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 A HEARING PANEL OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA

- AND -

IN THE MATTER OF THE UNIVERSAL MARKET INTEGRITY RULES

- AND -

IN THE MATTER OF TD SECURITIES INC., KENNETH NOTT, AIDIN SADEGHI, CHRISTOPHER KAPLAN, ROBERT NEMY and JAKE POULSTRUP

REASONS AND DECISION
(Section 27.1 and Subsection 8(3) of the Act)

Hearing:	December 12 and 13, 2011	
Decision:	July 19, 2013	
Panel:	Mary G. Condon	- Vice-Chair and Chair of the Panel
	Judith N. Robertson	- Commissioner
Appearances:	James D. G. Douglas Charles Corlett	- For Staff of the Investment Industry Regulatory Organization of Canada
	R. Paul Steep René R. Sorell Shane C. D'Souza	- For TD Securities Inc.
	Derek J. Ferris	- For Staff of the Commission

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REASONS AND DECISION

I. OVERVIEW

A. Background

[1] On December 12 and 13, 2011 a hearing was held before the Ontario Securities Commission (the "**Commission**") to consider an Application (the "**Application**") brought by staff of the Investment Industry Regulatory Organization of Canada ("**IIROC**") ("**IIROC Staff**") for a hearing and review of the decision of a hearing panel of IIROC's Ontario District Council (the "**IIROC Hearing Panel**") released on November 30, 2010 and revised April 30, 2011 (the "**Decision**"), pursuant to sections 8 and 21.7 of the *Securities Act,* R.S.O. 1990, c. S.5, as amended (the "**Act**").

[2] The Decision relates to allegations made by IIROC Staff against TD Securities Inc. ("**TDSI**"), Kenneth Nott ("**Nott**"), Aidin Sadeghi ("**Sadeghi**"), Christopher Kaplan ("**Kaplan**"), Robert Nemy ("**Nemy**") and Jake Poulstrup ("**Poulstrup**"). In its Decision, the IIROC Hearing Panel found that, during the period from May 2005 to October 2005, Nott, Nemy, Sadeghi, Kaplan and Poulstrup (the "**TDSI Traders**") entered artificial closing bids contrary to Universal Market Integrity Rules ("**UMIR**") Rule 2.2 and Policy 2.2. The IIROC Hearing Panel dismissed the allegations that TDSI failed to comply with its trading supervision obligations contrary to UMIR Rule 7.1 and Policy 7.1.

[3] IIROC Staff requests an order setting aside the IIROC Hearing Panel's Decision with respect to the allegations against TDSI and making a finding that, between May 2005 and October 2005, TDSI failed to comply with its trading supervision obligations contrary to UMIR Rule 7.1 and Policy 7.1.

[4] These are our Reasons and Decision on IIROC Staff's Application.

B. The Parties

(a) *IIROC Staff*

[5] IIROC Staff initially brought allegations of failure to comply with UMIR Rules and Policies against TDSI and the TDSI Traders in the proceeding heard before the IIROC Hearing Panel. IIROC Staff now applies for a hearing and review of the IIROC Hearing Panel's decision to dismiss IIROC Staff's allegations against TDSI.

(b) *TDSI*

[6] TDSI is a registered investment dealer and IIROC member and carries on an integrated securities business, which includes trading on the Toronto Stock Exchange, the TSX Venture Exchange, the NEX Market Place and other market places. During the time in question, TDSI employed the TDSI Traders.

(c) *OSC Staff*

[7] Staff of the Commission ("**OSC Staff**") is also a party to proceedings brought pursuant to subsection 8(3) and section 21.7 of the Act.

(d) *Other Respondents to the IIROC Proceeding*

[8] The five individual respondents to the IIROC proceeding were all proprietary traders in the Trade Execution Group ("**TEG**") at TDSI. Sadeghi, Kaplan, Nemy and Poulstrup worked at the Burlington branch of TDSI and Nott worked at TDSI's main branch in Toronto. IIROC's Application is with respect to the IIROC Hearing Panel's findings on the allegations against TDSI only, and not with respect to its findings against the TDSI Traders. The TDSI Traders did not participate in this hearing and review.

C. IIROC Staff's Application for a Hearing and Review

[9] IIROC Staff applied for a Hearing and Review of the IIROC Hearing Panel's Decision in a disciplinary proceeding against TDSI and the TDSI Traders. As noted above, the IIROC Hearing Panel made findings against the TDSI Traders, but dismissed the allegations against TDSI. IIROC Staff now seek an order setting aside the decision of the IIROC Hearing Panel with respect to the allegations against TDSI and making a finding that between May 2005 and October 2005 TDSI failed to comply with its trading supervision obligations, contrary to UMIR Rule 7.1 and Policy 7.1.

[10] Pursuant to the Application, IIROC Staff contends that the IIROC Hearing Panel made the following errors in its Decision:

(a) The IIROC Hearing Panel overlooked or misapprehended material evidence in three respects:

i. The IIROC Hearing Panel overlooked or misapprehended evidence that demonstrates TDSI was not adequately reviewing for artificial closing bids.

ii. The IIROC Hearing Panel overlooked evidence that TDSI condoned, or encouraged, the entry of artificial closing bids.

iii. The IIROC Hearing Panel misapprehended the evidence of the TDSI representatives about what they considered manipulative activity and the indicia of manipulative activity.

(b) The IIROC Hearing Panel erred in law or proceeded on an incorrect principle by adopting as an explanation for why TDSI did not prevent or detect the artificial closing bid activity that TDSI made an "honest but erroneous interpretation of UMIR".

D. The IIROC Hearing Panel's Decision

[11] The IIROC Hearing Panel considered allegations by IIROC Staff that over the course of the period from May 1 to October 31, 2005, the TDSI Traders breached UMIR Rule 2.2(2)(b) by

entering high closing bids without any intention that the orders would be executed and for no *bona fide* purpose and that TDSI failed to comply with its trading supervision obligations contrary to UMIR Rule 7.1 and UMIR Policy 7.1.

(a) Conduct of the TDSI Traders

[12] In the Decision, the IIROC Hearing Panel first analyzed the evidence with respect to the conduct of each of the TDSI Traders in their trading of one or more of five stocks, African Copper PLC ("**ACU**"), Canaco Resources Inc. ("**CAN.H**" or "**CAN**"), Central Canada Foods Corporation ("**CDF.A**"), Peterborough Capital Corp. ("**PEC**") and Titanium Corporation Inc. ("**TIC**"). The IIROC Hearing Panel ruled that bidding within the context of the market (*i.e.* bidding at prices at or below the last trade price or the highest intraday trade price) for the purpose of maintaining a closing bid price, with no *bona fide* intention to purchase the securities, constitutes an "artificial closing bid" contrary to UMIR Rule 2.2 and Policy 2.2 and found that, with respect to the allegations against the TDSI Traders:

(a) Nott entered a total of 230 artificial closing bids in ACU, CAN.H/CAN, CDF.A and PEC;

(b) Sadeghi entered a single artificial closing bid in PEC and two artificial closing bids in CDF.A, none of which were found to be part of a pattern of entering artificial closing bids. The IIROC Hearing Panel dismissed allegations that Sadeghi entered additional artificial closing bids in CDF.A and that he entered artificial closing bids in ACU and TIC;

(c) Nemy entered 39 artificial closing bids in TIC with the improper intention of maintaining the value of TIC. Allegations that Nemy entered 40 other artificial closing bids in TIC were dismissed;

(d) Poulstrup entered 14 artificial closing bids in TIC with the improper intention of maintaining the value of TIC. The IIROC Hearing Panel dismissed allegations that Poulstrup entered 13 other artificial closing bids for TIC and allegations that he entered two artificial closing bids for CAN; and

(e) Kaplan entered 19 artificial closing bids in CAN late in the trading day and 18 artificial closing bids in CAN earlier in the trading day (IIROC Staff had alleged that he entered a total of 57 artificial closing bids in CAN). The IIROC Hearing Panel dismissed allegations that Kaplan entered four artificial closing bids in CDF.A and PEC.

(b) Supervision by TDSI

[13] Having made the above findings with respect to the TDSI Traders, the IIROC Hearing Panel then considered the allegations that TDSI failed to comply with its trading supervision obligations contrary to UMIR Rule 7.1 and UMIR Policy 7.1 by reason of:

(a) failure to adopt trading supervision policies and procedures that were adequate, taking into account its business affairs and the risks associated therewith;

(b) failure to adequately address the risks associated with the TDSI Burlington office;

(c) failure of supervisory practices and procedures; and

(d) failure to adequately review and monitor order entry activity.

[14] The IIROC Hearing Panel analyzed each of the four alleged failures to comply with UMIR Rule 7.1 and Policy 7.1 and dismissed all allegations against TDSI. The IIROC Hearing Panel considered evidence of TDSI's trading supervision policies and procedures, the practices of the trade desk supervisors and the Compliance Department, the hiring and training of TDSI traders, including those located in the Burlington office, the availability of automated systems and tools to facilitate the monitoring tasks and how they were used and in particular, evidence of the Acting Chief Compliance Officer, Mathew Cooper ("**Cooper**") and the evidence of supervision by two individuals at TDSI, Robert Dingwall ("**Dingwall**"), Vice-President and Director of the TEG, and Ray Tucker ("**Tucker**"), Managing Director of the TEG, both of whom worked out of TDSI's Toronto office.

[15] With respect to the allegation that TDSI failed to adopt adequate trading supervision policies and procedures, the IIROC Hearing Panel found that during the period in question "TDSI implemented written policies and procedures that covered its entire business to ensure compliance with UMIR Rules and UMIR Policy including the Rules and Policy governing market manipulation" (Decision at para. 407), and noted that TDSI's supervision and compliance system was consistent with industry standards and practice (Decision at para. 408).

