Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8
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IN THE MATTER OF THE *SECURITIES ACT*, R.S.O. 1990, c. S.5, AS AMENDED

- AND -

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 SECTION 21.7 OF THE *SECURITIES ACT*, R.S.O. c. S.5, AS AMENDED

- AND -

IN THE MATTER OF DISCIPLINE PROCEEDINGS PURSUANT TO THE BY-LAWS OF THE INVESTMENT DEALERS ASSOCIATION OF CANADA AND THE DEALER MEMBER RULES OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

- BETWEEN -

STAFF OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

- AND -

MARK ALLEN DENNIS

REASONS FOR DECISION
(Sections 27.1 and Subsection 8(3) of the Act)

Hearing:	November 21, 2011	
Decision:	July 31, 2012	
Panel:	Mary G. Condon	- Chair of the Panel
	Sinan O. Akdeniz	- Commissioner
Appearances:	Jennifer Lynch	- For Staff of the Commission
	Philip Anisman and Rob DelFrate	- For Staff of IIROC
		- No one for Mark Allen Dennis

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REASONS FOR DECISION

I. BACKGROUND

[1] On November 21, 2011, a hearing was held before the Ontario Securities Commission (the "**Commission**") to consider an application for hearing and review (the "**Application**") brought by the Investment Industry Regulatory Organization of Canada ("**IIROC**") pursuant to sections 8 and 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**"). The Application seeks hearing and review of a June 3, 2011, decision of a hearing panel of the Ontario District Council of IIROC (the "**Hearing Panel**") in the matter of Mark Allen Dennis ("**Dennis**").

[2] The Applicant, IIROC, was represented at the hearing before the Commission by Philip Anisman and Rob DelFrate. Jennifer Lynch, Counsel with the Enforcement Branch of the Commission ("**Staff**") was also present at the hearing. Dennis was neither present nor represented at the hearing before the Commission.

Failure of Dennis to attend the proceedings

[3] As noted above, Dennis did not attend and did not participate, either in person or through an authorized representative, in the proceedings before the Commission. IIROC and Staff submit that Dennis was given proper notice of these proceedings and the Commission should proceed in his absence.

[4] Staff filed an Affidavit of Attempted Service sworn November 14, 2011, attesting to an attempt to serve Dennis with Staff's material on November 9, 2011. According to the Affidavit, service was not possible because the driveway to Dennis's last known address was gated and locked.

[5] IIROC submitted that Dennis was properly served a copy of the Application. IIROC directed the Panel to an Affidavit of Service which had previously been filed with the Office of the Secretary. The Affidavit of Service, received by the Office of the Secretary on July 7, 2011, states that Dennis was personally served with the Application on July 4, 2011, at his last known address for service.

[6] IIROC also submitted that Dennis had been properly notified of the hearing before the Commission. Mr. Anisman provided the Panel with a copy of a letter he had sent to Dennis at his last known address for service by regular and electronic mail on September 14, 2011, attaching a copy of the Notice from the Office of the Secretary advising the parties that "a hearing to consider the Application made by Staff of IIROC for a review of a Decision of a Hearing Panel of the IIROC dated June 3, 2011…will be held on November 21, 2011, at 10:00 on the 17th floor of the Commission's offices at 20 Queen Street West, Toronto." Mr. Anisman submitted that the Notice from the Office of the Secretary was published on the Commission's website on September 13, 2011.

[7] Subsection 7(1) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, as amended (the "**SPPA**") provides that a tribunal may proceed in the absence of a party when that party has been given adequate notice. That section provides as follows:

> Where notice of an oral hearing has been given to a party to a proceeding in accordance with this Act and the party does not attend at the hearing; the tribunal may proceed in the absence of the party and the party is not entitled to any further notice in the proceeding.

