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Securities
Commission

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de l'Ontario

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**IN THE MATTER OF AN APPLICATION FOR A HEARING AND REVIEW OF A
DECISION OF THE ONTARIO DISTRICT COUNCIL OF THE INVESTMENT
INDUSTRY REGULATORY ORGANIZATION OF CANADA PURSUANT TO
SECTIONS 8 AND 21.7 OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF DISCIPLINE PROCEEDINGS PURSUANT TO DEALER
MEMBER RULE 20 OF THE INVESTMENT INDUSTRY REGULATORY
ORGANIZATION OF CANADA**

BETWEEN

**STAFF OF THE INVESTMENT INDUSTRY REGULATORY
ORGANIZATION OF CANADA**

AND

JULIUS CAESAR PHILLIP VITUG

REASONS AND DECISION

Hearing: July 20, 2009

Decision: April 23, 2010

Panel: Mary G. Condon – Commissioner (Chair of the Panel)
Paulette L. Kennedy – Commissioner

Counsel: Alistair Crawley – for Julius Caesar Phillip Vitug
Jocelyn Loosemore

Natalija Popovic – for Staff of the Investment
Tamara Brooks Industry Regulatory Organization of
Canada

Jonathon T. Feasby – for Staff of the Ontario Securities
Commission

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REASONS AND DECISION

I. BACKGROUND

A. Introduction

[1] On July 20, 2009, a hearing was held before the Ontario Securities Commission (the “Commission”) to consider an application dated May 1, 2009 (the “Application”) brought by Julius Caesar Phillip Vitug (the “Applicant”) for a hearing and review of the decision of a hearing panel of the Ontario District Council (the “District Council”) of the Investment Industry Regulatory Organization of Canada (“IIROC”) dated March 31, 2009 (the “Decision”). These are our Reasons and Decision relating to the Application.

[2] This proceeding is a hearing and review of the Decision and not an appeal. Although there have been changes to IIROC’s adjudicative process which eliminated its internal appeal process, the Commission’s jurisdiction remains unchanged. This application for a hearing and review is heard pursuant to sections 8 and 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”).

[3] In its Decision, the District Council found that the Applicant engaged in conduct unbecoming or detrimental to the public interest because of an undisclosed financial interest in client accounts and undisclosed financial dealings in those accounts, in violation of IIROC By-law 29.1.

[4] The Applicant is seeking an order setting aside the Decision and dismissing the proceeding against him on the grounds that the District Council made serious and pervasive errors in its Decision. We discuss below the alleged errors by the District Council set out in the Application.

B. The Application

[5] The Applicant argues that the District Council made several serious findings against him that are entirely unsupported by the evidence. The Applicant submits that the allegations set out in the notice of hearing issued by IIROC were not proven under the applicable standard of proof. He alleges that the Decision contains other significant problems that are indicative of an attempt to overlook or compensate for the deficiencies in the case brought against him. These allegations are set out in detail below at paragraph 14.

[6] IIROC submits that the Decision is fair and reasonable, having sufficient explanation, transparency and intelligibility. According to IIROC, the District Council carefully considered the evidence and gave appropriate weight to it in light of all the circumstances.

[7] IIROC submits that the Commission should defer to the factual determinations of a recognized self-regulatory organization (“SRO”) such as IIROC because these determinations are made within its area of specialized competence. It contends that the circumstances of this Decision do not warrant interference by the Commission.

[8] Accordingly, we have to consider the scope of review of an IIROC decision by the Commission and whether this Decision of the District Council requires our intervention.

C. The District Council Hearing and Decision

[9] IIROC, formerly the Investment Dealers Association (the “IDA”), made allegations in a Notice of Hearing dated September 3, 2008 that the Applicant engaged in business conduct or practice that was unbecoming or detrimental to the public interest contrary to IDA By-law 29.1 (the “Notice of Hearing”). The Notice of Hearing alleged that he had an “undisclosed financial interest and undisclosed financial dealings in accounts, including accounts held at another member firm, of two of his clients”. These clients are the Applicant’s aunt (“EB”) and father-in-law (“DT”).

[10] The matter was heard on February 23, 25 and 26, 2009 before the District Council. IIROC Staff called one witness, an IIROC investigator who referred to documents and five exhibits introduced into the record by IIROC Staff. The Applicant called no witnesses, but filed an affidavit of DT and two exhibits comprising documents that had been provided to the Applicant through the disclosure process.

[11] Written closing arguments were submitted following the IIROC hearing. The District Council declined the Applicant’s request to make oral submissions. The reasons and decision on the merits were dated March 31, 2009 and were released on April 8, 2009.

[12] In its Decision, the District Council found the Applicant liable in respect of the following charge, alleged in the Notice of Hearing at page 2:

In or about April 2003 to August 2005 the Respondent engaged in business conduct or practice which is unbecoming or detrimental to the public interest in that he had an undisclosed financial interest and undisclosed financial dealings in accounts, including accounts held at another member firm, of two of his clients, in violation of IDA By-law 29.1.

[13] The District Council also dismissed a preliminary motion for a stay of proceedings in which the Applicant alleged an abuse of process. The District Council found that the Applicant had not satisfied it that a stay was warranted in this case. A request in the alternative that certain transcripts of interviews of the Applicant be excluded was also denied. This issue is discussed in more detail below at paragraphs 71–75.

