Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8
CP 55, 19e étage
20, rue queen ouest
Toronto ON M5H 3S8

IN THE MATTER OF
AN APPLICATION FOR A HEARING AND REVIEW OF A DECISION OF THE ONTARIO DISTRICT COUNCIL OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA PURSUANT TO SECTION 21.7 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF DISCIPLINE PROCEEDINGS PURSUANT TO BY-LAW 20 OF THE INVESTMENT DEALERS ASSOCATION OF CANADA

BETWEEN

STAFF OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA

AND

JEFFREY BRADFORD KASMAN AND CLINTON ANDERSON

Hearing:	March 30, 2009	
Reasons:	July 14, 2009	
Panel:	Wendell S. Wigle, QC	– Commissioner and Chair of the Panel
	Margot C. Howard	– Commissioner
Counsel:	Emily Cole	– For the Ontario Securities Commission
	Diana Iannetta	– For the Investment Dealers Association of Canada
	Alistair Crawley	– For Jeffrey Bradford Kasman and Clifton Anderson

REASONS AND DECISION

I. BACKGROUND

[1] On November 13, 2007, a Hearing Panel (the "Hearing Panel") of the Ontario District Council of the Investment Dealers Association of Canada (the "IDA" or the "Association") issued its decision on the merits (the "Decision on the Merits") in the matter of Jeffrey Bradford Kasman ("Kasman") and Clinton Anderson ("Anderson") (collectively, the "Respondents"). The Hearing Panel concluded that between January 30, 2003 and April 30, 2003, the Respondents violated IDA By-law 29.1 and engaged in conduct unbecoming or detrimental to the public interest by facilitating manipulative and/or deceptive trading.

[2] The penalty hearing was held on February 6, 2008 (the "Penalty Hearing"), and the Hearing Panel issued its decision and reasons on February 19, 2008 (the "Penalty Decision"). In the Penalty Decision, the Hearing Panel imposed the following sanctions and costs on each of the Respondents: a two-month suspension, a fine of $25,000 each and a cost award of $40,000 on a joint and several basis (amounting to an aggregate financial burden of $45,000 for each of the Respondents, assuming they contribute to the costs award on an equal basis). The Hearing Panel also concluded that the respondents should rewrite the Conduct and Practices Handbook ("CPH") examination within one year from the date of the decision.

[3] On March 28, 2008, Staff of the Investment Dealers Association ("IDA Staff"), filed a Notice of Request for a Hearing and Review of the Penalty Decision by the Ontario Securities Commission (the "Commission") pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "Act") (the "Application").

[4] The Respondents moved for an order that IDA Staff did not have standing to commence the Application. The standing motion was heard by a different Panel of the Commission on July 16, 2008 and was dismissed in a decision issued on November 28, 2008.

[5] The Application was heard by the Commission on March 30, 2009 (the "Commission Hearing"). At the outset of the Commission Hearing, we were advised by counsel for IDA Staff that the Penalty Decision has been stayed pending the outcome of the Application.

II. THE ISSUES

[6] IDA Staff submits that the Hearing Panel erred in principle by imposing a less stringent sanctions and costs order than what was requested by IDA Staff.

[7] The Respondents submit that the Hearing Panel did not err, and there is no basis for interfering with the decision of the Hearing Panel, which it made after a five day hearing on the merits and a further half-day of evidence and submissions on sanctions and costs.

[8] Staff of the Commission ("Commission Staff") takes no position on the merits of the Application, but makes submissions on the appropriate scope of a review pursuant to section 21.7 of the Act.

[9] The issue before us is whether we should confirm the Penalty Decision or substitute our own decision for that of the Hearing Panel, pursuant to section 21.7 of the Act.

III. DECISIONS OF THE IDA HEARING PANEL

A. Decision on the Merits

[10] The IDA proceeding was commenced by Notice of Hearing dated May 2, 2007 in which the IDA alleged that between January 30, 2003 and April 30, 2003, while employed at the Toronto branch of Desjardins Securities Inc. ("Desjardins"), the Respondents violated IDA By-law 29.1 and engaged in conduct unbecoming or detrimental to the public interest by facilitating manipulative and/or deceptive trading in the shares of American Motorcycle Corporation. Anderson was registered as a Registered Representative, Options, and Kasman as a Registered Representative (Restricted) at the time.

[11] The hearing on the merits was held on October 22, 23, 24, 25 and 26, 2007. The hearing proceeded by way of agreed facts and oral evidence.

[12] In the Decision on the Merits, issued on November 13, 2007, the Hearing Panel found that the trading in question by three individuals (John Kevin Dennee, Stanley James Siciliano and Dennis Giunta) was manipulative and/or deceptive trading, and that "the only reasonable interpretation of [it] was that it was done for the purpose of increasing the price of the stock, rather than for legitimate investment or profit making" (Decision on the Merits, para. 19). The Hearing Panel held that although IDA Staff "did not establish all the aspects that often appear with a pump-and-dump successful manipulation, the trading in this case created a false appearance of volume, interest and price change in the stock of American Motorcycle" (Decision on the Merits, para. 22).