[8] We note the following passage from *Administrative Law in Canada*:

> Where a party who has been given proper notice fails to respond or attend, the tribunal may proceed in the party's absence and the party is not entitled to further notice. All that the tribunal need establish, before proceeding in the absence of the party, is that the party was given notice of the date and place of the hearing. The tribunal need not investigate the reasons for the party's absence.
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> (Sara Blake, *Administrative Law in Canada*, 5th ed. (Markham, Ont.: LexisNexis Butterworths, 2011) at p. 32)

[9] We find that Dennis was given sufficient notice of this hearing. We find that the Application, outlining the issues upon which IIROC sought to have the decision reviewed, was personally served on Dennis at his last known address for service. We further find that Dennis was advised, by regular and electronic mail, of the time and location of this hearing. If Dennis no longer resides at his last known address, any failure to advise IIROC or the Commission of changes to his address for service should not accrue to his benefit. We are satisfied that Dennis had adequate notice of this proceeding and that we are entitled to proceed in his absence in accordance with subsection 7(1) of the SPPA.

The Proceedings before the Hearing Panel

[10] On February 17, 2011, IIROC issued a Notice of Hearing advising that a Hearing Panel would be constituted and a hearing held into allegations that Dennis had:

- misappropriated funds from a client in contravention of By-law 29.1 of the Investment Dealers Association (now IIROC Dealer Member Rule 29.1); and
- refused and/or failed to attend and give information in respect of an investigation being conducted by IIROC, contrary to Dealer Member Rule 19.5.

[11] A hearing was conducted before the Hearing Panel on April 25, 2011. IIROC Enforcement Counsel was present at the hearing, while Dennis was neither present nor represented at the hearing. The Hearing Panel found that Dennis had been duly served with a Notice of Hearing containing full particulars of the allegations against him, and notifying him that the hearing would proceed in his absence if necessary. As a result, the hearing proceeded in Dennis's absence.

[12] After hearing the evidence from IIROC, the Hearing Panel found that Dennis had misappropriated $1,400,000 from a client, contrary to Dealer Member Rule 29.1. The Hearing Panel further found that Dennis had failed to cooperate with the IIROC investigation contrary to Dealer Member Rule 19.5.

[13] At the same hearing, IIROC Enforcement Counsel sought the following sanctions from the Hearing Panel with respect to Dennis's contravention of the Dealer Member Rules:

- a permanent bar on Dennis's "approval with IIROC";
- in respect of the misappropriation of client funds, a fine in the amount of $1,450,000 which would include disgorgement of the misappropriated funds plus an additional fine of $50,000; and
- in respect of Dennis's refusal to attend and give information during the IIROC investigation, a fine in the amount of $50,000.

[14] IIROC Enforcement Counsel argued that the proposed sanctions were in accordance with the Hearing Panel's authority to impose penalties following a disciplinary hearing, under Dealer Member Rule 20.33. Rule 20.33 reads:

> **Rule 20.33** (1) Upon conclusion of a disciplinary hearing, a Hearing Panel may impose the penalties set out at 20.33(2) if, in the opinion of the Hearing Panel, the Approved Person:
>
> (a) failed to comply with or carry out the provisions of any federal or provincial statute, regulation, ruling or policy relating to trading or advising in respect of securities or commodities;
>
> (b) failed to comply with the provisions of any Rule or Ruling of the Corporation; or
>
> (c) failed to carry out an agreement or undertaking with the Corporation.
>
> (2) Pursuant to subsection (1), a Hearing Panel may impose any one or more of the following penalties upon the Approved Person:
>
> (a) a reprimand;
>
> (b) a fine not exceeding the greater of:
>
> (i) $1,000,000 per contravention; and
>
> (ii) an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention.
>
> (c) suspension of approval for any period of time and upon any conditions or terms;

(d) terms and conditions of continued approval;

(e) prohibition of approval in any capacity for any period of time;

(f) termination of the rights and privileges of approval;

(g) revocation of approval;

(h) a permanent bar from approval with the Corporation; or

(i) any other fit remedy or penalty.

[15] IIROC Enforcement Counsel also requested a cost order against Dennis in the amount of $7,500.

