, detailed particulars of his medical symptoms and a doctor's note previously redacted by the Tribunal, and particulars of the type,

[11] RSO 1990, c S.22

[12] 2021 SCC 25

dosage and effect of medication that Odorico was taking at the time of the CIRO proceedings. We do not agree that the following portions of the transcript should be confidential:

a. Odorico's explanation as to the impact of his health issues on his ability to prepare for the merits hearing before us that he offered in support of his request to adjourn the March 7, 2023, merits hearing;

b. the name of Odorico's doctor; and

c. Odorico's comments about the significance of a handwritten doctor's note.

3.3 Request to admit fresh evidence

3.3.1 Admissibility of fresh evidence identified by CIRO Staff

[39] Odorico made some statements and provided some details about his health conditions during his confidential submissions that CIRO Staff identified as "fresh" evidence or evidence that augmented the record that was before the CIRO panel when it dismissed Odorico's request to adjourn the CIRO disciplinary hearing on March 1, 2022.

[40] This evidence is included in the portions of the March 7, 2023 non-public transcript that all parties agreed should be kept confidential and that we have determined, for the reasons set out above, should be redacted in the public version of the transcript.[13]

[41] Odorico's statements identified by CIRO Staff as fresh evidence indicated the type, dosage and effect of medication he was taking at the time his adjournment request was denied by the CIRO panel and also included an assertion that elaborated on the nature of his health issues.

[42] CIRO Staff objected to this evidence being admitted on the ground that it does not meet the Tribunal's test for admitting fresh evidence on a hearing and review of a CIRO decision.[14] In order for Odorico to establish that we should exercise

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[13] The portions of the March 7, 2023 *in camera* transcript that contain the fresh evidence identified by New SRO Staff are as follows: p. 10, line 22 (the two words before "way more"); p. 13, lines 19 and 20 (the four words before "here"); p. 17, lines 24 to 26 (the words between "on" and "I didn't tell IIROC this"); and p. 18, line 9.

[14] *Re Canada Malting Co.* (1986), 33 9 O.S.C.B. 3566 (***Canada Malting***); *Northern Securities Inc (Re),* 2013 ONSEC 48 (***Northern Securities***), at paras 26-30; *Northern Securities v Ontario*

our discretion to admit the fresh or additional evidence on this application, the applicable test is whether the evidence is both "new and compelling".[15]

[43] CIRO Staff submitted that the evidence is not "new" as it was known to Odorico at the time of the CIRO hearing and could have been provided by him along with the other medical information that he did provide to the CIRO panel in support of his March 1, 2022, adjournment request. CIRO Staff submitted that the evidence is also not "compelling" because it is in the nature of bald assertions without supporting medical documentation and would not have changed the CIRO panel's decision to dismiss Odorico's adjournment request.

[44] OSC Staff objected on the same basis as CIRO Staff and also objected on the principled basis that Odorico had not provided advance notice of his intention to seek to tender and rely on this evidence.

[45] Odorico maintained that we should admit the fresh evidence but volunteered that the fresh evidence is not "shockingly extremely different evidence" but instead "merely supportive evidence" to the evidence that was presented to the CIRO panel and that in his submissions before us he "voluntarily mentioned more information in detail, although [he] didn't think it was needed to prove [his] issue".[16]

[46] Odorico submitted that if we decide to not admit the fresh evidence it is not going to make his argument on his application weaker. Odorico also submitted that at the time of his March 1, 2022 request to adjourn the CIRO hearing he did not think that the additional details in the fresh evidence were necessary as he thought that the doctor's note would be sufficient and he was not in good enough health to question if he must provide all background details.

[47] Notably, Odorico did not take the position that the fresh evidence was not available to him nor that he was incapable of raising it at the time the CIRO panel considered his adjournment request. Odorico also told us that the fresh

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(Securities Commission) 2015 ONSC 3641 (Div Ct) at para 12; *Debus (Re)*, 2021 ONSEC 1 (***Debus Motion***) at paras 26-32; *Debus* at paras 39-40; *Hahn Investment Stewards & Co. Inc (Re)*, 2009 ONSEC 41 (***Hahn***) at paras 197-198.

[15] *Northern Securities* at para 30; *Debus Motion* at paras 30-33

[16] Hearing Transcript, March 7, 2023at p 57, line 19 to p 58, line 2 and p 58, line 25 to p 59, line 3.

evidence relating to the type, dosage and effect of medication he was taking at the time his adjournment request was denied by the CIRO panel was information that he chose not to tell the CIRO panel.

[48] On an application for review under ss. 8(3) and 21.7 of the *Act*, the Tribunal has original jurisdiction to make a decision and can, in its discretion, admit new evidence that was not before the decision maker below.[17] This Tribunal has historically taken a restrained approach in exercising this discretion to ensure that an applicant is not permitted the opportunity to re-argue the initial hearing with an augmented record of evidence that was available at the time of the initial hearing and is of questionable probative value.[18]

[49] We find that Odorico's fresh or additional evidence is not "new" because it is information that was known to Odorico and that he could have raised at the time of the CIRO panel's decision to dismiss the adjournment request.[19]

[50] Furthermore, we find that Odorico's fresh or additional evidence is not "compelling" in the sense that it would have changed the CIRO panel's decision to dismiss Odorico's adjournment request had it been known by the CIRO panel at the time of the decision.[20] We carefully reviewed Odorico's submissions and evidence in support of his request to adjourn the March 1 and2, 2022 CIRO disciplinary hearing. We are satisfied that Odorico's fresh or additional evidence does not substantially add to the evidence about Odorico's health that was available to and considered by the CIRO panel, and would not have been expected to change the CIRO panel's decision to dismiss the adjournment request.

[51] For these reasons, we decline to admit Odorico's fresh evidence as identified by CIRO Staff.

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[17] *Debus Motion* at para 27; *Northern Securities* at para 27, citing *HudBay Minerals Inc (Re)*, 2009 ONSEC 15 (***HudBay***) at paras 111-112

[18] *Northern Securities* at paras 28-30; *Debus Motion* at para 29, citing *HudBay* at para 114

[19] *Debus Motion* at para 32; *Northern Securities* at para 28, citing *Hahn* at paras 197-198

[20] *Northern Securities* at para 28, citing *Hahn* at paras 197-198; *Debus Motion* at para 33

4. ISSUES AND ANALYSIS

4.1 Introduction

[52] Odorico asks that we set aside the CIRO Decisions and make a finding that the permanent registration ban and financial penalties ordered against him were excessive and unfair in the circumstances.

[53] In his application for review, Odorico's grounds for review are the following:

a. he was not treated fairly based on his health condition and needed more time to be represented properly; and

b. he did not do anything wrong with investment accounts; instead he only had a personal loan that was agreed upon with the related parties that were family and outside personal relationships that were outside his employment.

[54] At this hearing, Odorico made further oral submissions about the state of his health at the CIRO merits hearing. He submitted that the failure of the CIRO panel to take his medical evidence fully into account and the failure to grant him an adjournment of the merits hearing, resulted in an unfair hearing because it was one in which he could not meaningfully participate.

[55] It is important to note that at the merits and sanctions hearings before CIRO, Odorico was self-represented. He also made attempts to retain counsel for this hearing, but without success. Accordingly, Odorico remained self-represented in this hearing.