[13] The Respondents claimed that they did not understand the significance or impact of the trading at the time, though "now, in retrospect, when all the facts were laid before them in a comprehensive and coherent way, the trading in question was manipulative and/or deceptive" (Decision on the Merits, para. 24). It appears from the Decision on the Merits that the main issue in dispute was whether the Respondents "fulfilled their know-your-client and suitability obligations" and were "diligent and raised appropriate questions" about the trading (Decision on the Merits, para. 46).

[14] The Hearing Panel reached the following conclusion:

> There is clear and convincing proof, based on cogent evidence, that, on a balance of probabilities, the respondents' conduct facilitated the manipulative and/or deceptive trading and that the conduct was in violation of Association By-law 21.9 and unbecoming and contrary to the public interest.
>
> (Decision on the Merits, para. 49)

[15] IDA Staff had suggested three possible findings as to the Respondents' degree of culpability:

> (a) they knew that manipulative and/or deceptive trading was occurring and just did not care, or

(b) although they did not know that manipulative and/or deceptive trading was occurring, the conduct that facilitated the trading was grossly negligent or grossly unacceptable behaviour for a registrant, or

(c) although the respondents did not know that manipulative and/or deceptive trading was occurring, their conduct in relation to the activities in the accounts in question were sufficiently negligent to constitute conduct unbecoming.

(Decision on the Merits, para. 6)

[16] The Hearing Panel made the following findings on degree of culpability:

> With regard to the first possibility . . . we find on a balance of probabilities that the respondents were at the time unthinking and unaware of the significance of the trading in question and did not wilfully turn a blind eye to the manipulative and/or deceptive practices, although one may wonder at the inadvertence and naiveness [sic] required to be attributed to the respondents for such a conclusion.
>
> However, we find that the respondents' failure to make inquiries in the circumstances; to properly monitor and assess the trading of their clients; to treat record keeping and information gathering as more than a mechanical exercise, requiring assessment of information collected and analysis; their undue reliance on their administrative assistant; their purported reliance on a compliance function at Desjardins that was providing them with little, if any, support; and their failure to know their clients, and in these circumstances, to understand the purpose and intention of their trading: to be conduct falling far below that required and expected of a registered representative. In addition to facilitating the manipulative and/or deceptive trading, it was conduct unbecoming and contrary to the public interests and in breach of Association By-law 29.1.
>
> (Decision on the Merits, paras. 50-51)

[17] The Hearing Panel ordered that a sanctions hearing be scheduled, and made the following comments on the relevant considerations:

> There was no evidence of actual harm to specific persons. However, confidence in the public markets is shaken when manipulative and/or deceptive trading occurs.
>
> We understand that a culture of compliance and compliance support at Desjardins at the time in question was weak. Nevertheless, while a good compliance culture and a decent compliance infrastructure can be of great assistance and comfort to a registered representative and may permit reasonable reliance by the registered representative on the firm in appropriate circumstances, the lack of a decent compliance infrastructure does not obviate the primary responsibilities and duties of a registered representative to his clients, his firm and the market.
>
> We acknowledge that the conduct in question occurred during a relatively narrow time frame.

> Throughout the hearing it was evident that the respondents greatly regretted their conduct and that they have learned much from the ordeal of this proceeding against them.
>
> . . . .
>
> We ask counsel to address at the sanctions hearing what orders against the respondents would be appropriate in the circumstances keeping in mind the need for consequences to the respondents for breaches of Association By-law 29.1, both to deter them from a repetition of the conduct, and as a deterrent to others, and the fact that our role as a disciplinary tribunal is preventative and protective of the markets, and not punitive or retributive towards the respondents.
>
> (Decision on the Merits, paras. 52-55 and 57)

B. The Penalty Decision

[18] The IDA hearing on sanctions and costs was held on February 6, 2008.

[19] IDA Staff requested the following orders:

> (a) a suspension for two to five years;
>
> (b) a fine of between $40,000 and $60,000 against each of the Respondents;
>
> (c) a costs award of $60,000 (out of total IDA Staff costs calculated at approximately $123,000) payable on a joint and several basis,
>
> (d) a condition attached to the IDA approval of the Respondents that for two years they not be permitted to deal in securities listed on the Pink Sheets or on the Over The Counter ("OTC") Bulletin Board markets;
>
> (e) a condition attached to the IDA approval of the Respondents that they be subject to strict supervision (requiring trade tickets to be signed at the end of each day) for two years;
>
> (f) a requirement that, before being readmitted to the industry, the Respondents rewrite the CPH examination; and
>
> (g) a requirement that, before being readmitted to the industry, the Respondents take two additional courses:
>
> (i) one dealing with the consequences of non-compliance; and
>
> (ii) one dealing with ethics.
>
> (Penalty Decision, para. 3)

[20] The Respondents submitted that no suspension was appropriate and that a fine of $15,000, approximately equalling their share of the commissions earned on the trades in issue,

was appropriate. They submitted that no costs award was appropriate because they had incurred their own substantial legal costs. They submitted that "there had been full cooperation by the respondents and that the only reason there had been a hearing on the merits, rather than a full agreement on the facts, or indeed a settlement agreement, was to enable a panel to assess all factors relevant for determining appropriate sanctions" (Penalty Decision, para. 7).