[16] On June 30, 2011, the Hearing Panel released its decision. The Hearing Panel ruled that the fine authorized by Rule 20.33 is a penal sanction, and therefore Rule 20.33 must be given a strict construction. The Hearing Panel ruled that, under a strict construction, the authority to impose a fine greater than $1,000,000 was restricted to circumstances where there was a "true profit" made by the activity undertaken by the Member. The Hearing Panel stated:

> [16] The Panel took the view that sanction related to disgorgement of profit arose only in those circumstances where there was a true profit made by the activity undertaken, a profit in the nature of the sum remaining after deducting all costs….

[17] As a result, the Hearing Panel rejected IIROC Enforcement Counsel's request for a fine of $1,450,000 in respect of the misappropriation of funds. The Hearing Panel imposed the following sanctions on Dennis:

- A permanent bar on his "approval with IIROC";
- a fine in the amount of $1,000,000 in respect of his misappropriation of funds from a client; and
- a fine in the amount $25,000 in respect of his failure to provide information to IIROC.

[18] The Hearing Panel also ordered Dennis to pay costs in the amount of $7,500.

The Application

[19] In this Application, IIROC seeks review of the decision of the Hearing Panel on the grounds that the Hearing Panel:

- Erred in principle by interpreting Dealer Member Rule 20.33 as a penal rule requiring strict interpretation;

- Erred in law by misinterpreting the word “profit” in Dealer Member Rule 20.33; and

- Interpreted Dealer Member Rule 20.33 in a manner inconsistent with the public interest.

Standard of Review

[20] In considering an application brought pursuant to section 21.7 of the Act, the Commission exercises original jurisdiction, as opposed to a more limited appellate jurisdiction, and is free to substitute its judgment for that of the self-regulatory organization ("**SRO**") such as IIROC. However, in practice the Commission takes a restrained approach. The Commission will not substitute its own view of the evidence for that of the SRO, in this case the IIROC Hearing Panel, just because the Commission might have reached a different conclusion. As stated in *Re: Canada Malting*, the leading case on this issue, and reaffirmed in a number of subsequent decisions, the Commission will intervene in a decision of an SRO if:

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 the Commission.

(*Canada Malting Co., Re*, (1986) 9 O.S.C.B. 3566, at para. 24; *HudBay Minerals Inc., Re* (2009) 32 O.S.C.B. 3733, at para. 105; *Investment Dealers Assn. of Canada v. Kasman* (2009) 32 O.S.C.B. 5729, at para. 43; *Investment Industry Regulatory Organization of Canada v. Vitug* (2010) 33 O.S.C.B. 3965 at para. 48; and *Deutsche Bank Securities Ltd., Re* (2011) 34 O.S.C.B. 10333 at para. 26)

II. ISSUES

[21] No submissions were made by IIROC that issues 3 and 4 from the *Canada Malting* test were raised by the Hearing Panel decision. Accordingly we agree with counsel for IIROC that this Application raises the following issues:

- Did the Hearing Panel proceed on an incorrect principle?

- Did the Hearing Panel err in law?

- Does the Hearing Panel's perception of the public interest conflict with that of the Commission?

III. POSITIONS OF THE PARTIES

[22] IIROC made submissions that the Hearing Panel, by rejecting the request for a fine against Dennis in the amount of $1,450,000 in respect of his misappropriation of funds from a client, erred in a manner that engaged three of the *Canada Malting* factors: (i) it proceeded on an incorrect principle (ii) it made an error of law (iii) its perception of the public interest conflicted with that of the Commission.

Did the Hearing Panel proceed on an incorrect principle?

[23] IIROC submits that the Hearing Panel erred by treating Rule 20.33 as a penal sanction rather than a regulatory sanction. IIROC referred to its Sanctioning Guidelines, which states that the primary goals of sanctions imposed by a Hearing Panel are the protection of investors and the integrity of securities markets. In IIROC's view, any sanctions imposed by a Hearing Panel should be preventative in nature and prospective in their orientation, similar to sanctions imposed by the Commission under section 127 of the Act.