II. ERRORS ALLEGED BY THE APPLICANT

[14] The Applicant submits that the District Council made the following errors that should be addressed in this hearing and review:

(a) The District Council failed to deliver reasons that adequately explain how it arrived at its Decision;

(b) The District Council made material findings against the Applicant on issues that were not properly pleaded in the Notice of Hearing and were not part of the “charge” that the Applicant had to respond to;

- (c) The District Council made numerous errors in its treatment of the evidence including,
- i. making an adverse finding of credibility against the Applicant based on a manifestly inadequate evidentiary record;
 - ii. relying on the erroneous adverse finding of credibility to make important factual determinations that were adverse to the Applicant;
 - iii. mischaracterizing or disregarding evidence that was contrary to findings made by the District Council, including unchallenged affidavit evidence; and
 - iv. making findings of fact that were entirely unsupported by the evidentiary record;
- (d) In making its findings of fact, including the findings that fall within the categories of erroneous findings outlined above, the District Council failed to apply the required standard of proof; and
- (e) The District Council erred in admitting into the record the interview transcripts of the Applicant that a prior decision of the District Council had determined could not be relied on (the “Impugned Interview Transcripts”). This error was compounded by the failure to deliver adequate reasons for the Decision. Notwithstanding the statement in the Decision at paragraph 42 that they “did not need to rely on the evidence from the respondent in the transcripts in question”, it is clear that the District Council was influenced by the evidence in the Impugned Interview Transcripts and that it affected their decision.

III. THE ISSUES

[15] In considering the Application, we address the following issues:

1. What is the Commission’s jurisdiction to intervene in this matter?
2. What is the appropriate standard of review under section 21.7 of the Act?
3. Does this Application satisfy any of the grounds upon which the Commission may intervene in a decision?
4. If there are grounds to intervene in the Decision, what is the appropriate remedy in the circumstances?

IV. SUBMISSIONS OF THE PARTIES

A. The Applicant

[16] The Applicant submits that the District Council’s Decision contains serious and pervasive errors which call for a hearing and review by the Commission.

[17] According to the Applicant, the majority of the facts were not in issue at the hearing before the District Council. His concern is that speculative inferences were drawn from the facts by the District Council. The Applicant does not deny his financial dealings with EB and DT, but objects to any inferences of wrongdoing drawn from these dealings. He characterizes the substance of the allegations as an issue of firm compliance, rather than an issue to be addressed by IROC under By-law 29.1.

[18] The Applicant argues that the District Council failed to deliver proper reasons in its Decision which set out and reflect consideration of the main relevant factors. Instead, he contends that the Decision is mostly expressed in terms of bald findings and conclusions. Where the District Council made reference to the evidence underlying these particular findings, the Applicant submits that errors in the treatment of the evidence are apparent.

[19] The Applicant submits that the District Council accepted IROC Staff's invitation to go beyond the charge of having an undisclosed interest in client accounts to find that the Applicant engaged in serious intentional conduct, including acting deceitfully, concealing matters from his member firm and evading scrutiny. He submits that these findings should not have been made since they were not specifically alleged in the Notice of Hearing. He alleges that the District Council denied him his right to reasonable notice by making findings of culpability on matters that were not pleaded in the Notice of Hearing, which he contends is a breach of natural justice and procedural fairness.

[20] The Applicant also claims that he did not receive timely disclosure of material that IROC Staff relied on regarding industry standards and policies.

[21] He submits that, given the seriousness of the consequences he is facing, the District Council should have undertaken a thorough review of the evidence upon which it relied and the inferences it drew to conclude that the Applicant engaged in business conduct or practice that is unbecoming or detrimental to the public interest. The Applicant submits that the material findings against him cannot be supported by the evidentiary record.

[22] The Applicant submits that the District Council's finding at paragraph 95 of the Decision that he had "little regard for the truth" is an adverse finding of credibility against him that permeated the Decision and affected the interpretation of the evidence. The Applicant submits that the District Council clearly misapprehended the evidence and improperly made its own handwriting assessment regarding signatures of EB.

[23] Further, the Applicant contends that this adverse credibility finding led to other material findings against him, such as disbelieving his evidence on the existence of a loan.

[24] The Applicant alleges that the District Council mischaracterized and disregarded parts of DT's affidavit regarding his account at Standard Securities Capital Corporation ("SSCC"), finding that the Applicant effectively managed the account. He submits that since it was unchallenged affidavit evidence, there was no basis for the rejection of this evidence on issues that could have been addressed through cross-examination by IROC Staff or questions from the panel.

[25] In addition to the above, the Applicant also contends that the District Council made significant findings that were unsupported by the evidence before it. These findings concern DT's account, findings

that the Applicant acted intentionally and deceitfully for his own benefit and findings that his conduct created a conflict of interest. The Applicant submits that the finding of a conflict of interest was a new allegation not covered in the Notice of Hearing.

[26] Although he does not deny that the District Council correctly identified the standard of proof as being one of clear and convincing evidence, the Applicant submits that there should have also been reference to how findings of fact meet the standard of proof. He alleges that a meaningful articulation of how the factual findings were made in accordance with the required standard of proof is absent from the Decision.