[16] The IIROC Hearing Panel was also not satisfied that TDSI failed to adequately address the risks associated with the Burlington office, where four of the five TDSI Traders worked (Decision at paras. 413 to 422).

[17] The IIROC Hearing Panel characterized the crux of the allegation against TDSI with respect to failure of its supervisory practices and procedures as being that there was no procedure systematically employed by the TDSI trade desk supervisors for reviewing bids placed late in the day, except on a 'random' basis. The IIROC Hearing Panel considered TDSI's real time trade desk supervision of the proprietary traders, time spent by TDSI trade desk supervisors on considering the profit and loss position of the proprietary traders, the tools and software available to facilitate the monitoring, the volume of trading information from which manipulative bids and trades would be discerned and the difficulty of identifying artificial closing bids in real time. The IIROC Hearing Panel emphasized that they relied on the *pattern* of bidding by the proprietary traders as a factor in concluding that there had been artificial closing bids. Ultimately, the IIROC Hearing Panel found that "... the random review approach employed by Dingwall and Tucker was reasonable and realistic" (Decision at para. 441) and dismissed the allegation of a failure of supervisory practices and procedures.

[18] With respect to the final allegation against TDSI, that TDSI failed to adequately review and monitor order entry activity, as evidenced by the response of the trade desk supervisors to the trading activities of Nott as well as the lack of identification of trading improprieties in CDF.A and TIC, the IIROC Hearing Panel noted that this allegation overlapped with the previous allegation regarding supervisory practices and procedure. It applied that analysis and

conclusion to consideration of this allegation. In addition, the IIROC Hearing Panel reviewed the specific "criticisms" with regard to TDSI's monitoring of Nott, CDF.A and TIC. It found that "TDSI deserves credit, not criticism" for its monitoring of Nott and CDF.A and that the circumstances surrounding TIC were "understandable" (Decision, *supra* at paras. 447 and 454). As a result, the IIROC Hearing Panel dismissed this allegation.

(c) Discussion of the "October 2005 Analysis" in the IIROC Hearing Panel's Decision

[19] After dismissing the allegations that TDSI did not comply with its obligations under UMIR Rule 7.1 and Policy 7.1, the IIROC Hearing Panel ends the Decision with a section entitled "Discussion of the October 2005 Analysis" (the "**Discussion**"), The "**October 2005 Analysis**" refers to an analysis completed by TDSI's Acting Chief Compliance Officer, Cooper, in July 2006 based on a re-creation of the October 2005 market data and tests relating to late bids.

[20] The Discussion begins with a reference to "the fundamental flaw in the TDSI compliance monitoring system" (Decision, *supra* at para. 457). It concludes with the following paragraphs,:

> This approach to bidding explains why Dingwall and Tucker would not be concerned when a late bid triggered the Watch List. All of Nemy's late bids in TIC were less than the price of the last trade (which they could easily see) and therefore in the context of the market.
>
> Cooper did not develop a trading system. He analysed the existing trading system. His analysis confirms Nott's evidence that maintaining the price of a stock by bidding within the context of the market was the accepted standard at TDSI and not high closing.
>
> Dingwall and Tucker did not detect the late bids IIROC Staff says should have been identified because they were using an alert system that was different than the alert system prescribed by IIROC. The reason for the different alert systems was an honest but erroneous interpretation of UMIR Policy.
>
> The process of interpretation of the UMIR Rules and UMIR Policy is not something that happens overnight. The decision of this Panel is an important step in that process. The approach to bidding set out in these reasons closes the book on the practice of bidding within the context of the market in order to maintain the value of a stock and opens a new book of bidding in accordance with true market supply and demand.
>
> (Decision at paras. 462 to 465)

[21] The content of these paragraphs, appearing in the Decision subsequent to the analysis of the allegations against TDSI, are significant for purposes of the present Application. Accordingly, we have reproduced them in paragraph [20].

II. THE ISSUES

[22] In considering IIROC Staff's Application, we address the following issues:

(a) What is the Commission's jurisdiction to intervene in this matter?

(b) Are there grounds upon which the Commission should intervene in the Decision?

(c) If there are grounds to intervene, what is the appropriate remedy?

III. SUBMISSIONS OF THE PARTIES

A. IIROC Staff

[23] IIROC Staff requests that we overturn the Decision with respect to TDSI's supervision practices for two principal reasons:

(a) IIROC Staff submits that the IIROC Hearing Panel overlooked material evidence relating to TDSI's supervisory failures. IIROC Staff contends that the evidence clearly demonstrated that TDSI was either doing a very poor job of supervising the bidding activity of the TDSI Traders or, worse, condoned the manipulative bidding activity; and

(b) IIROC Staff submits that the Decision is premised on an error of law or incorrect principle, which caused the IIROC Hearing Panel to attribute "... to TDSI an understanding or interpretation of UMIR that has no factual underpinning" (Factum of IIROC Staff at para. 66) and then to use this as a basis to excuse TDSI's supervisory failures.

[24] In summary, IIROC Staff submits that the IIROC Hearing Panel's fundamental and overarching error is its finding that TDSI held a "mistaken belief" that bids within the context of the market were not potentially manipulative and that this mistaken belief excused TDSI's failure to detect the manipulative bidding by the TDSI Traders. IIROC Staff's position is that TDSI was "doing the wrong job" of supervising the bidding activity of the TDSI Traders because its starting position was that bids within the context of the market were not manipulative.

[25] IIROC Staff argues that there was nothing untoward or unusual about TDSI's supervisory or compliance system structurally, but takes issue with TDSI's execution of its system. Firstly, IIROC Staff submits that TDSI's system was inadequate because it excluded a whole group of trades and orders, those within the context of the market, from consideration as potentially manipulative. Secondly, IIROC Staff submits that even if TDSI said it was looking at trades and orders in the context of the market, but in fact largely overlooked them, TDSI's execution of its system would have been inadequate.

[26] IIROC's more detailed submissions are as follows:

(a) ***Overlooked or misapprehended evidence that TDSI was not reviewing for artificial closing bids***

[27] IIROC Staff submits that the IIROC Hearing Panel ignored evidence of what Dingwall and Tucker said they were doing and were capable of doing with respect to reviewing closing bids when they concluded that TDSI adequately supervised, despite the fact that TDSI did not detect any of the extensive closing bid activity at issue during the relevant period.

[28] IIROC Staff disputes the IIROC Hearing Panel's finding that Tucker and Dingwall faced a "monitoring difficulty", and submits that neither Tucker nor Dingwall made such a claim during the hearing. IIROC Staff contends that the IIROC Hearing Panel failed to address the evidence of how the "random review" approach used by TDSI failed in the circumstances.

[29] Further, IIROC Staff submits that the IIROC Hearing Panel's conclusion that the reason for TDSI not monitoring TIC trades was "understandable" and that it would not have been possible to perform a systematic review of Nemy's late bids overlooks and misconstrues evidence. IIROC Staff submits that the issue does not turn on the capacity for "systemic review" but whether the evidence demonstrates that Dingwall was either not conducting a review of closing bids or was doing so inadequately. Similarly, IIROC Staff also submits that if Tucker or Dingwall had acted on any of the indicia of manipulation that they purported to be monitoring, the issues would have been detected. Therefore, IIROC Staff submits that the evidence indicates that TDSI's trade desk supervisors were either conducting the review of unfilled orders inadequately or not at all; or that they condoned the entry of late closing bids.

(b) ***Overlooked evidence that TDSI condoned or encouraged the entry of artificial closing bids***

[30] IIROC Staff submits that the IIROC Hearing Panel failed to address significant evidence of an instant message exchange between Dingwall and Nemy on August 31, 2005 (the "**August 31 IM**") that makes it plain that Nemy intended to create an artificial closing bid. IIROC Staff submits that despite finding this exchange "extremely significant" with respect to the findings against Nemy, nowhere in the Decision does the IIROC Hearing Panel refer to the August 31 IM in relation to the allegations of lack of supervision. By this time, it should have been clear to Dingwall that at least one of the traders under his supervision was willing to, and did, manipulatively affect the bid price in an attempt to establish the closing bid price by his order activity.

[31] IIROC Staff further submits that the finding in the Decision that the "context of the market" approach to bidding explained why Dingwall and Tucker would not have been concerned when a late bid triggered their Stock Watch List ("**Watch List**")[1] is inconsistent with

[1] A Watch List is described in the Decision at para. 427 as:

> … [a] list of stock symbols on a screen that identifies the bid price, the quantity bid, the offer price, the quantity for sale on the offering, the last sale and volume for each of the stock symbols. A stock would remain on the Watch List unless it was deleted. Whenever anything happened in the stock the whole line of that stock would light up (flash) for a second or two and then disappear. … In short, this was a signal that *something* has happened in the stock.

the finding in the Decision that it would have been impossible to do a systematic review of Nemy's bids and that the reason for not monitoring TIC was understandable. Further, IIROC Staff submits that TDSI admitted it had the technology and procedures to detect, and did detect, in the case of Nott and Sadeghi, manipulative activity.

[32] IIROC Staff notes that the IIROC Hearing Panel accepted Nott's testimony that "bidding within the context of the market for the purpose of maintaining the price of the stock was accepted practice and not regarded as high closing" and found that this was consistent with other evidence. IIROC Staff submits that the IIROC Hearing Panel's acceptance of this evidence when considering the allegations against the TDSI Traders is inconsistent with the conclusion that the lack of monitoring of bidding in TIC was understandable when considering the allegations regarding supervision.