[21] In addition to the evidence received at the hearing on the merits, the Hearing Panel heard from two witnesses at the hearing on sanctions and costs. The Vice President and Branch Manager of Research Capital, the Respondents' employer since September 2004, testified about the supervision of the Respondents at Research Capital. Anderson testified about the impact various sanctions would have on the Respondents' business and earnings.

[22] The Hearing Panel ordered the following sanctions and costs:

> (a) Each of the respondents shall be suspended from approval for a period of two months.
>
> (b) Each of the respondents shall pay a fine of $25,000.
>
> (c) The respondents shall pay $40,000 of costs on a joint and several basis, on account of costs.
>
> (d) The respondents shall rewrite and pass the CPH examination within one year of the date of this decision.
>
> (Penalty Decision, para. 11)

[23] In reaching this conclusion, the Hearing Panel made the following findings:

> The conduct of the respondents in this case was unacceptable. Their dereliction of duty was inexcusable. They did not just misperform their "know your client" and "due diligence" obligations, they failed utterly to perform them at all.
>
> The respondents' conduct facilitated the market manipulation. Market manipulation is extremely detrimental to the reputation and integrity of the capital markets even where there is no evidence of direct harm to anyone.
>
> Although there were many extenuating circumstance[s] which justify lighter sanctions than the investment industry would otherwise expect where market manipulation has been facilitated by approved person, there still needs to be significant consequences to the respondents.
>
> (Penalty Decision, paras. 12-14)

[24] The Hearing Panel considered a number of precedents, but stated that, unlike in many of the cases referred to by IDA Staff, the Respondents "did not act dishonestly, or deceitfully, or with any wilful participation in the wrongdoing of others" (Penalty Decision, para. 15).

[25] Based on *Re Ng*, [2007] I.D.A.C.D. No. 47 (O.D.C.) ("*Re Ng*") and *Re Faiello*, [2007] I.D.A.C.D. No. 4 (O.D.C.) ("*Re Faiello*"), the Hearing Panel determined that a suspension was

required. However, a two month suspension was ordered because of the following extenuating circumstances:

> The period of time that manipulation was facilitated in the matter before us was relatively short.
>
> The respondents did not plan, organize, or participate through personal trading in the manipulation.
>
> The dollar value of the trading in issue was relatively minor.
>
> There was no evidence that any third party or the respondents' employer suffered direct harm.
>
> The respondents received no training and no supervisory support or assistance from their employer at the time.
>
> The respondents have no prior record of offences.
>
> We heard no evidence suggesting that the trading in question was not an isolated situation. The respondents have continued to work in the industry since the relevant period and there have been no subsequent incidents that suggest that the respondents have not been model employees and sales representatives since the time of the trading in question.
>
> The respondents did not have positions of responsibility over others in the industry.
>
> The respondents have not been "high" earners in the industry. Indeed, their remuneration has been at lower levels than one might expect from full time participants in the industry.
>
> The gross value of the commissions earned by the respondents from the trading in question was approximately $14,000.
>
> (Penalty Decision, paras. 22-31)

[26] In determining the duration of the suspension, the Hearing Panel rejected the submission of IDA Staff that a short suspension would encourage others not to treat the "know your client" and "due diligence" obligations seriously, but also rejected Anderson's evidence that a suspension of more than one month would result in a 75% loss of book to him and Kasman and cause undue hardship to their new employer. The Hearing Panel found that a two-month suspension would not prevent the Respondents from continuing in the business and would "amount to more than an unpaid vacation, especially taking into account their economic circumstances" (Penalty Decision, para. 34).

[27] With respect to costs, the Hearing Panel considered that the Respondents were entitled to a full hearing to enable the panel to determine appropriate sanctions based on all the

circumstances of the case, but also considered that the IDA Staff's costs of $123,000 were "real and reasonable" (Penalty Decision, para. 36).

[28] The Hearing Panel found:

> A fine of $25,000 per person and a costs award of $40,000 on a joint and several basis (amounting to a financial burden of $45,000 per respondent), when considered with the substantial legal expenses which, we were advised, the respondents have incurred in defending this matter, will have a meaningful, yet appropriate, financial impact on the respondents.
>
> (Penalty Decision, para. 38)

[29] The Hearing Panel ordered the Respondents to rewrite the CPH examination within the next twelve months as a refresher of conduct and practices expectations for registrants, but did not find it appropriate to order the Respondents to take courses on ethics, which were "not an issue in this case" or on the consequences of non-compliance with securities law: "Based on what the respondents have gone through in the case at hand, and the degree of remorsefulness and regret we know they have, they could teach a course on the consequences of their non-compliance" (Penalty Decision, para. 43).

[30] The Hearing Panel was not persuaded that the Respondents should be restricted in their activities upon readmission to the industry after the suspension, and rejected the proposal for strict supervision on the basis of evidence that the Respondents' new employer was supervising trading and on the basis that it was not appropriate, five years after the trading in question, to impose a period of strict supervision.

IV. POSITIONS OF THE PARTIES

[31] IDA Staff submits that the Hearing Panel erred in principle by:

a. considering the Respondents' legal costs as a mitigating factor in favour of lower sanctions;

b. failing to afford an opportunity to be heard and to cross-examine witnesses on whether the legal costs incurred by the Respondents were in fact "substantial";

c. assimilating the costs award into the fine that was imposed, amounting to a fine that fails adequately to protect the public;

d. overemphasizing the Respondents' ability to pay the costs and fine sought by IDA Staff; and

e. considering subsequent compliance as a significant factor when determining whether conditions ought to be imposed on the Respondents' future registration.