[27] The District Council admitted into evidence the transcripts of two interviews that a prior District Council decision had determined could not be relied upon to support a charge of a breach of By-law 29.1. Although the Decision states that evidence from the transcripts was not relied on, the Applicant submits that the District Council was influenced by those transcripts in its analysis. It is the Applicant's position that the District Council erred in admitting these transcripts into evidence.

B. IIROC

[28] IIROC submits that the Application is without merit and that Commission should defer to the District Council's discretionary decisions and to the factual determinations central to its specialized competence. IIROC submits that the Decision provided reasons that were sufficiently detailed to demonstrate that the applicable legal principles and the relevant evidence were properly considered.

[29] IIROC contends that the District Council's reasons for denying the stay for abuse of process show that it weighed the appropriate administrative law principles. On the issue of the District Council's refusal to exclude transcripts from evidence, IIROC submits that the District Council clearly indicated that it did not rely on the transcript evidence when making its decision, basing its findings on other evidence. It submits that it is reasonable to conclude that the District Council reasonably considered the relevant issues when it refused to grant a stay.

[30] Contrary to the Applicant's submissions, IIROC contends that the Notice of Hearing was sufficiently particularized to provide the Applicant with natural justice and procedural fairness. IIROC submits that the Notice of Hearing clearly identified the factual allegations and the evidence in support of them, giving the Applicant notice of the case that was being put against him and affording him the opportunity to make full answer and defence.

[31] IIROC submits that not only did the District Council clearly and correctly state the standard of proof as being founded on clear and convincing proof based on cogent evidence, but they also applied this standard correctly. IIROC refers to the analysis of the evidence which applies the standard of proof described earlier in the Decision. It submits that it is reasonable to conclude that the District Council considered the enumerated evidence to have met the required standard.

[32] IIROC also contends that there was no breach of natural justice or procedural fairness from a lack of timely disclosure. It submits that there is no evidence that the Applicant suffered any prejudice from the timing of disclosure of material outlining industry standards and policies, and that counsel for the Applicant did not object or request an adjournment for this reason at the IIROC hearing.

[33] IIROC submits that it is clear from the Decision that the District Council established the underlying elements of the charge of conduct unbecoming in an organized and logical manner. It contends that the evidence considered by the District Council demonstrates that the Applicant's conduct went beyond a member firm compliance issue and amounted to a breach of By-law 29.1.

[34] It is IIROC's position that the conflict of interest that resulted from the Applicant's conduct is the consequence or corollary of his actions, and not a separate allegation.

[35] IIROC refers to comments made by the District Council and contends that they arrived at the Decision after considering all the evidence in its totality. IIROC notes that there is no requirement that every piece of evidence considered by the District Council be identified in the Decision, but that it was sufficient for it to highlight the most compelling evidence, particularly as the facts were not in dispute in this case.

[36] IIROC disagrees with the Applicant's assertion that the District Council made a determination regarding the Applicant's credibility when it did not believe his assertions regarding loan arrangements. IIROC contends that the District Council's finding regarding the loan arrangement was not based on any finding of credibility and that it could conclude that the Applicant had a financial interest in EB's account, regardless of whether or not there was a loan.

[37] IIROC submits that the District Council enumerated its findings indicating that the Applicant benefitted personally while concealing information. This behaviour constituted blameworthy conduct that amounts to conduct unbecoming under By-law 29.1.

[38] IIROC claims that the Decision was based upon a review of all of the evidence before the District Council and was reasonable as a whole. It contends that the Decision was sufficient to inform the Applicant of why the issues were decided against him and to enable him to bring an appeal.

C. Staff

[39] Staff filed a factum to provide assistance to the Commission regarding the appropriate scope of review of a decision of the District Council.

[40] Staff takes no position on the facts of the case nor on whether the District Council's Decision meets any of the required grounds for review.

V. ANALYSIS OF THE ISSUES

A. The Law

1. Jurisdiction to Intervene

[41] The Commission has the discretion to set aside the Decision of the District Council and to dismiss the proceeding against the Applicant. Section 21.7 of the Act empowers the Commission to hold a hearing and review of a direction, decision, order or ruling of an SRO such as IIROC. It states:

21.7 (1) Review of decisions – 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.

(2) Procedure – Section 8 applies to the hearing and review of the direction, decision, order or ruling in the same manner as it applies to a hearing and review of a decision of the Director.

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

8(3) Power on review – Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.

2. Standard of Review and Grounds for Intervention

[43] In a section 21.7 hearing and review, the Commission exercises a form of original jurisdiction akin to a trial de novo. It does not serve a more limited appellate function:

... The hearing and review is treated much like a trial de novo where the panel may admit new evidence as well as review the earlier proceedings and the applicant does not have the onus of showing that the District Council was in error in making the decision that is the subject of the application. See *Security Trading Inc. and the Toronto Stock Exchange* (1994), 17 O.S.C.B. 6097 at 6105 and *Re Security Trading Inc.*, [1995] T.S.E.D.D. No.2; *Picard and Fleming – Brokers*, November (1953), O.S.C.B. 14; *BioCapital Biotechnology and Healthcare Fund and BioCapital Mutual Fund Management Inc.* (2001), 24 O.S.C.B. 2659 at 2662.