(c) ***Misapprehended evidence of TDSI representatives about what they considered manipulative activity and the indicia of manipulative activity***

[33] IIROC Staff submits that the finding in the Decision that TDSI had an "honest but erroneous interpretation" of UMIR is based on a misapprehension of the evidence about the prevailing understanding at TDSI at the time concerning artificial closing bids. IIROC Staff argues that the "context of the market" premise is nowhere delineated, averted to or described in the TDSI report to IIROC in November 2005 (the "**Gatekeeper Report**")[2] in evidence at the hearing. IIROC Staff submits that, in their testimony at the IIROC hearing, Tucker and Dingwall confirmed that it is the *bona fides* of the bid, not whether it is within the context of the market, which is key to a determination of artificiality.

[34] IIROC Staff notes that the "context of the market" principle was a defence advanced on behalf of TDSI, Nemy, Kaplan and Poulstrup at the IIROC hearing. IIROC Staff submits that this "context of the market" argument was rejected by the IIROC Hearing Panel in the Decision as it relates to the manipulative bidding activity of the TDSI Traders, but nevertheless became the cornerstone of the IIROC Hearing Panel's reasons for excusing TDSI's supervisory failures. With reference to Nott's testimony, which the IIROC Hearing Panel accepted as credible, IIROC Staff submits that the IIROC Hearing Panel concluded that the accepted practice of bidding in the context of the market was not just something that the TDSI Traders engaged in, but was a practice of which TDSI supervisors were cognizant and accepting.

[35] IIROC Staff further notes that TDSI took the position at the IIROC hearing that none of Nemy, Poulstrup and Kaplan, who were represented by the same counsel as TDSI, entered any artificial bids for the reason that their bids were within the context of the market.

[2] According to paragraph 45 of the Decision, the Gatekeeper Report addresses a report made by Nott to Dingwall in October 2005 of an accidental purchase of 154,000 shares in CDF.A. As a result of this accidental acquisition, Dingwall and Tucker conducted monitoring and investigation procedures that led to the suspension and ultimate dismissal of Nott and Sadeghi on November 30, 2005.

(d) Erred in law or principle in reaching the conclusion that an "honest but erroneous interpretation" or mistaken understanding of UMIR 2.2 excuses a failure to comply with trading supervision obligations

[36] IIROC Staff submits that the IIROC Hearing Panel, having overlooked or misapprehended evidence, then excused TDSI's supervisory failures on the basis of TDSI's erroneous understanding of the requirements of UMIR Rule 2.2.

[37] IIROC Staff submits that given the IIROC Hearing Panel's findings of numerous artificial bids by the TDSI Traders and rejection of the notion that bids in the context of the market cannot be considered artificial under UMIR, it cannot follow that "an honest but erroneous interpretation" of UMIR 2.2 absolves TDSI of liability for a failure to supervise its traders.

[38] With reference to previous Commission decisions, IIROC Staff submits that an erroneous interpretation or mistaken understanding of regulatory requirements is no defence on the part of a registered market participant to an allegation of a failure to supervise (*Re Gordon Capital Corp.* (1990), 13 O.S.C.B. 2035 at 2, aff'd *Gordon Capital Corp. v. Ontario (Securities Commission)*, [1991] O.J. No. 934 (Div. Ct.) and *Re Sabourin* (2009), 32 O.S.C.B. 2707 at paras. 64-68). IIROC Staff notes that TDSI did not raise the notion of a "mistaken interpretation" of UMIR as a defense to the allegations, rather "TDSI took the position that it detected the artificial bidding by Nott and Sadeghi and that other than one artificial bid by Kaplan no other artificial bidding ... had occurred" (Factum of IIROC Staff at para. 117).

B. TDSI

[39] TDSI submits that IIROC Staff mischaracterizes the reasoning of the IIROC Hearing Panel in its submissions. TDSI notes that the allegations against TDSI are dismissed in the Decision before any mention of an "honest but erroneous interpretation of UMIR Policy". TDSI submits that the comments by the IIROC Hearing Panel in the Decision regarding an "honest but erroneous interpretation" are from a separate part of the Decision, the section entitled "Discussion of the October 2005 Analysis", and that the IIROC Hearing Panel's comments are clearly directed at what "alerts" or "flags" TDSI had to assist it in monitoring trades or orders. TDSI argues that the IIROC Hearing Panel did not state, as IIROC Staff submits, that it was excusing a failure of supervision by TDSI on the basis of a mistaken understanding of UMIR Rule 2.2.

[40] TDSI submits that the IIROC Hearing Panel considered and rejected IIROC Staff's allegations against TDSI and provided detailed reasons, which were supported by references to the extensive record developed over a 24-day hearing. TDSI's more detailed submissions are as follows.

(a) The IIROC Hearing Panel did not misapprehend or overlook any material evidence

[41] TDSI urges the Commission to be cautious about claims that evidence was overlooked or misapprehended, and notes that the Commission has repeatedly emphasized in previous

decisions that it affords deference to the factual determinations of a hearing panel of a self-regulatory organization ("**SRO**"), especially those determinations central to the SRO's specialized competence. TDSI submits that the case law notes that an allegation that material evidence was overlooked must be demonstrated clearly and that the Commission will not intervene where it appears that the SRO considered the entire record before it and reached a reasonable decision (*Re Shambleau* (2002), 25 O.S.C.B. 1850 at 1852, aff'd *Shambleau v. Ontario (Securities Commission)* (2003), 26 O.S.C.B. 1629 (Div. Ct.) ("***Shambleau***"), *Investment Dealers Assn. of Canada v. Boulieris*, [2005] O.J. No. 1984 (Div. Ct.) at paras. 27, 33 and *Re Vitug* (2010), 33 O.S.C.B. 3965 at paras. 102-106, aff'd 2010 ONSC 4464 (Div. Ct.) ("***Vitug***")).

[42] TDSI submits that the IIROC Hearing Panel did not misapprehend the evidence of the TDSI supervisors, Dingwall and Tucker, as to the review of orders and that the IIROC Hearing Panel understood that the trading supervisors could only conduct a random review because of the enormity of the order volume TDSI generated each day and the limitations of existing technology. TDSI notes that the IIROC Hearing Panel concluded that the TDSI supervisory system described by the trading supervisors met industry standards. TDSI argues that the IIROC Hearing Panel found that the TDSI "trade supervision system" was adequate, even though it did not always succeed in identifying artificial orders.

[43] With respect to the August 31 IM between Nemy and Dingwall that IIROC Staff contends was overlooked, TDSI submits that the IIROC Hearing Panel clearly directed itself to the August 31 IM, and reproduced it in the Decision. TDSI submits that it was open to the IIROC Hearing Panel to assess the August 31 IM in the context of all the evidence and to treat it as less probative than IIROC Staff submitted it was. TDSI further notes that Dingwall testified that if he had been aware of late bids, he would have pursued them, and submits that the IIROC Hearing Panel accepted the veracity of Dingwall's evidence.

[44] Similarly, TDSI submits that the IIROC Hearing Panel did not overlook evidence with respect to CDF.A. TDSI contends that the IIROC Hearing Panel properly understood that the detection of manipulation in CDF.A resulted from factors that went beyond the detection of artificial orders, including "Nott's insubordination, wash trading and a loss of trust in the honesty of the traders who had a motivation to collude in the month leading up to a payout calculation" (Memorandum of Fact and Law of TDSI at para. 96(b)).

[45] TDSI submits that the IIROC Hearing Panel did not overlook evidence that would support a finding that TDSI condoned Nemy's statement that he might mark down the price of TIC. TDSI further submits that IIROC Staff's assertion that Dingwall did not question Nemy's proposal to mark down the price of TIC is contradicted by Dingwall's objections in the instant message exchange. TDSI argues that the IIROC Hearing Panel made adverse credibility findings against Nemy concerning the meaning of his statements to Dingwall and did not accept that the August 31 IM showed any tolerance by Dingwall for artificial bids.

[46] TDSI also contests IIROC Staff's allegation that the IIROC Hearing Panel misapprehended or overlooked Nott's evidence. TDSI submits that its approach was never to condone manipulative trading and that there is nothing in the reasons to this effect. TDSI submits that Nott's evidence is consistent with TDSI's interpretation of UMIR Policy 2.2 as meaning that

if prices of orders are consistent with preceding and succeeding bids, they are not likely to be artificial but rather are more likely to be legitimate because they are consistent with the prevailing market. TDSI submits that the statement in the Decision that "bidding within the context of the market was accepted practice and not regarded as high closing" cannot be read to mean that bidding in the context of the market always evidences an intention to place an artificial bid to maintain prices, but means only that bids placed in the context of the market bear further scrutiny because they could, given Nott's evidence, include artificial bids that were never intended to be filled.

[47] TDSI argues that the IIROC Hearing Panel certainly did not say that either Cooper or Dingwall tolerated or permitted traders to enter bids with no intention the bids would ever be filled. TDSI submits that IIROC Staff incorrectly equates Cooper and Dingwall's failure to identify bids made in the context of the market as potentially artificial with active acceptance of traders entering bids with a "bad intention". TDSI submits that Cooper and Dingwall's evidence was clearly that if they had actually become aware of any facts suggesting that the traders did not intend to buy, they would have followed up immediately.

[48] Finally, TDSI submits that the IIROC Hearing Panel did not misapprehend TDSI's view of what constituted manipulative activity.