[24] IIROC submits that the Commission acknowledged, in its decision in *Re Rowan* (2009) 33 O.S.C.B. 91, that IIROC's sanctioning authority, like the Commission's own sanctioning authority, is regulatory in nature, not penal.

[25] In IIROC's view, by applying the strict construction required for penal sanctions to Rule 20.33, the Hearing Panel proceeded on an incorrect principle, which warrants intervention by the Commission.

[26] Staff agree with IIROC that the Hearing Panel proceeded on an incorrect principle, albeit for different reasons. Staff submit that the Hearing Panel inappropriately considered the existence of criminal and civil proceedings against Dennis as justification for their refusal to order full disgorgement of the misappropriated funds through the imposition of a fine. Staff refer to paragraph 25 of the Hearing Panel's Decision and Reasons (as reported), where the Panel, in response to IIROC Enforcement Counsel's argument that the authority to fine must be interpreted as an authority to deprive Dennis of any pecuniary benefit of his contraventions, states: "…there are the other two forums, the criminal and the civil court to deal with any pecuniary benefit".

[27] Staff submits that in determining a penalty for Dennis's contravention of the Dealer Member Rules, the Hearing Panel should have given consideration to the protection of the public and the specific and general deterrent effect of the penalty. Staff submits that the existence of criminal and civil proceedings against Dennis was an irrelevant factor in the Hearing Panel's determination. Therefore, in Staff's view, the Hearing Panel applied an incorrect principle in determining the appropriate penalty when it considered the existence of the criminal and civil proceedings against Dennis.

Did the Hearing Panel make an error of law?

[28] IIROC submits that the purpose of Rule 20.33 is to permit a hearing panel to impose a fine that ensures that a person who contravenes a rule is not permitted to retain any benefit obtained as a result of the contravention. In IIROC's submission, the purpose of Rule 20.33 is to deter a violator, or anyone else inclined to contravene the Rules in a similar fashion, from engaging in such conduct in the future. IIROC submits that the Hearing Panel committed an error of law by interpreting Rule 20.33 in a manner that does not allow for a penalty that provides sufficient deterrence.

[29] IIROC further submits that the Hearing Panel committed an error of law by interpreting the word "profit" in Rule 20.33 too narrowly. IIROC submits that the correct approach to interpreting the Dealer Member Rules, requires that the words of the rule be read purposively, in their grammatical and ordinary sense, in light of their regulatory context (*In the Matter of X Inc.* (2010) 33 OSCB 11369, at para. 37 – citing *BellExpressVu Limited v. R.* [2002] S.C.J. 43). IIROC submits that in the "regulatory context" of Rule 20.33, "profit" must include any pecuniary advantage or gain obtained from a violation of IIROC's rules, whether or not funds were expended to obtain the advantage or gain.

[30] IIROC submits that the regulatory history of Rule 20.33 supports their interpretation of the rule. They point out that Investment Dealer Association ("**IDA**") By-law 20.10, the predecessor of Dealer Member Rule 20.33, authorized a hearing panel to impose a fine not exceeding $1,000,000 or an amount equal to three times the "pecuniary benefit which accrued to such person as a result of committing the violation". In May 2004 the By-laws were amended and the new wording was adopted.

[31] Prior to the amendment of the By-law the IDA published a Notice concerning the proposed amendments ((2003) 26 O.S.C.B. 7380). The Notice contained the following explanation concerning the proposed change to the wording of the limit on the maximum amount of a fine to be imposed under the By-laws:

> **Issue – Maximum Amount of Fine (Part 2 of the Formula)**
>
> The second part of the formula is based on a calculation of "three times the pecuniary benefit which accrued to the Member." The provision seeks to divest ill-gotten gains through calculation of a fine based on "disgorgement".
>
> **Proposed Solution – Improve Formula**
>
> The wording of the formula will be changed to "three times the profit gained or loss avoided" so as to ensure that the objective of the formula is met in that "loss avoided" is captured by the formula. The proposed wording is consistent with the wording in the Ontario Securities Act.