In this regard, a hearing and review may be considered broader in scope than an appeal, which is usually limited to determining whether there has been an error in law or a rule of natural justice has been contravened. See *Re C. Cole & Co Ltd., Coles Book Stores Ltd. and Cole's Sporting Goods Ltd.*, [1965] 1 O.R. 331; affirmed [1965] 2 O.R. 243 (C.A).

(*Investment Dealers Assn. of Canada v. Boulieris* (2004), 27 O.S.C.B. 1597 (aff'd [2005] O.J. No. 1984 (Div. Ct.)) (“*Boulieris*”) at paras. 29-30.)

[44] Although the scope of a hearing and review may be broad, previous cases have established that there is a high threshold to meet in demonstrating that a decision of an SRO should be overturned. (*Re Shambleau* (2002), 25 O.S.C.B. 1850, at 1852 (“*Shambleau*”) aff'd *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629 (Ont. Div. Ct.); and *Hudbay Minerals Inc.* (2009), 32 O.S.C.B. 3733 (“*Hudbay*”).

[45] Deference to a decision made by an SRO will be afforded when that SRO is interpreting and applying its own by-laws because of its specialized expertise (*Shambléau, supra*). In particular, deference will be owed to factual determinations made by an SRO. The Commission recognizes that the SROs are uniquely positioned to hear the facts and decide a case based on their expertise.

[46] The Commission will not generally substitute its own view of the evidence for that taken by the hearing panel on the basis that it might have come to a different conclusion. In *Hudbay*, a review of a decision of the Toronto Stock Exchange, the Panel noted:

The Commission's authority under section 21.7 of the Act should not be used as a means to second-guess reasonable decisions made by the TSX. The Commission will not substitute its own view for that of the TSX simply because the Commission might have reached a different conclusion in the circumstances.

(*Hudbay, supra* at para. 103.)

[47] We agree with Staff's submissions on the law and reiterate the principle that a Commission panel "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; *Investment Dealers Assn. of Canada v. Kasman* (2009), 32 O.S.C.B. 5729 ("*Kasman*") at para. 45). The Commission recently affirmed that it will employ a restrained approach when intervening in decisions of SROs, notwithstanding its broad powers of review:

... Although the statute provides the Commission with broad powers of review, the Commission has repeatedly emphasized the "restrained approach" urged upon us by Staff and RS. Such restraint is desirable to ensure that SROs have adequate control and direction over their own processes and procedures, and that they are not unduly hampered by interruptions caused by parties seeking a "second opinion" in the midst of an ongoing SRO regulatory proceeding.

(*Re Berry* (2008), 31 O.S.C.B. 5441 at para. 62.)

[48] Nonetheless, there are circumstances in which the Commission will intervene in an SRO decision. The test for determining whether the Commission should intervene is set out in *Canada Malting Co.* (1986), 9 O.S.C.B. 3565 ("*Canada Malting*"), where the Commission established that it will only interfere with the decision of an SRO on the following grounds:

1. the SRO has proceeded on an incorrect principle;
2. the SRO has erred in law;
3. the SRO has overlooked some material evidence;
4. new and compelling evidence is presented to the Commission that was not presented to the SRO; or

5. the SRO's perception of the public interest conflicts with that of Commission.

[49] This test has been endorsed in subsequent Commission decisions, including *Boulieris, supra* at para. 31, *Hudbay, supra* at para. 105 and *Kasman, supra* at para. 44. In *Hudbay* at paragraph 114, when discussing when the Commission might intervene in a decision of the TSX, the Panel described the burden on an applicant as follows:

We recognize, however, that if the Commission is too interventionist in reviewing decisions made by an exchange, that would introduce an unacceptable degree of uncertainty in our regulatory regime and in capital markets. In *Canada Malting*, the Commission stated:

The TSE supported the Applicants in their request for standing. However, it went on to note the difficulty that would be created for listed companies if the TSE could be second-guessed by the OSC on the initiative of a company's shareholders every time a notice for filing is accepted under By-law 19.06 [the predecessor of section 604 of the TSX Manual].

If the right of appeal meant that the OSC were to review every decision of the TSE on the merits, then companies issuing securities would be faced with the possibility of subsequently being forced to unwind the transaction or face delisting or trading sanctions on the basis that the Commission had decided to substitute its discretion for that of the TSE under By-law 19.06. In our view, this would introduce an unacceptable degree of uncertainty into the capital markets.

(*Canada Malting, supra* at 3588 and 3589.)

We agree with the caution reflected in that statement. Only in very rare circumstances should the Commission substitute its decision for that of the TSX. Subject to the discussion below, before the Commission intervenes in a decision of the TSX pursuant to section 21.7 of the Act, it should ensure that the applicant has met the heavy burden of demonstrating that its case fits squarely within at least one of the five grounds for intervention identified in *Canada Malting*.

[50] The Applicant's submissions allege several errors on the part of the District Council but does not directly address how these errors relate to the five grounds set out in *Canada Malting*. Nevertheless, we have considered whether any of these alleged errors on the part of the District Council constitutes a relevant ground for interfering with that Decision.

[51] Recognizing that we have jurisdiction to intervene in this case, we now turn to the issues raised by the Applicant.