[56] We have determined that there are grounds to warrant setting aside one aspect of the Merits Decision. We will also set aside a portion of the Sanctions Decision attributable to the aspect of the Merits Decision that we are setting aside and will consider written submissions from the parties regarding any further appropriate corresponding adjustments to the Sanctions Decision. We first discuss the applicable standard of review in conducting a review and we examine the duties owed to a self-represented party.

4.2 Scope of Review

[57] On applications for review under ss. 8 and 21.7 of the *Act*, the Tribunal may: (1) confirm the decision of CIRO (a recognized self-regulatory organization, or **SRO**); or (2) make such other decision as the Tribunal considers proper.[21]

[58] The Tribunal's review of a SRO decision is a hearing *de novo* rather than an appeal. In other words, the Tribunal exercises original jurisdiction rather than a more limited appellate jurisdiction. However, in practice the Tribunal takes a "restrained approach" on reviews of decisions of a SRO such as CIRO and applicants must meet a "high threshold" to demonstrate that a SRO decision should be overturned.[22] This is consistent with the requirement in the *Act* that the Commission should "use the enforcement capability and regulatory expertise of recognized self-regulatory organizations."[23]

[59] The Tribunal accords deference to decisions within a CIRO panel's area of expertise, including factual determinations and interpretation and application of CIRO's rules, and will not intervene in such decisions simply because it might have made a different decision.[24]

[60] In past decisions, the Tribunal has adopted the grounds set out in *Canada Malting* in determining whether to interfere with a decision of a SRO. Accordingly, the Tribunal will only interfere with a decision of a SRO where one or more of the following grounds have been satisfied:

a. the SRO has proceeded on an incorrect principle;

b. the SRO has erred in law;

c. the SRO has overlooked material evidence;

d. new and compelling evidence is presented to the Tribunal that was not presented to the SRO; or

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[21] *Act*, ss 8(3) and 21.7

[22] *Northern Securities* at paras 49, 54, 56-57

[23] *Act*, s 2.1

[24] *Northern Securities* at paras 57-61

e. the SRO's perception of the public interest conflicts with that of the Tribunal.[25]

4.3 Obligations in Proceedings Involving Self-Represented Litigants

[61] As Odorico was self-represented before CIRO and this Tribunal, certain obligations apply to the CIRO panel, this Tribunal, and all other participants in the proceeding.

[62] The Canadian Judicial Council's Statement of Principles on Self-Represented Litigants and Accused Persons has been endorsed by the Supreme Court of Canada in relation to court proceedings involving a self-represented party. As the Ontario Divisional Court and the British Columbia Court of Appeal have recently held, the Statement of Principles also provides useful guidance for proceedings before administrative tribunals.[26]

[63] With respect to decision-makers, the Statement of Principles states that:

a. judges have a responsibility to inquire whether self-represented persons are aware of their procedural options, and to direct them to available information if they are not. Depending on the circumstances and nature of the case, judges may have to explain the relevant law in the case and its implications before the self-represented person makes critical choices; and

b. in appropriate circumstances, judges should consider providing self-represented persons with information to assist them in understanding and asserting their rights, or to raise arguments before the court.[27]

[64] For self-represented litigants, the Statement of Principles provides that they are expected to familiarize themselves with the relevant legal practices and

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[25] *Canada Malting* at para 24; *Rudensky (Re),* 2019 ONSEC 24 at para 32; *Eley (Re),* 2021 ONSEC 19 (***Eley***) at paras 44-46

[26] *Pintea v Johns,* 2017 SCC 23 at para 4; Canadian Judicial Council, *Statement of Principles on Self-Represented Litigants and Accused Persons,* 2006 (**Statement of Principles**); *Hirtle v College of Nurses of Ontario,* 2022 ONSC 1479 (Div Ct) (***Hirtle***) at para 55; *Mountainstar Gold Inc. v British Columbia Securities Commission,* 2022 BCCA 406 (***Mountainstar Gold***) at paras 104-105

[27] Statement of Principles, section C at p 7; see also *R v Tossounian,* 2017 ONCA 618 at para 38

procedures pertaining to their case and are expected to prepare their own case.[28]

[65] Therefore, in the interests of conducting a fair hearing, a decision-maker has a duty to offer sufficient assistance to a self-represented party. However, the duty to provide assistance is not unlimited. The decision-maker must not act as counsel for the self-represented party and must balance providing assistance with the duty to both appear and remain neutral.[29]

4.4 Has Odorico established any grounds for intervention in the merits decision?

[66] We will first address the merits decision. Specifically, we will look at whether the CIRO panel:

a. proceeded on an incorrect principle or erred in law by dismissing Odorico's adjournment request;

b. proceeded on an incorrect principle or erred in law by proceeding with a two-member panel;

c. overlooked material evidence by disregarding Odorico's medical notes; or

d. proceeded on an incorrect principle or erred in law or overlooked material evidence by finding that Odorico misappropriated client funds, effected unauthorized trades in client accounts, and failed to cooperate with CIRO Staff.

4.4.1 Did the CIRO panel proceed on an incorrect principle or err in law by dismissing Odorico's adjournment request?

[67] We find that given the numerous requests for adjournments in the CIRO proceeding, CIRO did not proceed on an incorrect principle nor err in law by dismissing Odorico's adjournment request. Given all the circumstances outlined below, it was reasonable to proceed.

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[28] Statement of Principles, section C page 9 (under "For Self-Represented Persons")

[29] *Hirtle* at paras 57-58, 60, citing *Girao v Cunningham,* 2020 ONCA 260 (***Girao***); *Mountainstar Gold* at para 105

[68] The date for the CIRO merits hearing was scheduled on a peremptory basis due to the number of prior adjournments granted to Odorico. Nevertheless, prior to the hearing, Odorico advised CIRO Staff of his intention to seek an adjournment, submitting that he would not be able to proceed due to medical issues. CIRO Staff opposed the further request for an adjournment.

[69] Odorico also reiterated that the state of his health was such that he could not meaningfully participate in the hearing.

[70] CIRO Staff submits that Odorico's claim that he was not treated fairly due to his health, and that he needed more time to obtain legal representation is not supported by the record. CIRO Staff further submits that Odorico was previously represented and had ample opportunity to retain new counsel but did not do so.

[71] CIRO Staff also submits that Odorico participated in the merits hearing and was given opportunity to cross examine CIRO Staff's witnesses and declined to do so. He was aware on the first day of the merits hearing that oral closing submissions likely would be proceeding the following day. He was given the opportunity to call evidence and although he testified on his own behalf, he did not call any other witnesses. On the second day of the merits hearing Odorico did not allow himself to be cross-examined by CIRO Staff or to be questioned by the panel because he did not return to the hearing following the morning break or the lunch break despite efforts to reach him.