[32] IIROC submits that the regulatory history of Rule 20.33 supports their position that the purpose of the Rule is to provide for disgorgement of any amount accruing to the benefit of a person as a result of a contravention of the rules. IIROC submits that the Hearing Panel's narrow interpretation of Rule 20.33 effectively defeats the purpose of the Rule, and amounts to an error of law warranting intervention by the Commission.

[33] Finally, IIROC submits that there is no regulatory reason to cap a fine for misappropriating funds from a client at $1,000,000 (or $5,000,000 for a member firm) when there is no similar cap on fines for violations of a less serious nature, such as engaging in other business activities or commissions earned on improper trading. As a result, IIROC submits that the Hearing Panel's interpretation of the word "profit' in Rule 20.33 leads to arbitrary distinctions among fines available for contraventions of IIROC Member Rules.

[34] Staff agreed with IIROC that the Hearing Panel committed an error of law in misinterpreting Rule 20.33 in a manner that limited their authority to impose a penalty in this case to $1,000,000. Staff submits that the words "profit made or loss avoided" in Rule 20.33 are meant to encompass any benefit obtained by a person who violates the Dealer Member Rules. Staff submits that the error committed by the Hearing Panel in misinterpreting Rule 20.33 warrants intervention by the Commission.

Did the Hearing Panel's interpretation of the public interest conflict with that of the Commission?

[35] IIROC submitted that the public interest requires that persons who misappropriate funds from their clients should be ordered to fully disgorge those funds. IIROC argued that the Hearing Panel's interpretation of its sanctioning authority would allow individuals who misappropriate funds from their clients to retain any amounts in excess of $1,000,000. This, in IIROC's view, is not in the public interest.

[36] IIROC further submitted that the Hearing Panel's failure to order a fine that results in the full disgorgement of the misappropriated funds undermines the power of the fine to act as a general deterrent to others who may contemplate similar misconduct. In IIROC's submission, the Hearing Panel's decision is inconsistent with the Commission's view of the public interest as expressed in *Re Boulieris* (2004) 27 O.S.C.B. 1597 ("***Re Boulieris***").

[37] Staff agreed with IIROC, arguing that confidence in the securities market will be seriously eroded by the fact that Dennis was allowed to keep a significant portion of his ill-gotten gains. This, in Staff's submission, is contrary to the public interest.

IV. ANALYSIS

Did the Hearing Panel proceed on an incorrect principle?

[38] We agree that the Hearing Panel proceeded on an incorrect principle when it ruled that IIROC sanctioning power is penal in nature. As this Commission stated in *Rowan, supra*:

> [53] An even greater range for an administrative penalty is available to self-regulatory organizations recognized by this Commission (notwithstanding that the penalties are based on contractual agreements). The Investment Industry Regulatory Organization of Canada (formerly the Investment Dealers Association, hereinafter "IIROC"), the national self-regulatory organization for securities dealers, has the authority under the *Universal Market Integrity Rules* to impose a fine not to exceed the greater of $1,000,000 and an amount triple to the financial benefit which accrued to the person as a result of committing the contravention (*Universal Market Integrity Rules*, Rule 10.5(1)(b)). In

> addition, IIROC also has the authority to order its Approved Members and Dealer Members to pay a fine not exceeding the greater of $1,000,000 (in the case of Approved Persons) and $5,000,000 (in the case of Dealer Members) per contravention and an amount equal to three times the profit made or loss avoided by reason of the contravention (See: *IIROC Rule Book, Dealer Member Rules,* Rules 20.33 and 20.34).
>
> **…**
>
> [56] In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than "the cost of doing business". In the current securities regulation and today's capital markets context, a $1,000,000 administrative penalty is not *prima facie* penal.