[32] Further, IDA Staff submits that the Hearing Panel erred in principle by finding that the conduct at issue was of "relatively short" duration, favouring a lesser sanction, and ignored its own findings as to the seriousness of the Respondents' negligence.

[33] IDA Staff submits that more stringent sanctions were imposed in previous market manipulation cases, relying especially on *Re Ng*, and that the sanctions imposed by the Hearing Panel are not adequate to promote general deterrence.

[34] IDA Staff asks the Commission to replace the order of the Hearing Panel with an order that the Respondents:

- pay a fine of between $40,000 and $60,000 each;
- pay costs of $60,000 on a joint and several basis;
- be suspended for at least two years;
- rewrite the CPH examination before being readmitted to the industry; and
- upon readmission, be subject to strict supervision for two years.

[35] The Respondents submit that the Commission should defer to the Hearing Panel, which made its order after a five-day hearing on the merits and a further half-day of evidence and submissions at the hearing on sanctions and costs.

[36] Further, the Respondents submit that there was no dispute that they had facilitated trading that, when viewed in retrospect, was manipulative. The main dispute was about their culpability, with IDA Staff arguing the Respondents had acted intentionally, while the Respondents testified that they did not appreciate the significance or impact of the trading at the time. The Hearing Panel found, "on a balance of probabilities that the respondents were at the time unthinking and unaware of the significance of the trading in question and did not wilfully turn a blind eye to the manipulative and/or deceptive practices" (Decision on the Merits, para. 50).

[37] Further, the Respondents submit that the matter went to a full hearing because of the question of culpability and appropriate sanctions, and that the Penalty Decision reflects the Hearing Panel's consideration of the full panoply of the evidence heard on the merits.

[38] The Respondents submit that the Hearing Panel considered the appropriate factors in determining sanctions and costs and did not rely on any error of principle. According to the Respondents, the position of IDA Staff pays insufficient regard to the exercise of judgement by the Hearing Panel.

IV. ANALYSIS

[39] For the following reasons, the Application is dismissed.

A. Standard of Review

[40] There is no dispute about the appropriate scope of the Commission's review of the Penalty Decision.

[41] Section 21.7(1) of the Act provides as follows:

> The Executive Director or a person or company directly affected by, or by the administration of, a direction, decision, order or ruling made under a by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling.

[42] Subsection 8(3) of the Act provides that upon a hearing and review, the Commission may "confirm the decision under review or make such other decision as the Commission considers proper".

[43] However, while the Commission may substitute its judgment for that of the Hearing Panel, "in practice it takes a restrained approach":

> Where the basis of the application is a decision of a recognized stock exchange, recognized self-regulatory organization or similar body pursuant to s. 21.7, the Commission will accord deference to factual determinations central to its specialized competence: *Re Shambleau* (2002), 25 OSCB 1850 at 1852 ("*Re Shambleau*"); affirmed (2003), 26 OSCB 1629 (Ont. Div. Ct.).
>
> *Boulieris v. Investment Dealers Association of Canada* (2004), 27 OSCB 1597 ("*Boulieris*"), at paras. 26 and 31; aff'd [2005] O.J. No. 1984 (Ont. Div. Ct.) ("*Boulieris Div. Ct.*"), at para. 27.

[44] The Commission will only interfere with a decision of an IDA Hearing Panel if the Hearing Panel proceeded on some incorrect principle, erred in law, overlooked material evidence, if new and compelling evidence is presented to the Commission that was not presented to the Hearing Panel, or if the Hearing Panel's perception of the public interest conflicts with that of the Commission (*Re Canada Malting Co.* (1986), 9 O.S.C.B. 3565 ("*Re Canada Malting*") at p. 8, *Re Shambleau, supra*, at p. 4, *Boulieris*, *supra*, at para. 31).

[45] The Commission "will not substitute its own view of the evidence for that taken by an SRO just because the Commission might have reached a different conclusion" (*Boulieris*, *supra*, at para. 32).

[46] As the Applicant, IDA Staff has "a heavy burden of showing that its case fits within one of those five grounds [for review] before the Commission will interfere" (*Re Canada Malting*, *supra*, at p. 9).

[47] Further, "the courts have held that a great deal of deference should be accorded to the Commission when it determines what is in the public interest, especially in relation to sanctions" (*Boulieris Div. Ct.*, *supra*, at paras. 39 and 35).

[48] These well-established principles guide our review of the Penalty Decision.

B. Principles in Determining Sanctions

[49] There is no suggestion in this case that the Hearing Panel exceeded its authority to order sanctions and costs pursuant to IDA By-law 20.