(b) The IIROC Hearing Panel did not err in law or principle

[49] TDSI submits that the IIROC Hearing Panel's interpretation of UMIR Rule 7.1 and Policy 7.1 should be entitled to significant deference, given that UMIR Rule 7.1 and Policy 7.1 are rules that call for determinations based on knowledge of industry practices. TDSI submits that the composition of the IIROC Hearing Panel in this matter is significant, noting that it was comprised of an experienced trial judge and two members from the industry with considerable knowledge of trading, supervision of trading and industry practice.

[50] TDSI disagrees with IIROC Staff's submission that the IIROC Hearing Panel condoned an honest yet erroneous interpretation of UMIR 2.2. TDSI submits that the IIROC Hearing Panel determined that TDSI met industry standards and had adequate supervision by conducting the random review it did. In any event, TDSI submits that the statement in the Decision about TDSI's alert system being based on an "honest yet erroneous interpretation of UMIR Policy" clearly did not drive the conclusion that the supervision was adequate.

[51] TDSI submits that before the Decision, it was not clear how UMIR Policy 2.2 treated bidding activity that fits the context of the market. The Decision concludes that a pattern of small orders, in an illiquid stock, placed very late in the day but priced in the context of the market can still violate UMIR Rule 2.2 and Policy 2.2 whether or not anyone in the market observes or responds to such a pattern. TDSI submits that the adequacy of its supervision had to be measured against a policy that, for better or worse, did not provide a clear rule which, once crossed, conclusively established artificiality. TDSI disagrees with IIROC Staff's assertion that the Decision was not novel in its consideration of artificial bids, and distinguishes the cases cited by IIROC Staff from the Decision.

[52] In response to IIROC Staff's allegation that the IIROC Hearing Panel erred in allowing a "defence of ignorance or misunderstanding of the law", TDSI submits that the IIROC Hearing Panel did not rely on any "due diligence" defence in dismissing the allegations against TDSI. TDSI submits that the due diligence cases cited by IIROC Staff are inapplicable because the IIROC Hearing Panel did not consider or apply such a defence.

[53] TDSI submits that IIROC Staff is attempting to re-argue issues that were fully considered and is trying to disguise this fact by alleging that the IIROC Hearing Panel overlooked or misapprehended evidence, when it did no such thing.

C. OSC Staff

[54] OSC Staff made submissions regarding the regulatory framework for reviews of IIROC decisions and the appropriate scope of review of a decision of an IIROC hearing panel. OSC Staff submits that an applicant must meet a high threshold to demonstrate that a decision of a hearing panel of IIROC should be overturned (*Vitug, supra* at para. 44, *Shambleau, supra* at 1852 and *Re HudBay Minerals Inc.* (2009), 32 O.S.C.B. 3733 at paras. 103 and 104 ("***HudBay***")).

[55] OSC Staff further submits that the Commission will employ a restrained approach and will not generally substitute its own view of the evidence for that taken by an IIROC hearing panel on the basis that it might have come to a different conclusion (*Re Market Regulation Services Inc.* (2008), 31 O.S.C.B. 5441 at para. 62, *Vitug, supra* at para. 46 and 47 and *HudBay, supra* at para. 103).

[56] OSC Staff takes no position on the facts of the case or the order requested by IIROC Staff.

IV. RELEVANT UMIR SECTIONS

[57] The IIROC Hearing Panel considered the application of UMIR Rule 2.2 and Policy 2.2 to the actions of the TDSI Traders and also considered TDSI's supervisory obligations under UMIR Rule 7.1 and Policy 7.1.

[58] UMIR Rule 2.2 – Manipulative and Deceptive Activities states:

> (1) A Participant or Access Person shall not, directly or indirectly, engage in or participate in the use of any manipulative or deceptive method, act or practice in connection with any order or trade on a marketplace if the Participant or Access Person knows or ought reasonably to know the nature of the method, act or practice.
>
> (2) A Participant or Access Person shall not, directly or indirectly, enter an order or execute a trade on a marketplace if the Participant or Access Person knows or ought reasonably to know that the entry of the order or the execution of the trade will create or could reasonably be expected to create:

(a) a false or misleading appearance of trading activity in or interest in the purchase or sale of the security; or

(b) an artificial ask price, bid price or sale price for the security or a related security.

(3) For greater certainty, the entry of an order or the execution of a trade on a marketplace by a person in accordance with the Market Maker Obligations shall not be considered a violation of subsection (1) or (2) provided such order or trade complies with applicable Marketplace Rules and the order or trade was required to fulfill applicable Market Maker Obligations.

[59] UMIR Policy 2.2, Part 2 – Manipulative and Deceptive Activities states, in part:

For the purposes of subsection (2) of Rule 2.2 and without limiting the generality of that subsection, if any of the following activities are undertaken on a marketplace and create or could reasonably be expected to create a false or misleading appearance of trading activity or interest in the purchase or sale of a security or an artificial ask price, bid price or sale price, the entry of the order or the execution of the trade shall constitute a violation of subsection (2) of Rule 2.2:

…

(e) entering an order or orders for the purchase or sale of a security to:

(i) establish a predetermined sale price, ask price or bid price,

(ii) effect a high or low closing sale price, ask price or bid price, or

(iii) maintain the sale price, ask price or bid price within a predetermined range; …

[60] UMIR Rule 7.1 – Trading Supervision Obligations states:

(1) Each Participant shall adopt written policies and procedures to be followed by directors, officers, partners and employees of the Participant that are adequate, taking into account the business and affairs of the Participant, to ensure compliance with UMIR and each Policy.

(2) Prior to the entry of an order on a marketplace by a Participant, the Participant shall comply with:

(a) applicable regulatory standards with respect to the review, acceptance and approval of orders;

(b) the policies and procedures adopted in accordance with subsection (1); and

(c) all requirements of UMIR and each Policy.

(3) Each Participant shall appoint a head of trading who shall be responsible to supervise the trading activities of the Participant in a marketplace.

(4) The head of trading together with each person who has authority or supervision over or responsibility to the Participant for an employee of the Participant shall fully and properly supervise such employee as necessary to ensure the compliance of the employee with UMIR and each Policy.

V. THE COMMISSION'S JURISDICTION TO INTERVENE

[61] Under section 21.7 of the Act, the Commission has authority to hold a hearing and review of a decision of a recognized SRO, such as IIROC. Section 21.7 of the Act 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 exchange, recognized self-regulatory organization, recognized quotation and trade reporting system, recognized clearing agency or designated trade repository 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.

[62] Section 8(3) of the Act sets out the Commission's powers upon a hearing and review:

> 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.

[63] In a hearing and review, the Commission exercises a jurisdiction akin to a hearing *de novo*. The Commission has stated that "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" (*Investment Dealers Assn. of Canada v. Boulieris* (2004), 27 O.S.C.B. 1597 at paras. 29-30, aff'd [2005] O.J. No. 1984 (Div. Ct.)).

[64] The grounds upon which the Commission may intervene in a decision of a SRO are set out in *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3587 ("***Canada Malting***"), and have continued to be applied in subsequent Commission decisions. The Commission may intervene in the Decision pursuant to section 21.7 of the Act if:

(a) the IIROC Hearing Panel proceeded on an incorrect principle;

(b) the IIROC Hearing Panel erred in law;

(c) the IIROC Hearing Panel overlooked material evidence;

(d) new and compelling evidence is presented to the Commission which was not presented to the IIROC Hearing Panel; or

(e) the IIROC Hearing Panel's perception of the public interest conflicts with that of the Commission.

(*Canada Malting, supra* at 3587)

[65] In this case, IIROC Staff alleges that the IIROC Hearing Panel erred in law or proceeded on an incorrect principle and/or overlooked material evidence. No new evidence was presented to the Commission in this case. Our decision is based on the record before the IIROC Hearing Panel and its Decision.

[66] An applicant must meet the heavy burden of establishing that its case fits within one of these five grounds before the Commission will intervene (*Canada Malting, supra* at 3589). The Commission will not intervene simply because it may have come to a different conclusion in the circumstances, as stated by the Commission in a review of a TSX decision in *HudBay, supra* at para. 103:

> The Commission generally shows deference to the decisions of the TSX, particularly in the areas of the TSX's expertise. We recognize the important role that the TSX plays within our regulatory framework. 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.

[67] As noted in previous cases, there is a high threshold to meet in order to demonstrate that a Decision of a SRO should be overturned (*Vitug, supra* at para. 44 and *Shambleau, supra* at 1852). In the recent decision of *Re Magna Partners Ltd.* (2011), 34 O.S.C.B. 8697, the Commission stated, with respect to a review of a decision of an IIROC panel;

> The Commission will generally defer to determinations central to IIROC's specialized expertise, such as interpreting and applying its own by-laws or making factual determinations central to its expertise.
>
> (*Re Magna Partners Ltd., supra* at para. 43)

VI. ANALYSIS

A. Did the IIROC Hearing Panel overlook or misapprehend material evidence?

1. Did the IIROC Hearing Panel overlook evidence that TDSI was not adequately reviewing for artificial closing bids?

[68] IIROC Staff alleges that the IIROC Hearing Panel overlooked or misapprehended material evidence in three respects. The first issue addressed by IIROC Staff is that the IIROC Hearing Panel overlooked or misapprehended evidence that demonstrates that TDSI was not adequately reviewing for artificial closing bids.

[69] The crux of this allegation is that the IIROC Hearing Panel overlooked evidence that Dingwall and Tucker did an inadequate job in their supervisory capacity. Had the IIROC Hearing Panel properly considered this evidence, they could not have found that TDSI met its supervisory obligations under UMIR.