[39] We confirm the position articulated in *In the Matter of Rowan,* (2010) 33 OSCB 91, *Re Mills* (2001) 24 OSCB 4146, and in the IIROC sanctioning guidelines themselves that the penalties authorized under Rule 20.33, like the penalties authorized under section 127 of the Act, are intended to regulate future conduct, not punish past conduct. The provisions authorizing those penalties are regulatory in nature, not penal. By construing Rule 20.33 as a penal provision requiring a strict construction, the Hearing Panel proceeded on an incorrect principle. IIROC proceedings have a distinct purpose which includes protection of the investing public and the prevention of future misconduct (*In the Matter of Kasman,* (2009) 32 OSCB 5729 at paragraph 50).

[40] We agree with Staff's submission that the Hearing Panel considered an irrelevant factor when it cited the existence of criminal and civil proceedings against Dennis as a justification for not ordering full disgorgement of the "pecuniary benefit" obtained through the contravention of the Member Rules (IDA By-law 20.10(a)(ii)(2)). Criminal and civil proceedings have different purposes and roles than do IIROC proceedings and sanctions.

[41] We find that the Hearing Panel also improperly considered the fact that Dennis's employer had "completed full restitution to" Dennis's former client (Transcript of the Hearing before the Hearing Panel at page 30, Record of Proceeding, Tab 8). The fact that his former client has been made whole by his former employer is an irrelevant factor in considering the appropriate regulatory penalty to impose against Dennis for his misconduct. By considering whether Dennis's former client received restitution as a factor affecting the appropriate disciplinary sanction to be imposed for Dennis's misconduct, the Hearing Panel proceeded on an incorrect principle.

Did the Hearing Panel make an error of law?

[42] We find that the Hearing Panel made an error of law by misinterpreting the word "profit" in Dealer Member Rule 20.33. The Hearing Panel's analysis of the term "profit" is expressed in paragraph 16 of its Decision and Reasons:

> [16] The Panel took the view that sanction related to disgorgement of profit arose only in those circumstances where there was a true profit made by the

> activity undertaken, a profit in the nature of the sum remaining after deducting all costs… This is strengthened by reference to loss in the same clause. Indeed, the word profit may mean many things, such as that the Respondent profited by the misappropriation of funds. However this is a penal section of the rules and should therefore be construed strictly and where profit and loss are used in the same clause it seems to the panel that profit should therefore be used in its more restricted use that is the sum left after deducting costs. Should the Association have intended that this penalty should apply to misappropriation cases it would have been quite simple to say so merely by adding "the profit made or the loss avoided or the amount misappropriated….."

[43] We disagree that the word "profit" in Dealer Member Rule 20.33 should be interpreted to mean "a profit in the nature of the sum remaining after deducting all costs". We accept the submissions of IIROC that a purposive reading of the provisions is more appropriate. We doubt that it can have been the intention of this rule to make a distinction between wrongdoers whose activities required an outlay of costs and those whose activities did not, and to levy sanctions accordingly. The perverse result of such a construction would be that those whose wrongful activities required no outlay might be less deterred from engaging in such activities on the basis that the sanction that could be imposed on them could not be more than $1 million, which might be less than the benefit to be gained from the activity. Such a result would not be rationally related to the purposes of the sanction rule. Nor would it assist in achieving the overriding goal of investor protection.

[44] We also agree with the submissions by counsel for IIROC with respect to the significance of the shift in language from "pecuniary benefit" to "profit made or loss avoided" when the Rule was amended in 2004. In our view, the 2004 amendment to the IDA By-laws (the predecessor of the IIROC Member Rules) which produced the current wording of Rule 20.33, was intended to make the penalty formula more inclusive as opposed to less inclusive so as to better achieve the protection of investors. This is supported by the commentary that accompanied the revised wording of the Rule (set out at paragraph 31 above and reproduced here):

> **Proposed Solution – Improve Formula**
>
> The wording of the formula will be changed to "three times the profit gained or loss avoided" so as to ensure that the objective of the formula is met in that "loss avoided" is captured by the formula. The proposed wording is consistent with the wording in the Ontario Securities Act.

[45] We also found it helpful to our conclusion on this point that the specific sanctioning guideline relating to misappropriation of funds contrary to Rule 29.1, which has remained substantially unchanged since 2003, states that a fine "should include the amount of any financial benefit" to a respondent.