[72] CIRO Staff cites the Tribunal's decision in *Darrigo*[30] and observes that in that case the CIRO hearing proceeded after several adjournments based on medical grounds had been granted, with the last adjournment request refused. In its hearing and review decision, the Tribunal noted that the CIRO panel recognized that it had to balance the public interest in a timely hearing with Darrigo's interests in having an opportunity to answer the case against him.[31] The Tribunal found that:

> "…IIROC's liability hearing was consistent with the interests of natural justice, with no denial of procedural fairness. IIROC balanced the appropriate factors in determining

[30] 2016 ONSEC 21 (***Darrigo***)

[31] *Darrigo* at para 9

> whether the additional adjournment should be granted. The decision to deny the further adjournment reflected a judicious exercise of the Panel's discretion. It was not an error of law and the Panel did not proceed on an incorrect principle. There is no basis of procedural unfairness to support an intervention by the Commission."[32]

[73] We asked Odorico how the CIRO hearing would have been different had he been granted the adjournment. In particular, we asked Odorico whether there was evidence refuting the allegations of misappropriation of funds or unauthorized trading that he would have provided had the hearing been adjourned. Was there new evidence regarding his medical condition at the time of the CIRO merits hearing? Odorico was unable to provide an explanation and although he had the opportunity to seek leave to provide new evidence going to such matters for purposes of this hearing, he did not do so.

[74] In all the circumstances surrounding the conduct of the CIRO merits hearing, we agree with CIRO Staff that the CIRO panel did not proceed on an incorrect principle nor err in law when denying Odorico's request for an adjournment of the merits hearing. As was the case in the *Darrigo* decision, we find that the CIRO panel recognized that it had to balance the public interest in a timely hearing with Odorico's request for further time to better prepare his case in recognition of his continuing health issues, and that it balanced the appropriate factors in determining that a further adjournment should not be granted. Denial of Odorico's adjournment request did not result in an unfair hearing nor did it amount to the panel making an error in law or proceeding on an incorrect principle.

4.4.2 Did the CIRO panel proceed on an incorrect principle or err in law by proceeding with a two-member panel?

[75] On the date of the merits hearing one of the three members of the CIRO panel was unavailable. Under then-applicable IIROC Rules, a hearing could proceed with two panel members, but only with the consent of all parties. At the outset of the hearing, consent was sought and obtained from CIRO Staff and Odorico.

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[32] *Darrigo* at para 11

Thereafter, the two-person CIRO panel heard and denied Odorico's request for a further adjournment of the merits hearing.

[76] Subsequent to the two-person CIRO panel's denial of his adjournment request, Odorico submitted that he had not appreciated the consequences of consenting to a two-member panel. He said that immediately after his adjournment request was denied he asked the CIRO panel to allow him to retract his consent. However, the CIRO panel determined that the decision had been made and that the merits hearing would proceed over Odorico's objection.

[77] CIRO Staff submits there was no error in law made by the panel in proceeding with only two panelists in the circumstances.

[78] CIRO Staff observes that the CIRO merits hearing was held under IIROC Series 8000 Rules that were in effect at the time. Rules 8408(10) and (11) indicate that if a member of a hearing panel becomes unable to continue to serve as a member of the hearing panel for any reason, the remaining members may continue to hear the matter and render a decision, but only with the consent of all parties. A decision of a hearing panel must be made by a majority of its members, and if, as was the case in this merits hearing, the hearing panel consists of only two members, the decision must be unanimous.

[79] Rule 8401(1) provides that the Rules of Practice and Procedure set out the rules that govern the conduct of CIRO's enforcement proceedings and regulatory review hearings to secure fair and efficient proceedings and just determinations. Section 8403(1) of the IIROC Rules provides that the IIROC Rules shall be interpreted and applied to secure a fair hearing and just determination of a proceeding on its merits and the most expeditious and least expensive conduct of the proceeding.

[80] CIRO Staff submits the following regarding the fairness of the hearing in the context of the issue of a two-member panel:

a. there is no evidence that Odorico was unable to understand the proceedings at the merits hearing and instead, his comments at the time indicate that he understood that he was consenting to proceeding with two panelists. During the non-public portion of the hearing Odorico told the panel that he had been given the opportunity to cancel that day

because one of the panel members was not present, but that he did not want to delay the proceeding.

b. Odorico received a full and fair hearing with two panelists; and

c. the test is not whether the disciplinary hearing was "perfect"; the test is whether Odorico received a fair hearing and it is clear from the record that he did.

[81] CIRO Staff further submits that the duty of fairness is flexible and variable and cites *Baker v Canada (Minister of Citizenship and Immigration*)[33] in which the Supreme Court of Canada states:

> "the existence of a duty of fairness, however, does not determine what requirements will be applicable in any given set of circumstances. As I wrote in Knight v. Indian Head School Division No. 19, [1990] 1 SCR 653 at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness."[34]

[82] OSC Staff submits that it appears that the CIRO panel may not have adequately explained to Odorico that:

a. he had the right to refuse to allow the merits hearing to proceed that day, given the absence of one panel member and IIROC Rule 8408(10); and

b. if he consented to proceed with a two-member panel, the panel could deny his request for an adjournment of the merits hearing and the hearing would proceed.

[83] OSC Staff also submits that the fact that the CIRO panel may not have adequately explained these matters to Odorico is not in itself a basis for the Tribunal to determine that it should interfere in the CIRO Decisions. The question is not whether an adjudicator could have done more to assist a self-represented litigant. Rather, we must determine whether any such shortcomings gave rise to an unfair hearing or miscarriage of justice such that the CIRO panel incorrectly

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[33] 1999 CanLII 699 (SCC) (***Baker***)

[34] *Baker* at para 21

applied the principle of procedural fairness or erred in law by failing to apply procedural fairness. The fundamental issue is: "whether the proceedings were fairly conducted. Did the self-represented litigant get a fair hearing?"[35]

[84] Having regard to the discussion under section 4.3 above, although we agree with OSC Staff that it may have been preferable if the CIRO panel had explained to Odorico the points noted in paragraph 82 above, we do not find that such shortcomings resulted in an unfair hearing or miscarriage of justice. Indeed, as acknowledged by Odorico at the time, he was aware that he had the opportunity to refuse to allow the merits hearing to proceed that day given the absence of the third panel member, and he chose not to exercise that right.

[85] In our view the CIRO panel followed its rules of procedure regarding the composition of the panel at the merits hearing and in rendering its decision. We find no error in law. As to the question of procedural fairness more particularly, we agree with CIRO Staff that the duty of procedural fairness must be considered in the context of all the circumstances and that in these circumstances, the panel had to balance its duty to act fairly with all registrants with its role of protecting the public from harmful professional conduct and ensuring that the public's concerns are addressed on a timely basis. We find that the CIRO panel did not proceed on an incorrect principle nor err in law in proceeding with a two-member panel.

4.4.3 Did the CIRO panel overlook material evidence by disregarding Odorico's medical notes at the merits hearing?

[86] Odorico submits that his medical evidence in the form of medical notes was disregarded by CIRO when it refused to grant an adjournment of the merits hearing.

[87] CIRO Staff submits that the medical notes provided by Odorico were taken into consideration but they were either vague or insufficient to support an argument that more time was needed in addition to the time that had already been granted by the CIRO panel.

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[35] *Hirtle* at para 62, citing *College of Optometrists of Ontario v SHS Optical Ltd*, 2008 ONCA 685 at paras 57-59; *R v Forrester*, 2019 ONCA 255 at paras 17-18; *Girao* at para 7

[88] We have reviewed the written record from the CIRO proceedings and conclude that all of the medical notes provided to the panel were considered. However, the notes were lacking in clarity and insufficient to support the assertion that Odorico did not understand the questions asked of him or the proceedings. Further, insufficient medical evidence was provided to support Odorico's request for an adjournment of the CIRO merits hearing.