[50] Nor does there appear to be any dispute about the appropriate sanctioning principles, which were set out in IDA Staff's factum, as follows:

> In *Re Derivative Services Inc.* [2000] I.D.A.C.D. No. 26 (O.D.C.) ["*Re Derivative Services*"], the Panel set out what a Hearing Panel's main concerns in determining an appropriate penalty are:
>
> > The District Council's main concerns in determining an appropriate penalty are protection of the investing public, the Association's membership and the integrity of the Association's processes and the securities markets and prevention of a repetition of conduct of the type under consideration; see generally *In the Matter of Edward Richard Milewski*, (1999) 22 O.S.C.B. 5404 (August 27) at 5407. The penalty should reflect the District Council's assessment of the measures necessary in the specific case to accomplish these goals, ranging from a reprimand to an absolute bar, and may take into account the seriousness of the respondent's conduct and specific and general deterrence.
>
> The IDA's role as a disciplinary tribunal is primarily preventative and protective of the markets. Discipline proceedings are not focused on punitive or retributive sanctions.
>
> > *Re Ng*, [2007] I.D.A.C. No. 47, at paras. 56-7 and 64
>
> In *Stetler v. Ontario Flue-Cured Tobacco Growers' Marketing Board*, [2008] O.J. No. 172 (Div. Ct.) ["*Stetler*"] at paragraph 15, Justice Gans held as follows:
>
> > The role that deterrence plays in the penalty assessment phase of a regulatory disciplinary hearing is largely fact-driven. From my review of the cases, *it appears to take on a position of greater importance where the maintenance of public confidence is a paramount concern, such as in matters dealing with professional regulatory bodies*, as opposed to instances involving the operation and functioning of marketing boards, for example. I hasten to observe, however that this is not an inviolable rule. (emphasis added)

[51] IDA Staff also relies on the following statement from *Re Mills*, [2001] I.D.A.C.D. No. 7 ("*Re Mills*"), at paragraph 6:

> Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention, rather than punishment.

[52] These principles have been incorporated in the IDA Sanctions Guidelines (the "Guidelines"). The Guidelines set out a list, which is "illustrative, not exhaustive", of "key considerations when determining sanctions": (i) harm to clients, employer and/or the securities market; (ii) blameworthiness; (iii) degree of participation; (iv) extent to which the respondent was enriched by the misconduct; (v) prior disciplinary record; (vi) acceptance of responsibilities, acknowledgement of misconduct and remorse; (vii) credit for co-operation; (viii) voluntary rehabilitative efforts; (ix) reliance on the expertise of others; (x) planning and organization; (xi) multiple incidents of misconduct over an extended period of time; (xii) vulnerability of victim; (xiii) failure to co-operate with the investigation; and (xiv) significant economic loss to the client and/or member firm.

[53] The issue in this case is whether the decision of the Hearing Panel was consistent with these principles.

C. Grounds for Review of the Penalty Decision

(i) Did the Hearing Panel err in principle in failing to hear evidence on whether the Respondents' costs were "substantial", as the Respondents claimed?

[54] In determining the appropriate sanctions, the Hearing Panel made the following statement:

> A fine of $25,000 per person and a costs award of $40,000 on a joint and several basis (amounting to a financial burden of $45,000 per Respondent), when considered with the *substantial legal expenses which, we were advised,* the Respondents have incurred in defending this matter, will have a meaningful, yet appropriate, financial impact on the Respondents. [emphasis added]
>
> (Penalty Decision, para. 38)

[55] IDA Staff sought an order for costs of $60,000 payable by the Respondents on a joint and several basis, and, in support of that request, filed an affidavit, to which its Bill of Costs and time dockets are exhibits, to prove its investigation and litigation costs of $123,175.45. IDA Staff submits that its costs claim was founded on solid objective principles: the length of the hearing, the complexity of the issues with respect to manipulative and/or deceptive trading, and the co-operation of the Respondents, which IDA Staff gave as a reason why the costs claim reflected a significant reduction from the IDA's actual investigation and litigation costs. The Hearing Panel found that the costs claimed by IDA Staff were "real and reasonable" (Penalty Decision, para. 36).

[56] IDA Staff submits that, in contrast, the Respondents led no evidence as to their actual costs, despite the fact that Anderson testified at the hearing on sanctions and costs. IDA Staff submits that the only basis for the Hearing Panel's finding that the Respondents incurred "substantial legal expenses" came from the following submission by Respondents' counsel:

> From the income that Mr. Anderson and Mr. Kasman have earned over the last three years, one can see that last year we're talking about an income – this is prior to deductions for federal, provincial taxes of just over $100,000.00 for Mr. Anderson and Mr. Kasman. So if one was to *assume* a sort of a net take home pay of around $60,000.00, just over $60,000.00, one can *imagine* the impact of having to respond and retain counsel to deal with this proceeding, as reasonable though I [sic] may be, that one can imagine it's an expensive exercise. And any sort of final costs award from – coming from a take home pay of, you know, after tax in the range of $60,000.00 is going to have a significant effect on the Respondents. [emphasis added]
>
> (Penalty Hearing Transcript, pp. 117-118)

[57] IDA Staff submits that the Hearing Panel erred in principle by finding that the Respondents incurred "substantial legal expenses" without any evidentiary foundation.

[58] In addition, IDA Staff submits that while the Respondents were entitled to have "their day in court", they were aware that there were potential costs involved in doing so.