B. Application of the Law

[52] The Applicant alleges that three of the grounds for intervention from *Canada Malting* have been met. He submits that IIROC proceeded on incorrect principles, erred in law and overlooked material

evidence in reaching its Decision. There is no allegation that new and compelling evidence is available, nor that IIROC's perception of the public interest conflicts with that of the Commission.

1. Did the District Council proceed on an incorrect principle?

[53] The first ground for review set out in *Canada Malting* is whether the SRO proceeded on an incorrect principle. The test for whether an SRO proceeded on an incorrect principle is a narrow one. The SRO must have incorrectly interpreted a specific principle that it relied upon in its analysis.

[54] Since *Canada Malting*, no clear distinction has been made between "proceeding on an incorrect principle" and erring in law. Although different interpretations are possible concerning what constitutes "proceeding on an incorrect principle", the *Kasman* decision provides some guidance on this point.

[55] In *Kasman*, the Panel had to determine the issue of whether the IDA Panel had misapplied sentencing principles to the facts before them. The Panel discussed the relevant principles regarding sentencing that were at issue in that proceeding:

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.

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.

(*Kasman*, *supra* at paras. 51–52.)

[56] None of the alleged errors in this case relate to sentencing principles. Further, none of the parties pointed us to other examples of what would constitute an "incorrect principle", so as to guide us in our review. When considering the alleged errors by the District Council set out in the Application, we conclude that none of the alleged errors fall under the first ground of review set out in *Canada Malting*,

that is, proceeding on an incorrect principle. Rather, most of the alleged errors appear to us to be better considered under “error in law”.

2. Did the District Council err in law?

Adequacy of Reasons in the Decision

[57] The Applicant submits that the District Council failed to deliver reasons that adequately explain how it arrived at its decision.

[58] The Applicant alleges that the failure of the District Council to deliver proper reasons in its Decision denied him a fair hearing. He submits that the absence of reasons was a refusal by the District Council to address his answer and defence to the charge.

[59] IIROC submits that the District Council provided reasons that were sufficiently detailed to demonstrate that the applicable legal principles and the relevant evidence were properly considered (*Lawson v. Lawson*, [2006] O.J. No. 3179 (C.A.) at para. 9). Its position is that the Commission should not interfere with a Decision such as this where the reasons as a whole are reasonable.

[60] The Applicant draws our attention to a decision of the British Columbia Securities Commission which describes the importance of reasons in decisions:

The decisions of a hearing panel can have serious consequences. Respondents can be suspended or even barred from the industry. Substantial fines can be levied. In this case ... the findings of wrongdoing alone that were made can be expected to have negatively affected the careers of the respondents.

It is also important that the industry understand the standards that are expected of it, and this it cannot do if the reasons for a hearing panel’s decision are unclear.

For these reasons, respondents in an Exchange disciplinary hearing are entitled to receive reasons from the hearing panel that explain adequately how it arrived at its decision. What constitutes adequate reasons for a decision will vary with the circumstances. In a case in which the evidence is straightforward or not contested, the explanation need not be elaborate. In a case such as this, however, where the evidence is complex and includes opinion evidence that is rejected by the panel, it is in the public interest that the panel provide reasons that explain its decision.

(*Re Mathers* (1999), 7 B.C.S.C.W.S. 64 at 10.)

[61] In this case, the consequences for the Applicant are similarly serious. This is not, however, a case where the evidence was overly complex or highly contested by the parties, despite the Applicant’s submissions that the adequacy of the evidence was hotly contested. We note that the hearing took place over three days. Staff of IIROC submitted a compendium of seven volumes of documents and additional documents in evidence, and produced one witness, a member of IIROC’s investigation team, Mr. Michael

Arthur, who testified as to the documents and his investigations. The Applicant did not testify or produce witnesses.

[62] The Decision addressed the underlying elements of the allegation of conduct unbecoming and provided adequate reasons for its conclusion. The District Council did not misapprehend the law regarding the requirement to give reasons. We see no need to interfere with the District Council's Decision on this basis.

Procedural Fairness: Breach of Natural Justice

[63] The Applicant also submits that the District Council made material findings against the Applicant on issues that were not properly pleaded in the Notice of Hearing and were not part of the "charge" that the Applicant had to respond to.

[64] At the IIROC hearing, the Applicant argued that the Notice of Hearing did not adequately describe the charge against him, resulting in a breach of natural justice.

[65] The Applicant alleges that the Notice of Hearing failed to articulate any specific regulatory standards that had been breached since the allegations of having an undisclosed financial interest and financial dealings with clients are not referred to anywhere in the IIROC by-laws as being problematic for registered representatives. He submits that the charge of a breach of By-law 29.1 must accompany charges on some other grounds and cannot stand on its own, as in the Decision. The Applicant contends that the failure to particularize any IIROC Dealer Member Rule in the Notice of Hearing constitutes a breach of natural justice and procedural fairness since he was not given proper notice of the case he had to meet in important respects.

[66] In its decision on the request for a stay, the District Council found that the Notice of Hearing had sufficient particulars for the Applicant to be able to respond to the allegations against him:

None of the mistakes of staff could be viewed as prejudicial to the respondent's right to a fair hearing or his ability to give full answer and defence to the allegation in the matter before us.