[70] In order for us to address this issue it is necessary to review (i) the evidence that was marshalled by the IIROC Hearing Panel and other evidence before it about what Dingwall and Tucker were doing as supervisors, and (ii) what the Decision ultimately concludes about the extent to which Dingwall and Tucker supervised the TDSI Traders in making closing bids.

(a) Evidence Marshalled by the IIROC Hearing Panel and Other Evidence Consistent with its Findings

[71] The IIROC Hearing Panel accepted evidence about a variety of monitoring activities in which Dingwall and Tucker were engaged, including monitoring the Watch List and the criteria used by Dingwall to supervise trading activity. The following evidence is noted in the Decision:

- Dingwall said illiquid stocks have a higher potential for manipulation because there are generally fewer bids and offers in the book (Decision, *supra* at para. 367).

- Dingwall reviewed the inventory report for each trader every morning to determine individual trader exposure and TEG overall sector exposure. Based on this daily review, positions inconsistent with usual trading patterns could be detected (Decision*, supra* at para. 425).

- Dingwall said when he saw a stock on his Watch List flash he would generally pull up a Market by order to see whether the change was as a result of a TDSI trader. If it was, he would investigate further to see what happened (Decision, *supra* at para. 430).

- Because of the heavy TDSI inventory position in TIC, TIC was on the Watch List for the entire relevant period. After a "fat finger" purchase by Nott on October 4, 2005, CDF.A was also on the Watch List (Decision, *supra* at paras. 448-449).

[72] We further note that the IIROC hearing record contains additional evidence of Dingwall and Tucker's supervision activities that is consistent with the IIROC Hearing Panel's conclusions in its Decision, including the following:

- During the IIROC hearing, Dingwall testified that one of his criteria in supervision would be to focus on more illiquid stocks, and that TIC would have been a liquid stock during the relevant time period (IIROC Hearing Transcript, January 28, 2010 at page 2329).

- Dingwall testified during the IIROC hearing that TDSI reviewed orders on a daily basis, even if trades had not occurred. Dingwall further testified that he would review orders on a random basis even if there were not trades and he personally

reviewed high closing bids (IIROC Hearing Transcript, January 28, 2010 at pages 2279 to 2282).

- TIC was on Dingwall's Watch List, so that he would be notified when there was activity in TIC, and he also had a real-time tool that could show the position of TIC at any time (IIROC Hearing Transcript, January 28, 2010 at page 2361).

- Dingwall described his Watch List surveillance at the end of the month as being different from his daily surveillance as follows: "It's just a lot more focus on taking a look and seeing who's on the bid at the end of the day, quantities and taking a look in the context of where the stock is trading" (IIROC Hearing Transcript, January 28, 2010 at pages 2424 to 2425).

- Tucker also testified that he used Watch Lists as a supervision tool, stating "If it was on my watch list, I would go through a number of times a day and take a look at the stock just to make sure I was comfortable" (IIROC Hearing Transcript, January 29, 2010 at pages 2609 to 2610).

- As TDSI noted, Dingwall's testimony was not that he would ignore bids in the context of the market, but rather that "… if it had been trading at 2.75, 2.76, and I see it at – when I pull it up after the close that it's showing 2.71, I might not think too much of it. But if it – if the highlight popped up exactly one second and there's nothing going on in the stock, then I would definitely have asked for an explanation" (IIROC Hearing Transcript, January 28, 2010 at page 2401).

- In response to questions regarding late bids entered by Nemy, Dingwall testified as follows at the IIROC hearing:

> THE WITNESS: I would think too in terms of, like, the motive, in terms of -- you know he's quite comfortable in terms of the amount of P&L. You know, up a hundred, down two hundred. That -- I don't understand why. He was a successful trader. You know, he made real money trading, P&L realized profits, not unrealized losses. So that's why I question that he would be doing it just to be marking his inventory. That's you know ---
>
> MR. LAWSON: But is that a question in terms of price discovery?
>
> THE WITNESS: I would -- if I saw him doing it, I would definitely be wanting to question -- to ask that question of him, yes.
>
> (IIROC Hearing Transcript, January 28, 2010 at pages 2495 to 2496)

(b) The IIROC Hearing Panel's Conclusions with respect to Supervision at TDSI

[73] Having considered the evidence of how supervision was conducted at TDSI, the IIROC Hearing Panel found that TDSI's practices met the requirements of UMIR Rule 7.1 and Policy 7.1.

[74] However, IIROC Staff alleges that the evidence noted above is evidence of what Dingwall and Tucker said they were doing, not of what Dingwall and Tucker actually did.

[75] IIROC Staff submits that the Decision does not address evidence of how the "random review" approach used by TDSI, and in particular Dingwall, failed in the circumstances. IIROC Staff alleges that if Tucker or Dingwall had acted on any of the indicia of manipulation that TDSI said they looked for when supervising – large illiquid positions or overlapping inventory positions – issues could have been detected, investigated or escalated, for instance to TDSI Compliance which was well-equipped to do post-trade reviews. On this point, IIROC Staff makes specific reference to TDSI's monitoring of TIC and CDF.A and submits that the fact that there was an abundance of closing bid activity by Nemy and Poulstrup in TIC and by Nott in CDF.A, without further investigation by Dingwall or Tucker, is evidence that there was a failure in supervision. IIROC Staff also submits that, as noted by Cooper in his evidence, bidding in TIC had all the indicia of manipulation and was on Dingwall's Watch List, yet Dingwall never questioned the activity in TIC.

[76] IIROC Staff further alleges that in making the finding that TDSI had a "monitoring difficulty", the IIROC Hearing Panel overlooked evidence that neither Dingwall nor Tucker made any such claim. The Decision states:

> A flash on the screen is not a signal or flag alerting a late bid. The flash could be the result of *any* transaction in the stock by *any* trader. This was the monitoring difficulty facing Dingwall and Tucker. The flash on the Watch List screen imparted the information that some kind of activity had occurred with the stock. But in order to determine relevant reason for the flash (whether it was a bid, the time of the bid, who entered the bid) it was necessary to take the time required to use one of the monitoring tools. The overwhelming frequency of flashes near the end of the day made this impossible.
>
> (Decision at para. 438)

[77] Finally, IIROC Staff alleges that evidence from Dingwall's admissions and in the form of instant messages between Dingwall and Nemy demonstrates that Dingwall was either not conducting a review of closing bids or was doing so inadequately. Dingwall's comments to Nemy in the August 31 IM are addressed below in our analysis of whether the IIROC Hearing Panel overlooked evidence that TDSI condoned or encouraged the entry of artificial closing bids.

[78] The IIROC Hearing Panel made a number of findings with respect to Dingwall's supervision activities. First, the IIROC Hearing Panel noted that Dingwall did not find fault with Nemy's bidding in TIC:

> Nemy repeatedly said his bids were made within the context of the market. Cooper, the Chief Compliance Officer for TDSI, conducted a meticulous retroactive review of Nemy's trading in TIC and was satisfied there was nothing wrong with Nemy's bidding. Boddie examined every TIC bid by Nemy and Poulstrup. He testified that each and every Closing Bid was consistent with the market price at the time of the bid and therefore not an Artificial Closing Bid. Dingwall did not find fault with Nemy's bidding in TIC.
>
> (Decision at para. 334)

[79] We read this excerpt from the Decision as suggesting that the IIROC Hearing Panel considered Dingwall's supervision of Nemy and found it adequate, despite the fact that it did not identify the artificial closing bids that were eventually identified by the IIROC Hearing Panel.

[80] The IIROC Hearing Panel makes clear that the motivation, intention, or state of mind of a trader is a factor in determining whether a closing bid is artificial. As noted above in paragraph [72], the IIROC Hearing Panel considered Dingwall's testimony regarding Nemy's possible motivation to manipulate prices. This testimony was that Nemy made real money trading and that Dingwall questioned whether Nemy would be placing orders just to mark his inventory (Decision at para. 452 and IIROC Hearing Transcript, January 28, 2010 at pages 2495 to 2496). We conclude from this that the IIROC Hearing Panel considered Dingwall's testimony concerning his judgment about Nemy's lack of motivation to engage in artificial bidding to be sufficient explanation for the failure to identify the artificial closing bids in this instance.

[81] Second, the Decision notes that Dingwall did take action with respect to some of Nott's activities, including giving Nott a verbal warning in connection with his trading in CDFA.

[82] We do not find a basis here for the Commission to second-guess the IIROC Hearing Panel's view that Dingwall's supervisory actions with respect to Nemy and Nott were adequate in the circumstances. As discussed further below at paragraphs [114] to [125], the IIROC Hearing Panel accepted that an adequate supervisory system included elements of judgment. The IIROC Hearing Panel had evidence before it of the criteria used to exercise that judgment. In our view it was open to the IIROC Hearing Panel to accept that evidence as indicating that Dingwall was doing an adequate job of supervision.