[59] The Respondents note that IDA Staff did not object to their submissions on costs during the Penalty Hearing, though we note that IDA Staff did submit there was no documentary evidence as to the Respondents' income and assets to support any consideration of their ability to pay. In any event, the Respondents submit there should be no dispute that a five-day hearing represented by counsel is costly, and there was no error in the Hearing Panel taking judicial notice of that "obvious fact".

[60] We agree with Respondents that the Hearing Panel was well within its authority and expertise to find that the hearing involved substantial legal costs for the Respondents, as it had for IDA Staff. Indeed, counsel for IDA Staff acknowledged this reality when he said, referring to the hourly rates billed for IDA Staff counsel: "And I'm not sure what Mr. Crawley charges his clients, but I suspect it's considerably more than these rates." (Penalty Hearing Transcript, p. 87)

[61] It is important to note that respondents cannot seek a costs order against IDA Staff, and therefore the only costs issue before the Hearing Panel was whether IDA Staff should be allowed its costs claim of $60,000 or some lesser amount. As counsel for IDA Staff acknowledged in his oral submissions before the Hearing Panel, costs are at the discretion of the Hearing Panel.

[62] Moreover, IDA Staff recognizes that there is IDA precedent for a conservative approach to costs:

> In recent years, there has been a trend to the awarding of quite substantial costs in these cases. We think that care should be exercised so that the fear of attracting an award of very large costs does not have the effect of inhibiting a Member, or an approved person, from advancing a defence which it thinks is meritorious. It is

> also worth keeping in mind, when thinking about costs, that a successful respondent cannot get its costs from the IDA. Since the power to award costs is one-sided, we think that a conservative approach to costs is not unwarranted.
>
> (*IDA v. Credifinance Securities Ltd.*, [2006] I.D.A.C.D. No. 30 (O.D.C.) ("*Credifinance*"), at para. 56, referred to in *Re Ng*, *supra*, at para. 67 and *IDA v. Octagon Capital Corp.* [2007] I.D.A.C..D. No. 16 (O.D.C.), at p. 8.)

[63] In our view, it was open to the Hearing Panel to consider that the Respondents, who were represented at the hearing on the merits and the hearing on sanctions and costs, would also, as a matter of common sense, have incurred legal costs. IDA Staff did not ask for an opportunity to cross-examine the Respondents' on this point. In these circumstances, we are not satisfied the Hearing Panel erred in principle in considering the Respondents' costs, as well as IDA Staff's costs, in deciding the appropriate costs order against the Respondents.

[64] Moreover, the Penalty Decision suggests that in reducing the costs award sought by IDA Staff, the Hearing Panel also considered that while IDA Staff had suggested three possibilities bearing on the Respondents' degree of culpability, as set out in para. 14 above, possibilities to which the Respondents were entitled to respond, the Hearing Panel found only that the Respondents' conduct fell below the standard required of a registrant, was conduct unbecoming and contrary to the public interest. In effect, IDA Staff had partial success in proving its case on the merits.

[65] Further, the Hearing Panel also considered that the Respondents "were cooperative and this matter was brought forward in an expeditious manner", and that the Respondents "were entitled to a full hearing to put before the panel live evidence and a full appreciation of the facts to enable us to determine appropriate sanctions in all the circumstances of this case" (Penalty Decision, paras. 35-36). These, too, are appropriate considerations with respect to costs.

[66] We are not persuaded the Hearing Panel erred in principle.

(ii) Did the Hearing Panel err in principle in deciding that the Respondents' costs warranted a lesser fine?

[67] IDA Staff submits that the purpose of a fine, which is authorized by IDA By-law 20.33(2)(b), is to provide specific and general deterrence, while a costs award, which is authorized by IDA By-law 20.49, is generally compensatory in nature. IDA Staff submits that the purpose of costs is to compensate the IDA for the costs incurred in successfully investigating and prosecuting the matter. IDA Staff submits that costs are an element of the sanction (*Re Mills*, *supra*, at para. 65, *Re Ng*, *supra*, at para. 68), and should not be a reason for reducing the fine awarded.

[68] In our view, an order for costs has a different purpose and is governed by different principles than a fine and is not an element of the sanction. In any event, IDA Staff concedes that the totality of the financial impact of the sanctions must be considered. We are aware of no authority to suggest that it is an error to consider the financial impact of a given order on a respondent, along with other appropriate factors in determining sanctions and costs.

[69] We are not persuaded the Hearing Panel erred in principle when it determined that the fine and costs award, when considered together with the Respondents' own legal costs, "will have a meaningful, yet appropriate financial impact" on the Respondents (Penalty Decision, para. 38).

(iii) Did the Hearing Panel err in principle in deciding that the Respondents' ability to pay warranted a lesser fine, in over-emphasizing ability to pay?

[70] IDA Staff concedes that ability to pay is a relevant consideration in determining the appropriate fine, but submits that the Hearing Panel erred in principle by over-emphasizing the Respondents' ability to pay and doing so without any evidence about the Respondents' financial circumstances. IDA Staff notes that the IDA Sanctions Guidelines do not address ability to pay, and while the sanctions guidelines for disciplinary proceedings of Market Regulatory Services ("RS") state that an RS hearing panel may consider ability to pay, the respondent is required to produce evidence of financial hardship in the form of a sworn affidavit or declaration that includes information about total income and net worth. IDA Staff submits that in this case, the Hearing Panel failed to consider the Respondents' ability to pay in any meaningful way.