[89] Based on the foregoing, we find that the CIRO panel did not disregard material evidence in this respect at the merits hearing.

4.4.4 Did the CIRO panel proceed on an incorrect principle, err in law or disregard material evidence in finding that Odorico misappropriated client funds, effected unauthorized trades in RM's account, and failed to cooperate with the CIRO investigation?

[90] As noted above, Odorico did not file any written submissions in support of his application. As such, we were left to glean from his application and his oral submissions the additional grounds upon which he relies in seeking to have us intervene in the CIRO panel's merits decision.

[91] Other than the issue of whether he was treated fairly in light of his health conditions which has already been addressed above, Odorico's application only directly impugns the CIRO panel's finding that he misappropriated funds. In this regard, the only ground he raises is a bare denial of the factual finding made by the CIRO panel. He asserts that "he did not do anything wrong with investment accounts; instead he only had a personal loan that was agreed upon with the related parties that were family and outside personal relationships that were outside his employment."

[92] In his oral submissions, Odorico reiterated his denial that he misappropriated client funds and repeated his position (and essentially the same evidence he gave at the CIRO merits hearing) that he borrowed money for personal reasons and that the personal loans from his clients (including from his cousin MR) had nothing to do with their CIBC World Markets client accounts and were not investments. He submits that the CIRO panel's conclusions that he had misappropriated client funds was a miscarriage of justice.

[93] Odorico also submits that he got authorization for trades from his clients, spoke to them often, met with them regularly, made money for his clients, and his clients received statements and they were happy.

[94] Odorico submits that he did not deny failing to cooperate with CIRO Staff's investigation, but he sought to explain the failure by referring to the non-specific issues that he was dealing with at the time (which we understood to be various personal and health issues) and by explaining that he believed at the time of the investigation that CIRO Staff would figure out that he had done nothing wrong.

[95] In the course of his oral submissions, we specifically inquired whether Odorico had any additional evidence relevant to the CIRO panel's findings of contraventions that he might want to seek permission to introduce. Odorico reiterated that he had no intention to seek to introduce any additional evidence.

[96] CIRO Staff submits that Odorico has failed to establish any grounds under the *Canada Malting* test that would warrant interference with the CIRO panel's findings that Odorico misappropriated client funds, effected unauthorized client trades and failed to cooperate with CIRO Staff's investigation. CIRO Staff submits that the CIRO panel properly articulated and applied the burden of proof, explained why it did not accept Odorico's version of events and properly set out and applied the test for assessing the credibility of a witness.

[97] OSC Staff did not take a position on these issues, and instead simply offered guidance to us regarding the relevant law and principles to be applied by the Tribunal on a hearing and review.

[98] It is Odorico's heavy burden to establish that there are grounds on which we ought to intervene in the CIRO panel's merits decision. Odorico's bare denial of the findings of contraventions by the CIRO panel and his reiteration of the evidence he gave at the CIRO merits hearing did not offer us a roadmap with reference to the *Canada Malting* grounds justifying intervention in the CIRO panel's merits decision.

[99] We took into account the fact that Odorico is self-represented and might have difficulty articulating grounds for intervention within the *Canada Malting* framework that would amount to, or explain, his fundamental disagreement with the CIRO panel's conclusions (namely, that the conclusions were incorrect and

did not accord with his evidence). Bearing this in mind, we have considered whether the CIRO panel proceeded on an incorrect principle, erred in law or disregarded material evidence by reviewing the CIRO merits decision and the record that was before the CIRO panel. In doing so, we are aware that it is not our role to act as an advocate for a self-represented party nor is it our role to scour the record that was before the CIRO panel to identify and develop arguments that might assist Odorico. We are also aware that the burden does not shift to requiring CIRO Staff to establish that there are no grounds that warrant interference with the CIRO panel's merits decision.

[100] We have concluded that although we might differ with the CIRO panel's approach in some instances relating to the findings that Odorico: (i) misappropriated client RM's funds, (ii) effected unauthorized trades and (iii) failed to cooperate with the CIRO investigation, none of these instances warrant intervention as the CIRO panel neither erred in law, nor proceeded on an incorrect principle, nor misapprehended or otherwise overlooked material evidence in making such findings.

[101] However, with respect to the CIRO panel's finding that Odorico misappropriated clients JR's and MR's funds, we have concluded that the CIRO panel overlooked or misapprehended material evidence and expressed a supporting rationale for finding Odorico's evidence lacked credibility that was inconsistent with the overlooked or misapprehended material evidence. The reasons for our conclusions are set out below.

4.4.4.a Misappropriation of client RM's funds

[102] In concluding that Odorico misappropriated $429,000[36] of client RM's funds, it is evident from the CIRO panel's merits decision that the panel reviewed, considered and weighed the relevant conflicting testimony of RM and Odorico[37] as well as the relevant documentary evidence.[38] The CIRO panel clearly recognized that the evidence of RM and Odorico conflicted on the essential issue

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[36] CIRO's Statement of Allegations and the Merits Decision both stated that $449,000 had been misappropriated but this was corrected by the CIRO panel in the Sanctions Decision to $429,000 (see *Sanctions Decision* at para 15)

[37] Merits Decision at paras 15-22

[38] Merits Decision at paras 17, 18, and 22

of whether the monies advanced by RM to Odorico were to be invested by Odorico for RM or, alternatively, were a loan from RM to Odorico to allow him to make repairs on the house he had purchased from her before she became his client.[39]

[103] The CIRO panel properly recognized that the resolution of the conflict in the testimony of RM and Odorico hinged on the credibility of the witnesses.[40] The CIRO panel articulated the proper approach to assessing credibility of witnesses whose testimony is in conflict. The credibility of interested witnesses cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried the conviction of the truth. Instead, one must reasonably subject the evidence to an examination of its consistency with the probabilities that surround the existing conditions and whether the story of a witness is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.[41]

[104] The CIRO panel specifically acknowledged that the fact that RM advanced the money to Odorico in his personal name as well as the numerous promissory notes that Odorico gave RM in connection with the advances of monies might be indications that the monies were advanced by RM as a loan to Odorico.[42] The CIRO panel clearly considered this evidence but concluded that the money advanced by RM to Odorico in his personal name was explained by RM's inexperience and trust in Odorico and the CIRO panel preferred RM's explanation that she understood the promissory notes to simply provide her with evidence of the amounts advanced to Odorico for investment.[43] The CIRO panel appears to have been influenced in its decision by RM's level of education, investment inexperience and trust in Odorico.[44]

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[39] Merits Decision at para 20
[40] Merits Decision at para 21
[41] Merits Decision at para 21, citing *Faryna v Chorney*, 1951 CanLII 252 (BCCA) at p 357
[42] Merits Decision at para 22
[43] Merits Decision at para 22
[44] Merits Decision at paras 15 and 22

[105] In preferring RM's evidence to Odorico's on the essential question and in concluding that the money was provided to Odorico for investment on RM's behalf and not as a personal loan to Odorico, the CIRO panel also explained that it took into account the following facts:

a. Odorico did not cross-examine RM and "therefore RM's testimony remains unimpeached";[45]

b. Odorico provided no evidence to substantiate that he had done extensive repairs on his house and in the CIRO panel's view, this cast doubt on his testimony around repairs;[46]

c. Odorico provided no evidence to substantiate his testimony that he had paid RM monthly interest on the advanced monies for years;[47] and

d. Odorico failed to return to the hearing after giving his evidence to allow for CIRO Staff to cross-examine him.[48]