[83] Third, the IIROC Hearing Panel found that in the circumstances, it was understandable that Dingwall would not have been able to identify artificial closing bids in the manner suggested by IIROC Staff, based on his reviews. The IIROC Hearing Panel noted:

> It must be realized that the time of the bid information obtained from a random review was limited to one particular day. It is apparent from the reasons of the Panel that demonstrating a *pattern* of late bids by a trader is one of the factors relied on by the Panel in drawing an inference of Artificial Closing Bids. The time required to do this would have been completely beyond the capacity of Dingwall and Tucker because they would have to take the time to print out the end of the day trading of a stock from the Firm Book every day for enough days to reveal a pattern of late bids. [emphasis in original]

(Decision at paras. 437 and 439)

The IIROC Hearing Panel further noted that:

> Dingwall said the Watch List screen is updating all day. He said it would be physically impossible to investigate every signal. He said that if he tried to do this he would be sitting there just looking at TIC from 9.30 to 4.00 every single day because "as you can imagine from looking at the TOQs, each stock generates hundreds of pages of updates, every day, even on these illiquid stocks…"
>
> Dingwall recognized that manipulative activity is more likely to occur on or about the opening and at or near the close: "At 3.59 probably the entire screen would be going inverse because of the activity at that time of the day."
>
> (Decision at paras. 431 to 432)

[84] The IIROC Hearing Panel accepted that Dingwall was exercising adequate judgment about who and what to monitor and concluded that "[t]he reason for not monitoring TIC is understandable" (Decision at para. 454). We read these comments about the difficulty associated with the monitoring task as demonstrating that the IIROC Hearing Panel was cognizant of the challenges associated with real time supervision and the impossibility of examining all orders for evidence of artificiality. The IIROC Hearing Panel was prepared to accept the fact that artificial bids might go undetected by a nevertheless adequate supervisory system. Although the IIROC Hearing Panel found that the TDSI Traders entered artificial closing bids in many instances, we note that it did not find that every closing bid entered by the TDSI Traders referenced in the original allegations was artificial. The IIROC Hearing Panel took the view that supervision for artificial bids requires the exercise of judgment, and, considering all the circumstances, the Panel concluded that the TDSI system of supervision was adequate, despite the fact that it did not pick up on a pattern of artificial closing bids by the TDSI Traders.

[85] We reject the allegation that the IIROC Hearing Panel did not address the evidence of how TDSI's "random review approach" failed in the circumstances. On the contrary, we find that the IIROC Hearing Panel included an analysis of the entire supervisory structure in its Decision and addressed how the artificial bidding behaviour could have passed undetected. We find that it was reasonable for the IIROC Hearing Panel to conclude, based on the evidence before it, that TDSI met its responsibilities with respect to supervision.

2. Did the IIROC Hearing Panel overlook evidence that TDSI condoned or encouraged the entry of artificial closing bids?

[86] IIROC Staff alleges that the IIROC Hearing Panel overlooked evidence from the August 31 IM that Dingwall should have been aware that Nemy intended to create an artificial closing bid for TIC. The excerpt from the August 31 IM that IIROC Staff submits is evidence that TDSI condoned or encouraged the entry of artificial closing bids is reproduced in the Decision:

> 3:13:48 – *Nemy to Dingwall: approx what is top # this month*
>
> 3:15:54 – **Dingwall to Nemy: you got it by a good margin**

3:16:23 – *Nemy to Dingwall: might sell some TIC so we get a good start to next month*

3:17:57 – *Nemy to Dingwall: mark down … not up*

3:20:01 – **Dingwall to Nemy: I understand, but doesn't really help in long run does it. I wouldn't bother**

3:20:37 – *Nemy to Dingwall: its easier to trade with a lead*

3:20:53 – *Nemy to Dingwall: psychologically*

3:22:34 – **Dingwall to Nemy: Yeah but doesn't do any favours to the stock to knock it down. Rather you keep someone from running it up, maybe move it down small with some time to go than move it too much down close to close**

3:23:24 – *Nemy to Dingwall: have faith*

3:24:03 – *Nemy to Dingwall: its going north way too fast*

3:24:11 – **Dingwall to Nemy: y**

4:02:41 – *Nemy to Dingwall: damn … someone marked it up*

4:03:14 – **Dingwall to Nemy: you can still close it 2.20 offer**

4:03:51 – *Nemy to Dingwall: how*

4:03:51 – *Nemy to Dingwall: its CDX*

4:03:56 – **Dingwall to Nemy: dohhhh**

4:04:03 – *Nemy to Dingwall: dohhhhhhhhhhhhhhhhhhhhhhhhhhh*

[emphasis in Decision]

(Decision at para. 193)

[87] We find the August 31 IM troubling. Dingwall's statements to Nemy that he "wouldn't bother" marking down TIC and that "you can still close it 2.20 offer" are concerning to us. We would have expected a supervisor to take specific action to prohibit the conduct Nemy appeared to be proposing. Dingwall's statement to Nemy that "I wouldn't bother" is not a sufficient response to this situation. Moreover, this exchange could be read as indicating that Dingwall was providing instruction to Nemy regarding a closing bid which may have been artificial.

[88] However, on balance we are not satisfied that the IIROC Hearing Panel overlooked this evidence. On the contrary, the IIROC Hearing Panel specifically references this excerpt in an earlier section of the Decision and identifies it as being "extremely significant" (Decision, *supra* at para. 154). The IIROC Hearing Panel clearly understood the August 31 IM and considered it when assessing the allegations against Nemy. Although the August 31 IM causes concern with respect to Dingwall's approach to supervision, it does not definitively deal with the broader question of whether TDSI met its obligations under UMIR Rule 7.1 and Policy 7.1 and must be considered in the context of all the evidence the IIROC Hearing Panel had before it.

[89] We find that, with respect to the allegations against TDSI, the IIROC Hearing Panel had the August 31 IM evidence and reviewed it in the context provided by the entire hearing record, including Dingwall's testimony for two days. From our careful review of the Decision and the record, IIROC Staff has not persuaded us that the IIROC Hearing Panel overlooked this evidence when it failed to make the inference advanced by IIROC Staff.

[90] We agree with TDSI's submission that it was open to the IIROC Hearing Panel to consider the August 31 IM evidence to be less probative with respect to TDSI's supervision than IIROC Staff submits it was. Although the instant message exchange is not specifically referenced in the parts of the Decision dealing with TDSI's supervision of the TDSI Traders, we find it unlikely that the IIROC Hearing Panel did not also consider it with respect to Dingwall's supervision. Paragraphs 452 and 453 of the Decision show that the IIROC Hearing Panel undertook an adequate review of the interactions between Dingwall and Nemy, including quoting from transcript evidence. The IIROC Hearing Panel noted that:

> Dingwall said he never had any trouble getting information from Nemy about his loss position ("He was very good"). Dingwall said when Nemy called in his position at the end of the day he never understated or misled Dingwall about how much he was losing in TIC ("He was very open and transparent").
>
> (Decision at para. 453)

[91] The IIROC Hearing Panel accepted Dingwall's testimony with respect to his relationship with Nemy and his assessment of Nemy's lack of motivation to make an artificial bid. The IIROC Hearing Panel makes no negative findings with respect to Dingwall's credibility in the Decision.

[92] Ultimately, we do not agree with IIROC Staff that the IIROC Hearing Panel overlooked evidence that Dingwall condoned Nemy's artificial bidding activity. We find that the IIROC Hearing Panel accorded the August 31 IM evidence the weight it thought appropriate when reaching its ultimate conclusion with respect to TDSI.

[93] IIROC Staff also submits that the IIROC Hearing Panel overlooked Nott's testimony on the issue of whether Dingwall condoned artificial closing bids. IIROC Staff points to Nott's testimony with respect to making bids with the intention of maintaining the price of a security:

> [Nott] testified and openly stated that the closing bids listed on the Tables to the Statement of Allegations were not motivated by an intention to establish a price justified by real demand or supply. He said his intention was to maintain the price of the security:
>
> > I think basically what this all – this whole argument comes down to – I think comes down to what's the definition of high trading. My management team, Rob Dingwall, Tucker, Rob Nemy, obviously had the same definition of high closing bid that I did, which meant not to go higher but you could maintain the bid. I mean, you know, this is – I'm just saying that this is proved by the actions with the – with the stock TIC …

(Decision at para. 230)

[94] In the section of the Decision that considers the allegations against Poulstrup, the IIROC Hearing Panel notes that Nott's testimony clearly established the purpose of bidding by Poulstrup, quoting from Nott's testimony as follows:

> … So often, you know, Rob Dingwall or Mr. Tucker – when Rob Nemy was absent from the office they would always tell me, "Oh, make sure Jake [Poulstrup]'s taking care of the TIC," you know, and I was really busy, like I said. And I would be like, "Why don't you guys just call him," right? And then, you know, I would call him and say, "Jake," and he would say, "Yeah, yeah, yeah. Don't worry. You know, I'm watching it." He would put in the bid, maintain the bid like what was indicated and, you know, there was a lot of people in that office that were long with TIC, not just Rob Dingwall, not just Tucker. There was numerous people. They had an inventory there that was long a bunch. They all – everyone in the room watched that stock like a hawk.
>
> (Decision at para. 331)

[95] In the same section of the Decision, the IIROC Hearing Panel further finds that Nott's testimony was credible:

> Nott was not cross-examined by anyone. No evidence was called to contradict him. His testimony is not tainted by any self-serving purpose. The Panel accepts Nott's testimony as credible.
>
> Nott's assertion that bidding within the context of the market for the purpose of maintaining the price of the stock was accepted practice and not regarded as high closing is consistent with other evidence.
>
> (Decision at paras. 332-333)

[96] It is challenging to reconcile the apparent inconsistency between this testimony, accepted by the IIROC Hearing Panel in the context of other sections of its Decision, and our understanding of the key elements of the IIROC Hearing Panel's decision that TDSI had an adequate system of supervision with respect to artificial bids in the context of the market.

[97] Although it is true that the Decision notes that the IIROC Hearing Panel found Nott's testimony to be credible, it did so in the context of its analysis of allegations against Nott and Poulstrup. While the IIROC Hearing Panel does not refer to Nott's testimony in its analysis of the allegations against TDSI, we do not see a basis to infer that the IIROC Hearing Panel did not take it into consideration.