[71] The Respondents submit that it was entirely reasonable for the Hearing Panel to consider the Respondents' ability to pay, and that this is appropriate to achieve specific deterrence and can be consistent with the object of general deterrence. In addition, the Respondents note that the Hearing Panel also considered that the commissions the Respondents earned from the trades (approximately $14,000) were significantly less than the fines that were ordered.

[72] We accept that a respondent's personal and financial circumstances are relevant factors to be considered, along with other appropriate sanctioning factors, in determining the amount of a fine. We also accept that considering ability to pay is consistent with the principle of proportionality in determining sanctions, and we are not persuaded that it is inconsistent with achieving general deterrence.

[73] In this case, counsel for IDA Staff cross-examined Anderson about his income based on information the IDA had received from Research Capital. In closing submissions, counsel for the Respondents suggested that the Respondents' pre-tax income of just over $100,000 each would result in take-home pay of just over $60,000 each. Counsel for IDA Staff noted, in closing, that the Respondents had not given any evidence about their assets, but he had not cross-examined Anderson on this point, and did not request any further documentation as to the Respondents' income or assets. The Hearing Panel considered that the Respondents "have not been high earners in the industry. Indeed, their remuneration has been at lower levels than one might expect from full time participants in the industry" (Penalty Decision, para. 30).

[74] We are not persuaded that the Hearing Panel over-emphasized ability to pay in fixing the amount of the fines imposed on the Respondents. Indeed, rather than considering "ability to pay", the focus of the Hearing Panel was on determining an appropriate fine that would achieve specific and general deterrence, considering all the relevant factors. Amongst other factors, the Hearing Panel noted that the gross value of the commissions earned from the trades in question was approximately $14,000, that the dollar value of the trades was "relatively minor", that the trades occurred over a "relatively short" period, that there was no evidence of any harm to any third party or to Desjardins, and that the Respondents did not plan, organize or participate through personal trading in the manipulation. Considering these and other factors, the Hearing

Panel concluded that a fine of $25,000 for each Respondent, coupled with a costs award of $40,000 payable on a joint and several basis (amounting to a financial burden of $45,000 for each Respondent) and considering the Respondents' own legal costs, "will have a meaningful, yet appropriate, financial impact on the respondents."

[75] We are not persuaded the Hearing Panel erred in principle in its consideration of the Respondents' financial circumstances in concluding that the sanctions were appropriate.

(iv) Did the Hearing Panel err in principle in considering the Respondents' subsequent compliance in determining whether conditions ought to be imposed on the Respondents' future registration?

[76] IDA Staff submits that the Hearing Panel erred in principle when it considered the Respondents' subsequent conduct as one of the extenuating circumstances justifying lesser sanctions. The Hearing Panel said:

> We heard no evidence suggesting that the trading in question was not an isolated situation. The respondents have continued to work in the industry since the relevant period and there have been no subsequent incidents that suggest that the respondents have not been model employees and sales representatives since the time of the trading in question.
>
> (Penalty Decision, para. 28)

[77] IDA Staff submits that while subsequent proven misconduct is clearly an aggravating factor, neutral subsequent conduct is not a mitigating factor, since compliance is expected of all members. Moreover, this consideration gives the Respondents the benefit of the administrative delays in completing the proceeding. In contrast, IDA Staff submits that the Hearing Panel appropriately considered the Respondents' good disciplinary history prior to the events in issue (when they were not under a regulatory spotlight) because this "demonstrates responsibility and conformity to professional norms."

[78] IDA Staff submits that the Respondents' subsequent conduct is of particular concern because over 80% of their current business consists of unsolicited orders and over 20% was OTC Bulletin Board and Pink Sheet unsolicited orders. IDA Staff submits that it was these types of unsolicited orders that formed the basis of the violations and therefore IDA Staff views the Respondents' ongoing business as high risk.

[79] Accordingly, IDA Staff submits that the Hearing Panel erred in principle by failing to impose a two-year post-readmission order for strict supervision of the Respondents and prohibiting the Respondents from trading and to ban on the OTC Bulletin Board and Pink Sheets.

[80] The Respondents submit that the purpose of strict supervision is protective, and therefore the fact that the Respondents' trading has been supervised for the five years since the trades in question and there have been no repeat problems is clearly relevant to the issue before the Hearing Panel.

[81] IDA Staff notes that section 3.5 of the Guidelines provides that a respondent's prior disciplinary history should be considered in determining sanctions because a good disciplinary

record demonstrates conformity to professional norms, and section 3.8 provides that any voluntary rehabilitative efforts should be considered because they demonstrate recognition of the misconduct and a commitment to remedy it. IDA Staff submits that mere compliance after the fact is not evidence of a voluntary rehabilitation effort or a good disciplinary record.