Nor would allowing the current proceeding to proceed in any way bring the administration of justice into ill repute.

A stay for abuse of process is an extraordinary remedy granted solely in the most exceptional circumstances in the clearest of cases where otherwise the administration of justice would be put in ill repute.

Our case is not one of them.

(IIROC District Council Decision at paras. 50-53.)

[67] It is clear that the Applicant was aware of the allegation of having an undisclosed financial interest in the accounts of EB and DT from his Response to the Notice of Hearing, which states at paragraph 15:

Vitug pleads that to the extent that he had financial dealings with EB and DT, his aunt and father-in-law respectively, he was not aware of any requirement to disclose them to his member firm employer. Vitug states that the personal transactions with his aunt or father-in-law were entirely visible to his member firm employer as funds were either transferred out from or received into his bank account at his member firm employer.

[68] We find no evidence that the District Council erred in law when it concluded that a breach of By-law 29.1 may be alleged in the absence of additional, more specific allegations. The District Council correctly perceived the principles of natural justice and procedural fairness when it found that the Applicant's right to a fair hearing was not prejudiced on the basis of lack of notice.

[69] The Applicant also claimed that IIROC failed to disclose material it relied on regarding industry standards and policies in a timely fashion, which was equally a breach of natural justice.

[70] With respect to the adequacy of disclosure of documents relating to industry standards and policies, we do not find that the District Council erred in law. As a registrant and an industry participant with extensive experience, the Applicant must be presumed to have knowledge of industry conflict of interest rules and standards of practice.

Procedural Fairness: Abuse of Process

[71] The Applicant submits that:

The [District Council] erred in admitting into the record the interview transcripts of the Applicant that a prior decision of the Ontario District Council had determined could not be relied on ("the Impugned Interview Transcripts"). This error was compounded by the failure to deliver adequate reasons for the Decision. Notwithstanding the statement in the Decision that they "did not need to rely on the evidence from the respondent in the transcripts in question", it is clear that the [District Council] was influenced by the evidence in the impugned transcripts and that it affected their decision.

(Statement of Fact and Law of the Applicant dated July 2, 2009 at para. 22(e).)

[72] The Applicant had requested that transcripts of his interviews conducted by IIROC investigative staff be excluded from evidence in the event that a stay was not granted. It was determined at the first proceeding that these transcripts could not be relied upon to support a charge under By-law 29.1 on the basis that the interviews were conducted in breach of the requirement of proper notice. The District Council denied the Applicant's request to exclude the transcripts from evidence in its Decision.

[73] The District Council's oral ruling on the admissibility of the transcripts shows that it considered the ruling of the previous panel on the issue. The Chair stated:

... our decision is that we are not prepared to exclude the transcript evidence. But we wish to point out that when it comes to assessing how much weight should be given to the transcript evidence, we will take into consideration the views of the earlier panels ...

(IIROC Hearing Transcript, February 23, 2009, 191:19–192:4.)

[74] Later, in the Decision at paragraph 42, the District Council clearly states that reliance on this transcript evidence was not necessary for its findings, which were based on the consideration of other evidence:

... we did not need to rely on the evidence from the respondent in the transcripts in question in finding that the respondent did have financial interests and financial dealings in EB's and DT's accounts at SSCC. There was clear and convincing proof based on other cogent evidence that led us to our decision.

[75] We conclude that the District Council did not err in law when it ruled on the admissibility of the transcript evidence and the weight to be given to it. In any case, the District Council clearly stated that the transcript evidence did not form the basis of subsequent findings about the Applicant's financial interests. We also note that paragraphs 85–89 of the District Council's Decision, which we refer to in our Reasons and Decision at paragraph 89, demonstrate that the District Council considered adequate material evidence in coming to its conclusion. We find that the Applicant's claims with respect to abuse of process have not been made out.

Standard of Proof

[76] The Applicant also submits that in making its findings of fact, including the findings that fall within the categories of erroneous findings outlined above, the District Council failed to apply the required standard of proof.

[77] The Supreme Court of Canada recently confirmed that there is only one standard of proof in a civil cases, and that is proof on a balance of probabilities. Evidence must be sufficiently clear, convincing and cogent to satisfy this requirement (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 at paras. 45-49). The civil standard of proof applicable in an administrative hearing required that the District Council find clear and convincing proof based on cogent evidence (*Law Society of Upper Canada v. Neinstein*, [2007] O.J. No. 958 (Div. Ct.) at para. 55). The District Council is clear in its Decision that this standard was applied.

[78] The Applicant contends that the District Council stated that it applied this standard, but failed to refer in its Decision to how its findings of fact meet the standard. He submits that merely stating the correct standard is insufficient without an explanation of how the evidence met this standard. IIROC submits that there is no reason to conclude that the District Council did not consider the evidence to have met the correctly articulated standard.

[79] We are in agreement with IIROC on this point. The Decision outlines evidence in support of its finding against the applicant, and specifically refers to the standard of proof when it declines to make a finding that the Applicant was the beneficial owner of DT's account:

It is not clear that the respondent was the beneficial owner of DT's SSCC account, because there was no clear and convincing proof that the respondent would have received any profits from the account.

(IIROC District Council Decision at paras. 55–56.)