[106] We might quibble with the CIRO panel's emphasis on RM's testimony being "unimpeached" on the basis that Odorico did not cross-examine her. This is because, as appears from the transcript of the CIRO merits hearing, when Odorico was asked by the CIRO panel whether he wanted to cross-examine RM he advised that he was saddened and disappointed to have heard a lot of "untruths" from RM. Notwithstanding, he was not advised by the CIRO panel of the potential evidentiary importance based on the rule in *Browne and Dunn*[49] of challenging any "untruths" through cross-examination of a witness.[50] We would have preferred that the CIRO panel have done so. However, reading the CIRO panel's merits decision as a whole, it is evident to us that despite the panel's comment about RM's testimony being "unimpeached" the panel nevertheless did consider and weigh all of the relevant material evidence, including the evidence that contradicted or might have put into doubt RM's evidence.

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[45] Merits Decision at para 22

[46] Merits Decision at paras 23-24

[47] Merits Decision at paras 23-24

[48] Merits Decision at para 23

[49] *Browne v Dunn*, 1893 CanLII 65

[50] Exhibit 1, Record of Original Proceeding, Transcript, CIRO Merits Hearing, March 2, 2022 at p 39

[107] While we cannot say that we necessarily would have arrived at the same conclusion as the CIRO panel, we find that there was an adequate (although not ample) evidentiary record before the CIRO panel on which to base its credibility findings and conclusion that Odorico misappropriated funds from client RM, and that RM did not advance the funds to Odorico as a personal loan. We find that the CIRO panel articulated and applied the proper standard of proof to be met, namely that CIRO Staff must prove the allegations on a balance of probabilities based on clear, convincing and cogent evidence.[51]

4.4.4.b Misappropriation of clients JR's/MR's funds

[108] In concluding that Odorico misappropriated $150,000 of clients JR's and MR's funds advanced to Odorico on September 26, 2018 it is evident from the Merits Decision that the CIRO panel reviewed, considered and weighed the relevant conflicting testimony of JR and MR and Odorico[52] as well as the post-dated personal cheque dated October 26, 2018 provided by Odorico to JR and MR for $165,000 (representing the original $150,000 advanced to him plus 10%).[53] It is also evident that the CIRO panel clearly recognized that the evidence of JR and MR and Odorico conflicted on the essential issue of whether the monies advanced by JR and MR to Odorico were to be invested by Odorico for them in a "guaranteed investment" or, alternatively, were a personal loan to Odorico.[54]

[109] The CIRO panel resolved the conflict in the testimony between JR and MR and Odorico in favour of JR's and MR's testimony on the following basis:[55]

> [32] Similar to the situation involving client RM, there is a conflict between the testimony of the Respondent and the Rs, and the Panel resolved this conflict in the same manner. The testimony of both JR and MR was straight-forward and believable. The Panel characterized the testimony of the Respondent in the same way as his testimony regarding RM. The lack of credibility of the Respondent's testimony is supported by the following: he testified that he promised to

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[51] *F.H. v MacDougall*, 2008 SCC 53; Merits Decision at para 14

[52] Merits Decision at paras 28-34

[53] Merits Decision at paras 28-29

[54] Merits Decision at para 32

[55] Merits Decision at paras 32-33

> repay the Rs as soon as he refinanced his property but was prevented from doing so because of the *lis pendens* put on the property. However, the *lis pendens* was not registered until August 29, 2019, almost a year after the funds were to be repaid to the Rs.
>
> [33] Furthermore, the Respondent did not cross-examine either JR or MR whose testimony therefore remained unimpeached; also after testifying on March 2, 2022, the hearing took a short recess after which the Respondent did not return and therefore IIROC counsel could not cross-examine him.

[110] Reading the Merits Decision as a whole it appears that, as with the case of RM, the CIRO panel concluded that the fact that the money was given by JR and MR to Odorico in his personal name and the fact that Odorico gave a personal post-dated cheque (dated one month after the advance) as intended repayment of the advanced funds (plus 10%)--which facts could have indicated that the funds were a personal loan--were instead explained by JR's and MR's inexperience and complete trust in Odorico. The panel preferred JR's and MR's testimony that the money was not advanced as a personal loan to Odorico but was, instead, advanced for a guaranteed investment.

[111] We find that in arriving at its decision that Odorico also misappropriated investment funds from JR and MR, the CIRO panel overlooked or misapprehended material documentary evidence relevant to the fundamental question of whether the funds were advanced to Odorico as a personal loan. We also conclude that the CIRO panel's articulated supporting reason for finding Odorico's testimony that the funds were a personal loan to lack credibility is also explained by the CIRO panel overlooking or misapprehending material evidence.

[112] The CIRO panel's Merits Decision makes no reference whatsoever to the promissory note dated October 26, 2018 (**Promissory Note**) that MR testified was prepared by a friend of hers at her request and that she demanded Odorico sign.

[113] MR's evidence was that she took steps to have her friend prepare the Promissory Note and demand that Odorico sign it after Odorico advised JR and MR not to

cash his October 26, 2018 post-dated cheque due to insufficient funds.[56] The Promissory Note provides that Odorico promises to pay JR and MR the principal amount of $150,000 with interest calculated annually in arrears at the rate of 15% per annum on September 20, 2019.[57]

[114] The Promissory Note is a critical document that on its face supports Odorico's oral evidence that the money advanced to him by JR and MR was a personal loan, and not for investment by him on their behalf. The fact that the Promissory Note was a document that MR herself had someone prepare for her and she demanded Odorico sign is also significant evidence tending to confirm that the money was advanced to Odorico as a loan. MR's evidence about why she demanded that Odorico sign the Promissory Note is also consistent with a loan, or at best neutral. Neither JR nor MR gave any evidence at the CIRO hearing to explain why they required Odorico to sign a document that ordinarily connotes a loan (namely a promissory note) if the money they advanced to him was other than a personal loan. The entirety of MR's evidence about the reason for requiring Odorico to sign the Promissory Note (described by her as a "letter") was:[58]

> Q. ..Have you seen this document before?
>
> A. Yes.
>
> Q. And can you explain the circumstances of this document?
>
> A. It was a letter that I asked a friend of mine to draft up in order to give me, to give me some kind of peace of mind that the monies were going to be returned to me. So it was a letter that I drafted up. We asked Mr. Odorico to come to the house. I was extremely upset. I asked him, probably demanded that he sign this in order to make sure that I had some kind of information or proof that he was going to pay

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[56] Exhibit 1, Record of Original Proceeding, Promissory Note dated October 26, 2018, Tab 5, p 27; Exhibit 1, Record of Original Proceeding, Transcript, CIRO Merits Hearing, March 1, 2022 at pp 33-34, 44-45

[57] Exhibit 1, Record of Original Proceeding, Promissory Note dated October 26, 2018, Tab 5, p 27

[58] Exhibit 1, Record of Original Proceeding, Transcript, CIRO Merits Hearing, March 1, 2022 at p 44 line 20 to p 45 line 15

me back some kind of money, the money that we had given him.