[98] We find the evidence referenced in paragraphs 444 to 447 of the Decision does provide a basis for the IIROC Hearing Panel's finding that Dingwall was supervising Nott's activity, rather than condoning it. Dingwall placed CDF.A on his Watch List, he gave Nott a "verbal warning" in connection with his trading in this stock, and the IIROC Hearing Panel ultimately found that "TDSI … monitored and detected the bidding improprieties of CDF.A" (Decision at para. 447).

[99] TDSI's Corporate Security & Investigations Final Report, eventually included in the Gatekeeper Report, states:

> [Cooper] was asked to review the trading activities of Ken Nott and Aidin Sadeghi to determine if they were involved in any manipulative and deceptive trading activities contrary to section 2 of [UMIR] that govern trading on the Toronto Stock Exchange and TSX Venture Exchange. This concern was brought to the attention of Compliance after Rob Dingwall, Ken Nott's supervisor on the trade desk, noted some unusual activity in Central Canada Foods (CDF.A – TSX/VE). Specifically, Trade Desk Management was concerned that Ken and Aidin may have been assisting each other in artificial pricing of securities in their respective inventory accounts.
>
> (IIROC Hearing Exhibit 1, tab 5C)

[100] We take the purpose of statements in the Decision with respect to the monitoring of Nemy and Nott, such as those referenced in paragraphs [78] and [98] above, as being to illustrate that a bid in the context of the market is difficult to identify as artificial, absent the presence of other factors (such as motivation and pattern of trading). In addition, the IIROC Hearing Panel goes further, in paragraph 335 of the Decision, to refute the assertion put forward by the TDSI Traders that if a bid was the context of the market it was definitively not artificial. The IIROC Hearing Panel "closes the book" on this position, but sets forth its understanding of how the TDSI supervisory system could fail to identify these bids as being artificial, despite finding the system adequate in an overall sense.

[101] Finally, the Decision directly references the allegation that TDSI "conducted the review of unfilled orders either very badly, not at all, or *condoned* the entry of late day closing bids ..." [emphasis added] (Decision, *supra* at para. 443). The IIROC Hearing Panel reviewed the specific monitoring of Nott and CDF.A and Nemy and TIC (Decision, *supra* at paras. 444 to 454) in some detail in connection with this serious allegation.

[102] We are not convinced that the IIROC Hearing Panel overlooked evidence that TDSI condoned or encouraged the entry of artificial bids that were in the context of the market. We find that the IIROC Hearing Panel directed itself to the allegation that the TDSI supervisors condoned the artificial bidding and considered the evidence on which IIROC Staff now relies. That the Decision does not refer, when analyzing the allegations against TDSI, to the specific evidence cited by IIROC Staff is not sufficient indication that they overlooked such evidence.

3. Did the IIROC Hearing Panel misapprehend evidence of TDSI representatives regarding what they considered to be manipulative activity or indicia of manipulative activity?

[103] Lastly, IIROC Staff alleges that the IIROC Hearing Panel misapprehended evidence of what individuals at TDSI considered to be manipulative activity or indicia of manipulative activity. We note that this alleged ground for intervention in the Decision overlaps substantially with the two previous allegations by IIROC Staff that the IIROC Hearing Panel overlooked or misapprehended evidence.

[104] With respect to this ground of review, both IIROC Staff and TDSI are in agreement that we should not place significant weight on the IIROC Hearing Panel's statement that TDSI had an "honest but erroneous interpretation of UMIR Policy", though for different reasons. IIROC submits we should place little weight on it because other evidence from Tucker and Dingwall shows that they understood that bidding in the context of the market without a bona fide intention to trade *was* contrary to UMIR. TDSI submits we should place little weight on it because the IIROC Hearing Panel had clearly come to its conclusion on other grounds. As noted below, we too have struggled to reconcile the IIROC Hearing Panel's statements in paragraphs 457 and 461 to 464 with its findings about TDSI's supervisory practices earlier in the Decision.

[105] As elaborated below (see paragraphs [126] to [143]), we read the findings in the Discussion section of the Decision where the IIROC Hearing Panel comments on TDSI's "honest but erroneous understanding of UMIR Policy" as a critique of the then-existing technological configuration of the compliance system at TDSI.

[106] Although statements at paragraphs 457 and 461 to 464 of the Discussion section may appear to suggest that the IIROC Hearing Panel's view was that TDSI did not consider bids within the context of the market to be capable of being artificial, there are other aspects of the Decision that clearly support the opposite conclusion. In this regard, we would point to the IIROC Hearing Panel's acceptance of Dingwall, Tucker and Cooper's testimony about the components of their approach to supervision, and we note in particular Dingwall and Tucker's testimony about what could constitute artificial bidding.

[107] We are not satisfied that the IIROC Hearing Panel did not consider the evidence concerning Tucker and Dingwall's approach to supervision when it drew its conclusion with respect to the allegations against TDSI. In fact, the record indicates that the IIROC Hearing Panel appropriately considered the specific evidence that IIROC Staff is alleging it overlooked or misinterpreted. In our view, taken overall, the Decision affirms that bidding in the context of the market is capable of being artificial and finds that the TDSI supervisors understood that. This finding is consistent with the IIROC Hearing Panel's conclusion that the supervisory system at TDSI was adequate.

[108] For the sake of completeness, we observe that we do not find IIROC Staff's argument concerning the position TDSI took before the IIROC Hearing Panel particularly relevant to our evaluation of the Decision and its treatment of the evidence.

B. Did the IIROC Hearing Panel err in law?

[109] IIROC Staff alleges that the IIROC Hearing Panel erred in law or proceeded on an incorrect principle by adopting as an explanation for why TDSI did not prevent or detect the TDSI Traders' artificial closing bid activity that TDSI made an "honest but erroneous interpretation of UMIR". IIROC Staff notes that the IIROC Hearing Panel found numerous artificial closing bids by the TDSI Traders and rejected the notion that bids in the context of the market cannot be considered artificial under UMIR. IIROC Staff submits that given this finding, it cannot follow that "an honest but erroneous interpretation" of UMIR 2.2 absolves TDSI of liability for a failure to supervise its traders as required by UMIR Rule 7.1 and Policy 7.1.

[110] Addressing this allegation requires that we consider closely the IIROC Hearing Panel's basis for its conclusion that TDSI had not failed to comply with its supervisory obligations. We first consider the framework of supervision requirements imposed by UMIR, then the IIROC Hearing Panel's application of these requirements to the facts before them. Finally, we address the comments related to supervision in the Discussion section of the Decision.

(a) What does UMIR require with respect to supervision?

[111] As set out above, UMIR Rule 7.1 requires, among other things, that Participants adopt written policies and procedures to ensure compliance with UMIR and each Policy.

[112] Part 3 of UMIR Policy 7.1, which deals with *Minimum Compliance Procedures for Trading on a Marketplace*, provides a list of non-exhaustive minimum compliance review procedures for monitoring trading. With respect to monitoring for Establishing Artificial Prices under UMIR Rule 2.2 and Policy 2.2, the following minimum compliance review procedures are listed:

- review tick setting trades entered at or near close
- look for specific account trading patterns in tick setting trades
- review accounts for motivation to influence the price
- review separately, tick setting trades by Market on Close (MOC) or index related orders

The same chart notes the following minimum compliance review procedures for a Grey or Watch List (as defined in paragraph [31], above):

- review for any trading of Grey or Watch List issues done by proprietary or employee accounts

[113] The guidelines provided by UMIR Policy 7.1 with respect to reviewing for activity covered by UMIR Rule 2.2 by and large do not speak to reviewing orders specifically, but rather focus on reviews of activity relating to trades. However, UMIR Rule 2.2 and Policy 2.2, compliance with which UMIR Policy 7.1 is intended to promote, expressly prohibits deceptive or manipulative activity for both orders and trades. Several Market Integrity Notices specifically remind Participants of their supervision responsibilities for detecting artificial prices in both trades and orders (MIN 2002-021, MIN 2003-027, MIN 2004-003, MIN 2005-011). In addition, MIN 2003-025, Guidelines on Trading Supervision Obligations states:

> Part 3 of Policy 7.1 sets out a framework for the **minimum** compliance procedures to be used to monitor trading on a marketplace. Participants are reminded that their compliance procedures should be modified to take account of:
>
> - new or amended Rules or Policies as made from time to time;
> - interpretations of UMIR as published by RS as a Market Integrity Notice.

(emphasis in original)

In any case, TDSI did not dispute that the requirement to review traders' activity for the potential to artificially influence prices is not limited to a review of trades, but also includes orders.

(b) The IIROC Hearing Panel's application of UMIR requirements to TDSI's supervisory system

[114] TDSI's supervision system involved multiple components related to the review of traders' activity. In addition to real time trade desk supervision, the Decision notes that TDSI also employed additional levels of supervision and trade oversight. The Decision describes TDSI's two-tiered trade monitoring structure as follows:

> (a) Trade Desk Supervision, divided into:
>
> (i) real time Trade Desk Supervision of the Proprietary Traders;
>
> (ii) post trade Supervisory Group; and
>
> (b) Compliance Department post trade review (headed by Cooper)
>
> (Decision, *supra* at para. 403)

[115] We note that the systematic review procedures employed by the post trade Supervisory Group and the Compliance Department monitored trades, as opposed to orders. IIROC Staff's allegations with respect to inadequate supervision relate to TDSI's supervision of orders, rather than trades.