Does the Hearing Panel's interpretation of the public interest conflict with that of Commission?

[46] The Hearing Panel did not deal directly with the question of how its conclusions as to the appropriate sanction to be levied would be in the public interest. Given that the decision of the Hearing Panel makes no direct statement as to the public interest, and given our findings that the

Hearing Panel proceeded on an incorrect principle and erred in law, it is not necessary for us to address this ground of review.

[47] However, to the extent that the Hearing Panel's interpretation of the Rule (which could encompass the result that a member who misappropriates funds from a client can retain any funds in excess of $1,000,000) may be seen as an expression of its perception of the public interest, the Hearing Panel's interpretation of the public interest is not consistent with that of the Commission. As the Commission stated in *Re Boulieris*:

> [50] Where a registrant has willfully (sic) facilitated a market manipulation, he should face severe consequences, including removal from the marketplace for an appropriate period and *disgorgement of moneys received as a consequence of his conduct.* Otherwise, confidence in the capital markets will suffer and the market will be at risk of further disreputable conduct, and harm from the registrant.
>
> [51] The District Council misapprehended the public interest in having strong sanctions in view of the Respondent's willful (sic) conduct. (*emphasis* added)

V. ORDER

[48] For the Reasons set out above, we find that the Hearing Panel proceeded on an incorrect principle and made an error of law in imposing a fine against Dennis which does not achieve disgorgement of the entire amount that he was found to have misappropriated from his client.

[49] Both Staff and IIROC made submissions that, should we be inclined to grant the Application, we should not to refer the matter back to the District Council but rather substitute our decision in place of the decision of the original Hearing Panel. We agree that this is a case where it would be appropriate for the Commission to substitute its decision for that of the Hearing Panel. As this Commission stated in *Re Boulieris*, where no further evidence or argument is required to make the Order, it is not necessary to refer the matter back for a further hearing. In such cases, it is more efficient for the Commission to substitute its decision for that of the original Hearing Panel.

[50] We conclude that it would be appropriate and in the public interest to allow the Application and to substitute our decision for that of the Hearing Panel. In our view, the appropriate sanctions against Dennis should include a fine in the amount of $1,450,000, representing full disgorgement of the misappropriated funds as well as an additional fine of $50,000, as requested by IIROC. We would not disturb any of the other sanctions imposed by the Hearing Panel. Our decision will vary the decision of the Hearing Panel only in respect of the fine for misappropriation.

[51] We did give some consideration to imposing a higher amount of penalty than the $1,450,000 requested by IIROC staff, and we canvassed this issue with IIROC's counsel at the hearing. We have broad authority under s.8 to make "such other decision as the Commission considers proper". We note that our interpretation of Rule 20.33 could allow for a fine of up to $4,200,000 to be imposed on Dennis. However we have ultimately not taken this step, in light of

circumstances particular to this hearing. These circumstances include the fact that we were not requested to impose a higher amount by IIROC staff in their request for review under s.8, with the result that Mr. Dennis, who did not attend the hearing, would have had no notice of this possibility. Further, while we are ultimately substituting our decision for that of the IIROC panel, we remain mindful of the practice, as expressed in cases such as *Boulieris,* that the Commission should exercise restraint in so doing.

[52] Accordingly, we order that as sanctions for his breaches of Dealer Member Rules 29.1 and 19.5:

- There will be a permanent bar on Dennis's approval with IIROC;
- Dennis shall pay a fine in the amount of $1,450,000 with respect to his misappropriation of funds from a client;
- Dennis shall pay a fine in the amount of $25,000 for his failure to provide information to IIROC in connection with their investigation; and
- Dennis shall pay costs in the amount of $7,500.

[53] A separate Order of the Commission will be issued to give effect to the Panel's ruling above.

Dated at Toronto this 31st day of July, 2012.

"Mary G. Condon"	*"Sinan O. Akdeniz"*
Mary G. Condon	Sinan O. Akdeniz