Q. Did you consider that this money was a loan, Mrs. R?

A. It was an investment. He told JR it was a guaranteed investment opportunity. What he considered it to be…?

[115] JR's evidence about the reason for requiring Odorico to sign the Promissory Note (also referred to as a "letter" in his testimony) was:[59]

Q. And what was the –do you know the circumstances of preparing this document?

A. My wife, I'll let her speak to it, but she was getting very nervous that our monies were not put into some kind of investment account. So she just wanted, you'd have to ask her, but I think she just wanted something to prove that Mr. Odorico owed us this money.

So he came over to the house one day, trying to explain the circumstances. My wife saw that I was very agitated and she made – she got him to sign this letter that she wrote. I didn't even know, to be honest with you.

Q. Were you present that day when Mr. Odorico --

A. Oh, I --

Q.--came over?

A. I was very much present. My wife was trying to get me to contain myself and I think she drafted up this letter.

Q. All right. Did you see Mr. Odorico sign this letter?

A. Oh, yes.

Q. Thank you.

[59] Exhibit 1, Record of Original Proceeding, Transcript, CIRO Merits Hearing, March 1, 2022 at p 33 line 7 to p 34 line 13

> A. And his intention was to pay us, pay us the money, but he would sign anything, he would, I guess, to appease her and put her mind at rest.

[116] The CIRO panel also made a factual finding that was directly inconsistent with the Promissory Note. This factual finding was identified by CIRO as support for its conclusion that Odorico's testimony that the funds were advanced as a personal loan was not credible. The relevant portion of the Merits Decision where the factual finding and rationale for finding Odorico's testimony to not be credible is reproduced below:[60]

> [32] …"The lack of credibility of the Respondent's testimony is supported by the following: he testified that he promised to repay the Rs as soon as he refinanced his property but was prevented from doing so because of the *lis pendens* put on the property. However, the *lis pendens* was not registered until August 29, 2019, almost a year after the funds were to be repaid to the Rs."

[117] The CIRO panel's finding reproduced above is predicated on the CIRO panel's apparent understanding that JR's and MR's funds were to be repaid by Odorico on October 26, 2018, the date of the post-dated cheque that Odorico provided to them. The CIRO panel failed to take into account the terms of the Promissory Note which, on its face, extended Odorico's obligation to repay the funds to September 20, 2019, a date that was *after* (and not before) the registration of the *lis pendens*.

[118] Although the CIRO panel's Merits Decision references at a high level the fact that JR and MR made a complaint to Odorico's former employer, CIBC Wood Gundy, when the money they advanced to Odorico was not returned to them,[61] the Merits Decision makes no reference whatsoever to the contents of the complaint letter from JR and MR dated September 23, 2020 (**Complaint Letter**).[62] The Complaint Letter sets out JR's and MR's characterization almost two years prior

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[60] Merits Decision at para 32

[61] Merits Decision at para 31

[62] Exhibit 1, Record of Original Proceeding, Complaint letter from JR and MR to CIBCWG dated September 23, 2020, Tab 3, p 23; Exhibit 1, Record of Original Proceeding, Transcript, CIRO Merits Hearing, March 1, 2022 at pp 25, 41

to their testimony at the CIRO hearing of the circumstances under which they advanced money to Odorico, as follows:[63]

> "Specifically, during the week of September 25, 2018, Mr. Odorico called us on more than one occasion to recommend an opportunity that would generate a return of 10% on **a $150,000.00 loan** in 30 days. As our investment advisor, we trusted Mr. Odorico and delivered the $150,000.00 to him on September 26, 2018. He told us the return of the capital was "guaranteed" and provided us with a personal post-dated cheque for $165,000.00 dated October 26, 2018. Mr. Odorico advised us that 10% was an appropriate rate of interest **for a loan of this nature.** He told us that he expected to receive funds from CIBC to cover the post-dated cheque. While we found it different that Mr. Odorico asked that the money be delivered to him personally, we trusted him as our advisor.
>
> …
>
> After Mr. Odorico left CIBC and Mr. GP took over as our advisor, we were led to believe that **Mr. Odorico was asking other CIBC clients to lend him personal funds**. Our relationship with CIBC ended and we moved our accounts to another financial institution…
>
> We understand that **Mr. Odorico owes a significant amount of money to other people, some of them with connections to CIBC.** We also understand that Mr. Odorico was let go by CIBC, however we were not advised of the circumstances directly by CIBC. Had we known the full extent of Mr. Odorico's situation, we likely could have acted sooner to increase the chances of recovering our funds"…[emphasis added]

[119] The fact that JR and MR themselves describe in their Complaint Letter the money as being advanced as "a loan" and refer to Odorico asking other clients to lend him funds is itself material, especially when considered in conjunction with the Promissory Note and the two other documents (the bank draft and the September 26, 2018, post-dated cheque) relevant to the advance of funds to

[63] Exhibit 1, Record of Original Proceeding, Complaint letter from JR and MR to CIBCWG dated September 23, 2020, Tab 3 at p 24

Odorico by the Rs that were introduced into evidence at the CIRO hearing. From our review of the CIRO record the "loan" language in the Complaint Letter was not specifically drawn to the attention of the CIRO panel and neither JR nor MR was asked to explain it.[64] Nevertheless, we conclude that it was material enough that it ought to have factored into the CIRO panel's considerations.

[120] We reconvened the hearing of this application on July 18, 2023, to receive further submissions from the parties specifically on the manner in which the CIRO panel considered the Promissory Note and the Complaint Letter in arriving at its finding that Odorico misappropriated JR's and MR's funds.

[121] CIRO Staff acknowledged that neither the Promissory Note nor the Complaint Letter is referred to specifically in the Merits Decision. CIRO Staff submits that despite the fact that the Merits Decision does not refer to these documents, the CIRO panel did, in fact, consider them in resolving the conflict between the testimony about the advance of funds of JR and MR on the one hand, and Odorico on the other. The essence of this submission was that because the Promissory Note and the Complaint Letter are both part of the CIRO record, they necessarily were taken into account by the CIRO panel in arriving at its decision. CIRO Staff also emphasized that it is well-established that it is not necessary for a decision-maker to specifically address every piece of evidence in its reasons for decision, or set out every finding and every conclusion.[65]

[122] OSC Staff took no position on the manner in which the CIRO panel considered the Promissory Note and Complaint Letter in arriving at its decision that Odorico misappropriated JR's and MR's funds. Instead, OSC Staff emphasized certain principles, including that it is not necessary for reasons for decision to address every piece of evidence that is adduced and the importance of this Tribunal deferring to the knowledge and expertise of SRO's as well as to their factual determinations.

[123] Odorico made no submissions specific to the manner in which the Promissory Note and Complaint Letter were considered by the CIRO panel.

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[64] Exhibit 1, Record of Original Proceeding, Transcript, CIRO Merits Hearing, March 1, 2022 at p 25, line 19 to p 26, line 7 and p 41, lines 16-21

[65] *Clifford v Ontario (Attorney General)*, 2009 ONCA 670 (***Clifford***) at paras 17, 29, 30 and 40

[124] We accept and agree with the principle advanced by both CIRO Staff and OSC Staff; namely, that a tribunal need not refer to every piece of evidence or set out every finding or conclusion in the process of arriving at its decision.[66] However, we also note that on a hearing and review we are not limited to an assessment of the adequacy of the CIRO panel's reasons from a functional perspective (that is, from the perspective of whether the reasons are intelligible).[67] The *Canada Malting* test imports additional considerations.