[80] The District Council was correct in its articulation of the standard of proof and we find that it proceeded to consider the evidence before it, based upon this standard.

[81] In summary, we find that the District Council considered the correct legal principles when it ruled on the admissibility of the transcripts, correctly considered principles of natural justice and procedural fairness and applied the correct standard of proof. Although one may argue with its application of the standards, it is not the role of the Commission to substitute its own view of the evidence in a situation where the District Council did not err in law (*Kasman, supra* at paras. 45, 84 and *Boulieris, supra* at para. 32).

Burden of Proof

[82] The Applicant alleges that the District Council made findings that were unsupported by the evidentiary record. In its Decision, the District Council correctly stated the burden of proof to be met as being a balance of probabilities. The Applicant submits that given the seriousness of the allegations against him, the District Council should have made a thorough review of the evidence it relied on in its Decision.

[83] The District Council's correct characterization of the burden of proof and its assertion that it decided the matter on the evidence before it is sufficient to satisfy us that it made findings against the Applicant in accordance with the appropriate burden of proof.

[84] In our view, there is no reason to second-guess the District Council's determinations regarding the probative nature of the evidence before them. It made no error in law regarding the correct application of the burden of proof.

3. Did the District Council overlook material evidence?

[85] The Applicant also submits that based on the limited reasons contained in the Decision and from the evidentiary record, it is apparent that the Hearing Panel made numerous errors in its treatment of the evidence.

[86] The District Council appears to have considered the whole of the body of evidence before it in deciding that the Applicant's conduct constituted conduct unbecoming or detrimental to the public interest. The Applicant makes specific allegations that material evidence was overlooked or misapprehended by the District Council. We address these claims and provide reasons for dismissing them below.

Involvement in EB's SSCC Account

[87] According to the Applicant, the District Council misapprehended evidence and made questionable assumptions when it found that he assisted EB in opening her SSCC account. Contrary to the District

Council's finding, the Applicant submits that he merely witnessed the opening of the account, and did not assist in opening it.

[88] Whether he assisted with or merely witnessed the opening of the SSCC account, the Applicant was nevertheless aware of the information contained in the SSCC New Account Application Form. There was sufficient evidence before the District Council for it to conclude that the Applicant was acting in a manner that he ought not to regarding the opening of the SSCC account.

[89] Whether or not we would have interpreted the evidence in the same manner as the District Council, the decision record shows that it considered the material evidence when coming to the conclusion that the Applicant had an improper financial interest in EB's SSCC account:

From March 9, 2004 to April 20, 2004, EB's account sold and purchased Spectrum shares in a series of transactions in proceeds of approximately \$700,000 USD.

There is no evidence that EB benefited from the proceeds of these transactions.

The proceeds from these sales formed the basis for numerous subsequent payments made to the respondent from EB.

The respondent received the benefit of those monies into his TD Bank account.

Through a series of 13 separate transactions, in excess of \$337,000 (Canadian) and \$125,000 (U.S.), (for an approximate total in excess of \$500,000 (Canadian)) flowed from EB's accounts to the respondent.

(IIROC District Council Decision at paras. 85–89.)

Credibility and the Existence of a Loan

[90] The Applicant alleges that the District Council made an improper finding of credibility against him when it found that he had "little regard for the truth", while IIROC contends that there was no finding of credibility at all.

[91] Since the Applicant was not a witness at the hearing and the District Council did not have the opportunity to observe his answers to any questions, the Applicant submits that the District Council was not in a position to make a finding of credibility. The Applicant further alleges that the District Council used this negative finding of credibility against the Applicant throughout the Decision. He alleges it was used to disbelieve his evidence that there was a loan between himself and AD and to find that he acted deceitfully, that he concealed his involvement in the accounts and that he evaded his member firm's scrutiny.

[92] IIROC contends that there was no finding of credibility, and that the District Council's findings were based on the Applicant's conduct and the documentary evidence before it.

[93] We agree with the submissions of IIROC. The District Council found that it did not believe the Applicant's assertions regarding loan arrangements with AD, but this did not amount to a finding of credibility. This is similar to the situation in *Boulieris*, where the Divisional Court had the following to say:

Moreover, the Commission reached that decision without making findings of credibility, as alleged by the Appellant. He did not testify before the District Council, and it made no findings with respect to his credibility. Nor did the Commission make a finding about his credibility; rather, it characterized his conduct and drew inferences about the nature of his role from the evidence as a whole, much of which was documentary.

(*Boulieris, supra* at para. 37.)

[94] The District Council decided that there was insufficient evidence to find there was a loan, considering all the evidence:

Considering all the facts, we did not believe the respondent's assertion that there was a loan from him to AD and that payments through EB's SSCC account to him were repayments of that loan. The respondent was the beneficial owner of EB's SSCC account and had a financial interest in it.

(IIROC District Council Decision at para. 96.)

[95] We agree with IIROC's submission that this finding was not based on a prior finding of credibility. The Decision states that this finding was made considering all the facts, which include, but are not limited to, the Applicant's assertion.