[82] IDA Staff relies on *Re Ng*, where a one-year suspension was imposed on a respondent who had already been under "close supervision" for almost two years pending determination of the matter, and *Re Faiello*, where, pursuant to a settlement agreement, a two-year suspension was imposed. The respondents in *Re Ng* and *Re Faiello* had unknowingly facilitated market manipulation by the same third party. The hearing panel in *Re Ng* stated:

> We have reached the conclusion that, because of the damage which a market manipulation can do to the investing public and to the apparent integrity of the investment industry, a sanction must include a suspension. In the circumstances of this case, anything less could lead those who are gatekeepers to think that a lack of vigilance would not be taken seriously and could result in little more than a slap on the wrist. The length of the suspension, in the case of a worthwhile person like Mr. Ng, should not be such as to prevent any hope of his rehabilitation into the industry. We have decided that a balancing of the need for general deterrence with the hope of rehabilitation of Mr. Ng calls for the imposition of a one-year suspension commencing on January 1, 2008.
>
> (*Re Ng*, *supra*, at para. 65)

[83] As we read the Penalty Decision, the Hearing Panel made the appropriate distinction between the Respondents' prior record of no offences and their conduct during the five years since the trades in question. We agree that these are relevant considerations, which are consistent with the finding by the Hearing Panel that the trades in issue were "an isolated situation". We also note the Hearing Panel's comment that the Respondents' current employer has been supervising their trading, and that it would not be appropriate, five years after the trades in question, to impose a period of strict supervision.

[84] As stated in *Boulieris*, *supra*, the Commission will not substitute our view of the evidence for that of a self-regulatory organization "just because the Commission might have reached a different conclusion" (at para. 32).

[85] In this case, the Hearing Panel determined that a two-month suspension would not be "unduly devastating" to the Respondents, who, according to Anderson's testimony, would lose 75% of their book if a suspension of more than one month were imposed, but would "amount to more than an unpaid vacation, especially taking into account their economic circumstances" (Penalty Decision, paras. 32-34). Amongst other factors, the Hearing Panel considered that the Respondents' current employer has been supervising their trading, that "[t]rading on the Pink Sheets and the OTC Bulletin Board markets is not illegal", and that there was no evidence that "since the market manipulation in question, the respondents have not been capable of dealing in such markets on a proper basis" (Penalty Decision, para. 40). The Hearing Panel also considered that this case was, "in the scheme of things", "a small matter", and that the Respondents were remorseful and co-operative with IDA Staff.

[86] We are satisfied that the Hearing Panel considered the appropriate factors in determining the duration of the suspension. We are not persuaded the Hearing Panel erred in principle in ordering a two-month suspension in all the circumstances.

(v) Did the Hearing Panel err in principle in finding that the "relatively short" duration of the Respondents' misconduct was an extenuating circumstance warranting a lesser sanction?

[87] IDA Staff submits that the Hearing Panel erred in principle when it considered the "relatively short" period at issue as one of the "extenuating circumstances" favouring a lesser sanction.

[88] There is no dispute that the allegations of IDA Staff and the findings of the Hearing Panel related solely to the Respondents' conduct between January 30, 2003 and April 30, 2003.

[89] Indeed, counsel for IDA Staff conceded the point in his submissions at the Penalty Hearing, when he stated, after addressing aggravating factors: "There were also some mitigating factors, and you've noted them in your decision. You've noted some of them in your decision. The activity took place in a relatively short time frame, three months. There was no actual harm to investors that we have been able to ascertain. The Respondents have no prior disciplinary record. The Respondents cooperated in the investigation. And you've observed at paragraph 55, that 'throughout the hearing, the Respondents regretted their conduct'" (Penalty Hearing Transcript, p. 42).

[90] We are not satisfied the Hearing Panel erred in principle in considering the "relatively short" duration of the Respondents' misconduct as one of the extenuating circumstances favouring a lesser sanction.

D. Conclusion

[91] As stated above, the Commission takes a restrained approach when reviewing decisions of the IDA that fall within its area of expertise, and an applicant in a section 21.7 proceeding has "a heavy burden" of showing that its case falls within one of the five grounds for review.

[92] The Hearing Panel summarized its view of the case in the following paragraphs at the conclusion of the decision:

> The sanctions, considered together, constitute an appropriate deterrence for the respondents and will send the right message to others in the industry about the importance of fulfilling the "know your client" and "due diligence" obligations, the lack of fulfillment of which in this case facilitated the market manipulation in question.
>
> One might conclude that this case, in the scheme of things, was a small matter. No one was directly harmed. Amounts were small. The trading period was short. The market manipulation was not even noticed at the time. The events occurred in 2003 and did not come to light until 2005.

> Nevertheless, the conduct of the respondents fell significantly below that expected of members of the industry. They permitted market manipulation to occur.
>
> It was appropriate that, when the facts were drawn to the Association's attention, the Association took up this matter and pursued it.

[93] Decisions on sanctions and costs are heavily fact-dependent. In this case, we find that the Hearing Panel heard and decided the evidence and submissions of IDA Staff and the Respondents and made its decision based on the appropriate principles.

[94] Although IDA Staff would have preferred a different order for sanctions and costs, we are not persuaded the Hearing Panel proceeded on any incorrect principle or made any other error that would justify our intervention in the Penalty Decision.

V. ORDER

[95] For these reasons, IT IS ORDERED THAT:

1. The Application is dismissed.

DATED in Toronto this 14th day of July, 2009.

"Wendell S. Wigle" *"Margot C. Howard"*

Wendell S. Wigle, QC Margot C. Howard