[125] In the circumstances of this case, the Promissory Note and the Complaint Letter were significant, important and "core" evidence. It was significant documentary evidence that was actually and potentially contradictory to the CIRO panel's finding that Odorico misappropriated (rather than personally borrowed) JR's and MR's funds and, in our view, ought to have been considered by the CIRO panel when it considered the contradictory oral evidence and decided that JR's and MR's evidence was preferred. As such, the CIRO panel's failure to address this evidence in the Merits Decision is a clear indication that the CIRO panel overlooked or misapprehended material evidence. The CIRO panel's finding supporting its adverse credibility determination against Odorico is also a further clear indication that the CIRO panel overlooked or misapprehended the Promissory Note.

[126] Only four documents (including the Promissory Note and the Complaint Letter) related to the Rs advancing funds to Odorico were introduced into evidence in the CIRO hearing. All four of these documents are on their face inconsistent or potentially inconsistent with the CIRO panel's decision that the R's funds were not advanced to Odorico as a personal loan. The CIRO panel's determination of the issue rested on directly contradictory evidence of JR and MR and Odorico with such contradiction being resolved at least in part upon an adverse credibility finding that was supported by a misapprehension of the evidence. Accordingly, we are satisfied that the CIRO panel's errors in overlooking or misapprehending

[66] *Clifford* at para 29

[67] *Clifford* at paras 29-32

this key documentary evidence impacted the panel's finding. In sum, we are satisfied that the errors were of consequence to the CIRO panel's decision.[68]

[127] In so-concluding, we have specifically taken into account the fact that Odorico did not return to the hearing to be cross-examined after giving his evidence-in-chief. We agree with CIRO Staff that Odorico's failure to return to be cross-examined could be relevant to the weight accorded to Odorico's testimony. However, this does not, in our view, alter our conclusion that the CIRO panel's failure to take into account or misapprehension of the Promissory Note and the "loan" language in the Complaint Letter amounted to an error of consequence.

4.4.4.c Unauthorized trading in RM accounts

[128] The CIRO panel found that Odorico did not obtain RM's authorization to make trades in her accounts and that he did not have discretionary trading authority over these accounts.[69] The panel's reasons indicate that the panel accepted RM's "uncontroverted evidence" in this regard and found that Odorico did not provide any evidence, verbal or documentary, to the contrary.[70]

[129] Our review of the record indicates that Odorico did, in passing, and only at a very high level, give some testimony going to the issue of trading authorization. The extent of this testimony is reproduced below:[71]

> "She became my client, and I basically managed her account to the best of my ability with professionalism and full integrity, and **I tried to explain to her every time I was doing a trade**, and she trusted me, you know, she trusted me, and I did the best I could do and I made her money." [emphasis added]

[130] In the circumstances, we have concluded that the CIRO panel neither erred in law, nor proceeded on an incorrect principle, nor misapprehended nor overlooked material evidence in finding that Odorico engaged in unauthorized trading in RM's accounts. We are satisfied that it was reasonably available to the CIRO

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[68] *Eley* at paras 61-64

[69] Merits Decision at paras 36-39

[70] Merits Decision at para 37

[71] Exhibit 1, Record of Original Proceeding, Transcript, CIRO Merits Hearing, March 2, 2022 at p 44, lines 16-21

panel to conclude as it did based on the record before it that RM's evidence was sufficient to establish the contravention on a balance of probabilities.

4.4.4.d Failure to cooperate with CIRO investigation

[131] We have considered the CIRO panel's reasons for concluding that Odorico failed to cooperate with the CIRO investigation. The CIRO investigator's evidence at the merits hearing about Odorico's multiple failures to cooperate was indeed uncontroverted and unchallenged. Indeed, as noted above, Odorico did not deny in his oral submissions in this hearing that he failed to cooperate with the CIRO investigation.

[132] As appears from the CIRO panel's reasons, the panel duly considered, and rejected, Odorico's position as set out in the Response that he filed in the CIRO proceeding that his non-cooperation with the CIRO investigation was either explained or excused by the fact that he was allegedly "distracted with the pandemic and other pressing legal and financial issues and did not have the capacity to respond".[72] We note that Odorico did not address or provide evidence relevant to this position at the CIRO merits hearing.

[133] We see no basis that might warrant intervention with the CIRO panel's finding that Odorico failed to cooperate with the CIRO investigation.

4.5 What is the appropriate remedy for our finding of reversible error in connection with the CIRO panel's conclusion that Odorico misappropriated MR's and JR's funds?

[134] When we reconvened the hearing of this application on July 18, 2023, we also asked the parties for submissions on the appropriate remedy in the event that we should find that there was a reversible error in respect of the CIRO panel's finding of misappropriation of MR's and JR's funds.

[135] CIRO Staff submits that the Tribunal has a wide discretion in fashioning a remedy, including that the Tribunal can substitute its own decision for that of the CIRO panel. CIRO Staff submits that in this case we should not simply dismiss the particular misappropriation allegation (or charge) or substitute our own

[72] Merits Decision at para 40

decision. CIRO Staff submits that we should instead adopt the approach that was taken by the Tribunal in *Northern Securities*[73] where the allegation (or charge) in question was sent back to CIRO Staff to decide whether it is important from a regulatory perspective that the allegation be reheard in a new hearing (or hearing *de novo*) before a different CIRO panel.

[136] CIRO Staff did not offer any particular guidance to us as to the relevant factors or considerations that we should take into account in deciding whether to send the question back to CIRO Staff.

[137] OSC Staff did not take a position on the appropriate remedy in this case. Instead, OSC Staff made submissions about the applicable principles and considerations in fashioning a remedy, including that:

a. the Tribunal has broad discretion to fashion an appropriate remedy;[74]

b. any remedial order issued by the Tribunal should be the least intrusive necessary to accomplish the regulatory objectives;[75]

c. in fashioning a remedy we should remain deferential to SRO knowledge and expertise, including to the fact-finding of the SRO;[76]

d. we should be careful not to substitute our own decision for that of the SRO unless all necessary evidence and factual findings are available to us, to avoid usurping the role of the SRO; and

e. efficiency is an important consideration.

[138] Odorico made only limited submissions on the issue of the appropriate remedy. His submissions were that he does not want further litigation and wants to resolve this matter as quickly and as fairly as possible.

[139] We have considered the parties' submissions on appropriate remedy, including the submissions of OSC Staff about the applicable principles and considerations we should take into account. In the particular circumstances of this case, including because the CIRO panel's decision about misappropriation raises

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[73] *Northern Securities* at para 343

[74] *Eco Oro Minerals Corp (Re)*, 2017 ONSEC 23 (***Eco Oro***) at para 164; *Northern Securities* at para 53

[75] *Eco Oro* at para 164; *Northern Securities* at para 53

[76] *Northern Securities* at para 61

significant credibility issues and contradictory oral evidence and we have not had the benefit of hearing the relevant witnesses' testimony, we have decided to set aside the CIRO panel's decision that Odorico misappropriated JR's and MR's funds and we refer the matter back to CIRO for disposition.