[96] In any event, the District Council's conclusion regarding the loan was not essential to its finding that the Applicant had a financial interest in EB's account. The District Council made a finding of fact that the Applicant's conduct amounted to a financial interest in EB's SSCC account, regardless of the status of the loan arrangement:

However, even if there were loans that were being repaid, as alleged, and the respondent were not the beneficial owner of the account, the respondent would still have had a financial interest in EB's SSCC account: namely an interest in the Spectrum shares and the proceeds of the sale while they were in EB's SSCC account, pending payout to him.

(IIROC District Council Decision at para. 97.)

[97] The District Council noted that if there was in fact a loan, this would give rise to serious conflict of interest concerns that go beyond merely the registrant:

Furthermore, significant loans and gifts to or from family members involving a registrant, were they can be connected with securities transactions of family members, can give rise to serious conflicts of interest affecting not only the registrant and his firm, but also other member firms and their clients.

(IIROC District Council Decision at para. 135.)

[98] The District Council made its finding regarding the Applicant's financial interest in the SSCC account without overlooking or misapprehending material evidence. On a review of the evidence, the District Council reasonably found that the Applicant had an improper financial interest in EB's SSCC account.

[99] We acknowledge that there was some ambiguity regarding the existence of the loan. However, the District Council made no error in its consideration of the material evidence. We therefore see no reason to intervene in the Decision of the District Council on the ground that material evidence was overlooked in making the findings discussed above.

Alleged Unsupportable Findings

[100] The Applicant alleges that the District Council made findings that are unsupported by the evidence before it. He challenges findings regarding DT's account, the intentional and deceitful nature of his own conduct and the existence of a conflict of interest. The Applicant also submits that the District Council mischaracterized the unchallenged affidavit evidence of DT and should not have rejected its evidence on issues that could have been addressed through cross-examination.

[101] IIROC submits that the District Council found that the Applicant was in a conflict of interest because he had undisclosed financial interest and undisclosed financial dealings in the accounts of DT and EB. This conflict of interest led the District Council to find that the Applicant was deceitful. IIROC notes that a finding that the Applicant acted intentionally was not a necessary element of the allegations in this case, but was simply a finding by the District Council.

[102] In coming to its conclusions on the conflict of interest and the Applicant's conduct, the District Council considered the evidence before it and made its decisions accordingly. We see no reason to intervene in the District Council's findings in this respect. It weighed the material evidence and came to the conclusion that the Applicant's actions amounted to conduct unbecoming:

The respondent's dealings in both the EB and DT accounts resulted in a conflict of interest with his other brokerage clients. These are all facts pertinent to the terms of the respondent's employment and registration that were required to be disclosed to his member firm.

(IIROC District Council Decision at para. 141.)

[103] The finding that the Applicant "effectively managed DT's SSCC account" is not an indication that the District Council overlooked the evidence of DT's affidavit, even though the conclusion is contrary to statements made in the affidavit. The District Council made a finding, based on the evidence, that the Applicant had an undisclosed financial interest and undisclosed financial dealings in DT's account:

It is not clear that the respondent was the beneficial owner of DT's SSCC account, because there was no clear and convincing proof that the respondent would have received any profits from the account.

However, he provided the assets for the account (the \$108,000). He chose the investment. He decided when and how the investment should be realized. It was understood that he would suffer any loss on the investment (the "loan" would be repaid only from the investment).

Accordingly, the respondent, at a minimum as a creditor, had an undisclosed financial interest and undisclosed financial dealings in the account.

(IIROC District Council Decision at paras. 138–140.)

[104] The Applicant lists other evidence with respect to the Applicant's knowledge of his clients' activities that he alleges the District Council overlooked in reaching its conclusion regarding conduct unbecoming. Simply because findings are inconsistent with some evidence is not an indication that that evidence was overlooked. It appears that the District Council considered the whole of the evidence in coming to its conclusions with respect to the allegation of conduct unbecoming or detrimental to the public interest.

[105] While the Applicant takes issue with the District Council's interpretation of certain evidence, it is not clear that material evidence was overlooked. That the Applicant, or even the Commission, may have come to a different conclusion based on the evidence is not a sufficient reason to intervene in a Decision where the material evidence was duly weighed by the hearing body of an SRO.

[106] We find that although the Applicant objects to the Decision on these particular findings, the District Council made no error in its apprehension of material evidence with respect to the allegation of conduct unbecoming or detrimental to the public interest. It considered the evidence before it and reached its Decision accordingly. Since we find that the District Council did not overlook any material evidence, we are not in a position to intervene with the Decision where findings were grounded in the evidence.

VI. CONCLUSION

[107] Although we may not have made the same findings of fact as the District Council in all instances, we see no reason to interfere with its reasonable Decision. The Applicant did not meet the burden of demonstrating that the Commission has grounds to intervene in the Decision as set out in *Canada Malting*. Despite the Applicant's submissions that the District Council made serious and pervasive errors in its Decision, we do not find that the District Council proceeded on an incorrect principle, erred in law or overlooked material evidence. After considering the totality of the evidence, the District Council's findings were supported by an analysis of the evidence before it. We find that the District Council's Decision is reasonable and does not require intervention by the Commission.

[108] Accordingly, we defer to the District Council's Decision. The Application is hereby dismissed.

Dated at Toronto this 23rd day of April, 2010.

"Mary G. Condon"

Mary G. Condon

"Paulette L. Kennedy"

Paulette L. Kennedy