[140] Similar to the approach taken by the Tribunal in *Northern Securities*[77], CIRO Staff shall be entitled to decide whether this allegation of misappropriation shall be re-heard in a new hearing before a different CIRO panel. While there may be some practical challenges and inefficiencies related to rehearing the matter, we have concluded on balance that CIRO Staff should have the option to decide whether the allegation should be re-heard if CIRO Staff considers that to be important from a regulatory perspective. Any decision by CIRO Staff to have a different CIRO panel re-hear the misappropriation allegations shall be made by CIRO Staff and communicated to Odorico, OSC Staff and to the Tribunal via the Registrar's office within 30 days from the release of our further decision (referred to below) as to the effect on sanctions of setting aside the CIRO panel's decision that Odorico misappropriated JR's and MR's funds, failing which the allegation of misappropriation of JR's and MR's funds shall be dismissed.

[141] Consistent with our decision to set aside the CIRO panel's decision that Odorico misappropriated JR's and MR's funds, we also set aside the portion of the CIRO panel's disgorgement order that corresponds to the finding that Odorico misappropriated JR's and MR's funds. Accordingly, the amount of the disgorgement order is reduced by $150,000 (from $579,000 to $429,000), which amount corresponds to the amount of the alleged funds misappropriated from JR and MR.

[142] We also request submissions in writing from the parties as to the effect, if any, that setting aside the finding that Odorico misappropriated JR's and MR's funds should have on the remaining orders made by the CIRO panel further to the Sanctions Decision where such orders were not made solely with respect to the finding of misappropriation for JR's and MR's funds but were also made in light of other contraventions found by the CIRO panel—namely the orders (i) imposing a fine of $50,000 for "contravention 1" which included both the misappropriation of

[77] *Northern Securities* at para 343

funds from RM and the misappropriation of funds from JR and MR, (ii) permanently banning Odorico from registration and (iii) for payment of CIRO's investigation and prosecution costs in the amount of $25,000.

4.6 Did the CIRO panel err in law by imposing sanctions that were harsh and excessive?

[143] Odorico also asks that the Sanctions Decision be set aside and that we find that a permanent registration ban and the financial penalties ordered against him were excessive and unfair in the circumstances.

[144] Separate and apart from the considerations above about sanctions relating to the misappropriation finding that we have set aside, we find that the sanctions imposed by the CIRO panel were reasonable. We do not find that the CIRO panel erred in law by imposing sanctions that were harsh and excessive.

[145] CIRO Staff submits that the CIRO panel considered the facts of this case on the evidence before it, the IIROC Sanctions Guidelines and relevant caselaw.

[146] CIRO Staff further submits that in assessing the penalty related to misappropriation, the CIRO panel considered the number of clients impacted, the amounts involved and the period of time over which the conduct occurred. Similarly, they considered the number of clients, number of trades and period of time related to the finding of unauthorized trading. They noted that the failure to cooperate was a one-time event but that this has been recognized by previous panels as a serious contravention.[78] Each of the above contraventions was found to be serious. The CIRO panel also considered the financial benefit to Odorico, noting that $579,000 was not returned to clients.

[147] With respect to the permanent ban ordered, CIRO Staff submits that in this case it is not "harsh and excessive", rather, it is a protective and preventative sanction that achieves the goals of specific deterrence and general deterrence. The CIRO panel considered the quasi-criminal nature of the misconduct, found that Odorico cannot be trusted to act in an honest and fair manner, and that the

[78] *Nelson (Re)*, 2019 IIROC 22 at paras 36 and 38

contraventions involved significant harm to the investing public and the integrity of the securities industry.

[148] Finally, CIRO Staff submit that prior cases have noted that "the [Tribunal] accords even greater deference in matters of sanctions and recognizes that [CIRO] hearing panels will have greater familiarity with IIROC's regulations and sanction guidelines."[79]

[149] We find that the CIRO panel's approach to determining the appropriate sanctions is consistent with the purpose and principles applicable to regulatory sanctions, the IIROC Sanction Guidelines and prior CIRO decisions. The CIRO panel considered the protective, preventive and prospective nature of sanctions and the importance of fostering investor protection and improved industry standards and practices, the seriousness of the misconduct and the need for specific and general deterrence. We do not find that the CIRO panel erred in law by imposing sanctions that were harsh and excessive.

5. CONCLUSION

[150] For the reasons set out above we have set aside the CIRO panel's finding that Odorico misappropriated JR's and MR's funds. We have also set aside the portion of the CIRO panel's disgorgement order that is attributable to this finding. After receiving and considering further written submissions from the parties as detailed above in paragraph 142 we will determine the effect, if any, our setting aside of the CIRO panel's finding that Odorico misappropriated JR's and MR's funds shall have on those portions of the CIRO panel's additional sanctions orders that are attributable to the misappropriation finding.

[151] CIRO Staff shall be entitled to decide whether the allegation of misappropriation of JR's and MR's funds shall be re-heard in a new hearing before a different CIRO panel. Any decision by CIRO to re-hear the misappropriation allegations shall be made by CIRO and communicated to Odorico, OSC Staff and to the Tribunal via the Registrar's office within 30 days from the release of our further decision contemplated in the preceding paragraph. Failing such communication within

[79] *Eley* at para 134

that time frame, the allegation of misappropriation of JR's and MR's funds shall be dismissed.

[152] We also order that the transcript of the confidential or non-public portion of the March 7, 2023, hearing is to be made public, with the following redactions made:

a. the words before "I'm still dealing with" on line 21, page 4;

b. the words between "aside from" on line 3, page 5 to the end of line 5, page 5;

c. the word between "know" and "or doctor" on line 2, page 7;

d. the words between "Due to my" and "okay" on line 13, page. 8;

e. the word between "chief" and "there" on line 25, page 8;

f. the words after "doctor" on line 4, page 11 to the end of line 8, page 11;

g. the words after "life" on line 11, page 11 to the end of line 12, page 11;

h. the words between "fake" on line 16, page 11 and "I mean" on line 18, page 11;

i. the words after "things" on line 19, page 11 to the end of line 19, page 11;

j. the words between "cut out" on line 22, page 11 and "Can you" on line 24, p. 11;

k. the words after "Odorico" on line 25, page 11 through to the end of line 1, page 12;

l. the words between "I had" and "so" on line 4, page 13;

m. the word between "not" and "to realize" on line 11, page 13;

n. the words on line 19, page 13;

o. the first word on line 20, page 13;

p. the words between "I had" and "they" on line 11, page 16;

q. the words between "your" and "prevented" on line 19, page 16;

r. the words after "realize what" on line 19, page 17 to the end of line 19;

s. the words on lines 21 and 22, page 17;

t. the words between "on" on line 24, page 17 and "I didn't" on line 26, page 17;

u. the words on line 9, page 18;

v. the words after "to me" on line 16, page 18 to the end of line 17, page 18;

w. the words after "warning" on line 27, page 18 to the end of line 27, page 18; and

x. the entry on page three of the word index to the transcript between "seriousness" and "session".

Dated at Toronto this 13th day of October, 2023

"Andrea Burke"

Andrea Burke

"Sandra Blake"

Sandra Blake

"Dale R. Ponder"

Dale R. Ponder