[116] The IIROC Hearing Panel considered the order-related activity reviewed by TDSI in its analysis of the Alleged Failure of Supervisory Practices and Procedures. The IIROC Hearing Panel found:

> During the Relevant Period a record of executed trades was available that enabled the Trade Supervision Group and Cooper's second tier Compliance to carry out systematic procedures for post trade reviews. However, there was no tool available to TDSI to monitor real time orders (i.e. bids and offers). Consequently, there was no systematic procedure, manual or otherwise to review orders. Tucker said:
>
> > Q. So that your review of orders was really more either random or *ad hoc*? In other words, it didn't follow an articulated procedure?
> >
> > A. Recall there was no -- there was no software available on the street to the participants to monitor real time orders so each participant, as part of their supervisory responsibilities, had their own methodology of reviewing orders. So I would say we reviewed orders, not on an *ad hoc* basis. It was done daily but it was certainly done in a manual type of

> fashion until we had – there was software commercially available to do it – to help us supplement the process.
>
> Q. But it was in the nature of a more random review; isn't that fair?
>
> A. Okay. That would be fair.

(Decision, *supra* at para. 434)

[117] In our view, this excerpt from the Decision makes clear that the IIROC Hearing Panel's approach to the analysis of supervision was that a review of orders as well as trades was required as part of an adequate supervisory system and that the Panel turned its mind to understanding how, in the absence of comprehensive automated tools, TDSI fulfilled this obligation.

[118] The Decision identifies the three methods of oversight and review noted above: (1) real time, random monitoring of orders and trades through Trade Desk Supervision; (2) post trade software surveillance and review by the Supervisory Group; and (3) post trade software surveillance and review by the Compliance Department. In other words, the Decision recognizes that the supervisory system at TDSI involved multiple components, comprised of technological monitoring capability, manual, random monitoring and judgment on the part of the trade desk supervisors and the compliance group as to how to monitor effectively for many potential rule violations or improper behaviour.

[119] The IIROC Hearing Panel notes at several points in the Decision that identifying artificial bids in the context of the market is difficult. They point to the multiple factors that need to be considered including motive, and trading patterns (Decision, *supra* at para. 17). In fact, the IIROC Hearing Panel agreed that the core of the original allegations made by IIROC Staff and "really what this case is all about" was a "*consistent pattern* of Artificial Closing Bids" (Decision, *supra* at para. 53, emphasis in original). The IIROC Hearing Panel notes in paragraph 78 of the Decision that "this is not a typical stock manipulation case. The conduct of the Individual Respondents is much more subtle ..."

[120] The IIROC Hearing Panel further stressed the importance of looking at the "whole of the evidence" including the direct evidence of instant messages and telephone calls and circumstantial evidence of motive and trading patterns when it determined that the Individual Respondents had engaged in the improper practice of making artificial closing bids (Decision, *supra* at paras. 190 and 191).

[121] Emphasizing the difficulty in detecting a pattern of artificial bidding, the IIROC Hearing Panel found that "The time required to do this would have been completely beyond the capacity of Dingwall and Tucker ..." (Decision, *supra* at para. 440). They highlight the TDSI Compliance Department's review of trading by Nott and Sadeghi as an example of the time and difficulty involved:

> In affirmation of the time that would be required to establish a pattern of bidding one need only look at the testimony of Cooper describing what he did in July 2006 to evaluate whether eight traders, including Sadeghi and Nott, engaged in improper trading during the month of October 2005. Using a sophisticated

> software program called Compliance Explorer and applying his considerable skill, Cooper was able to compile sufficient information to re-create the October 2005 market data and do certain tests relating to late bids ("**October 2005 Analysis**") Cooper said this analysis took him "weeks" to perform. …
>
> (Decision, *supra* at para. 440).

[122] Specifically with respect to reviewing orders, the IIROC Hearing Panel concluded that with no real time software surveillance system available to monitor orders during the relevant period, random review was the only pragmatic alternative (Decision, *supra* at para. 437).

[123] We note that, notwithstanding the limitations with real time order supervision, TDSI was able to identify problems with the trading activity of two of the TDSI Traders, which became the subject matter of the IIROC hearing. Ultimately, TDSI's supervision policies and procedures enabled it to detect the impugned trading activity engaged in by Nott and Sadeghi. This led to further analysis on the part of the Compliance Department, which then identified potential issues with order activity, so called 'window dressing', and caused them to report on it to RS in the Gatekeeper Report.

[124] The IIROC Hearing Panel found that TDSI had an acceptable supervision system under UMIR Rule 7.1, despite the fact that TDSI was unable to identify the improper late day bidding in the context of the market. The IIROC Hearing Panel took into account the limitations of TDSI's supervision technology. However, it did so as part of its broader consideration of the overall supervision system in place at TDSI:

> … There was no software program available that was designed to detect late bids. There was no flag or signal on the monitor screens in the trade room that specifically alerted late bids. Having regard to these facts and the trade room scenario relating to detecting and investigating late bids (fully described in the Reasons below) the Panel finds that the random approach review employed by Dingwall and Tucker was realistic and reasonable. …
>
> (Decision, *supra* at para. 400)

[125] Ultimately, the IIROC Hearing Panel dismissed the allegations against TDSI after an adequate consideration of the requirements of UMIR Rule 7.1 and Policy 7.1 and how they were implemented by TDSI.

(c) Was TDSI's "erroneous understanding of UMIR" central to the IIROC Hearing Panel's conclusion?

[126] In its allegations that the IIROC Hearing Panel erred in law or proceeded on an incorrect principle, IIROC Staff focuses on the section of the Decision entitled "Discussion of the October 2005 Analysis". This section begins with the statement: "The following discussion of the October 2005 Analysis delineates the fundamental flaw in the TDSI compliance monitoring system" (Decision at para. 457). In this final section of the Decision, the IIROC Hearing Panel observes that:

> This approach to bidding explains why Dingwall and Tucker would not be concerned when a late bid triggered the Watch list. All Nemy's late bids in TIC were less than the price of the last trade (which they could easily see) and therefore in the context of the market
>
> Cooper did not develop a trading system. He analysed the existing system. His analysis confirms Nott's evidence that maintaining the price of a stock by bidding within the context of the market was the accepted standard at TDSI and not high closing.
>
> Dingwall and Tucker did not detect the late bids IIROC Staff says should have been identified because they were using an alert system that was different than the alert system prescribed by IIROC. The reason for the different alert systems was an honest but erroneous interpretation of UMIR Policy.
>
> (Decision, *supra* at paras. 462 to 464)

[127] IIROC Staff submits that paragraph 464 of the Decision shows that the IIROC Hearing Panel accepted that, because of their "honest but erroneous" interpretation of UMIR 2.2, TDSI did not adequately design or implement their supervisory system; that is, that it had a "fundamental flaw". We acknowledge that if the IIROC Hearing Panel had based its conclusion with respect to TDSI on a finding that TDSI had an honest but erroneous interpretation of UMIR, it may well have erred in law. As a result, we have considered carefully the meaning of paragraphs 462 to 464 of the Decision.

[128] We accept that there is some inconsistency between saying that TDSI had an erroneous interpretation of UMIR and therefore did not program an alert that would select bids that were in the context of the market for further scrutiny, and saying as the IIROC Hearing Panel does earlier in the Decision, that the method used to supervise orders was reasonable. The meaning of paragraph 464 is further confused by the fact that, in answer to a question posed at the Commission hearing, IIROC Staff acknowledged that there is no "alert system prescribed by IIROC" set out in UMIR.

[129] In our view, however, the IIROC Hearing Panel's earlier conclusion with respect to the allegations against TDSI is based not only on considering the alerts programmed into the compliance system by TDSI, which it found to be flawed, but on TDSI's overall system of supervision, which provided additional layers of oversight (see paragraphs [114] and [118]).

[130] We do not find that the IIROC Hearing Panel's reference to TDSI's "erroneous interpretation of UMIR Policy" was central to its findings with respect to the adequacy of TDSI's supervision. The IIROC Hearing Panel makes this observation, having already considered the four allegations by IIROC Staff of failure to supervise, and after having concluded that all four allegations should be dismissed.

[131] We take the view that the IIROC Hearing Panel did not dismiss the allegations of failure to supervise on the basis of TDSI's honest but erroneous interpretation of UMIR 2.2, but on the basis of what they considered to be adequate policy and practice with respect to detecting inappropriate bidding activity.

[132] We see no error in law or principle in the IIROC Hearing Panel's conclusion that TDSI's trading supervision policies and procedures were in accordance with the requirements of UMIR Rule 7.1 and Policy 7.1. The IIROC Hearing Panel properly considered the policies and procedures in place at TDSI and the requirements of UMIR Rule 7.1 and Policy 7.1, taking into account the context of standards in the industry and:

> During the Relevant Period TDSI implemented written policies and procedures that covered its entire business to ensure compliance with UMIR Rules and UMIR Policy including the Rules and Policy governing market manipulation.
>
> Cooper said that the TDSI system of supervision and compliance was consistent with industry standards and practice elsewhere on the street. The Panel members are in accordance with this statement.
>
> (Decision*, supra* at paras. 407 and 408)

[133] In addition, in its allegations, IIROC Staff point to the proposition advanced by TDSI and the TDSI Traders that the primary determinant of whether a bid was artificial was whether it was "in the context of the market". IIROC Staff states that "This argument was rejected by the Hearing Panel in the Decision as it relates to the manipulative bidding activity of the five traders but nevertheless becomes the cornerstone of the hearing Panel's reasons for excusing TDSI's supervisory failures" (Factum of IIROC Staff at para. 95).

[134] We accept IIROC Staff's submission that the fact that a bid is in the context of the market is not sufficient to determine that it is not artificial. This position is amply supported by the findings and statements of the IIROC Hearing Panel in the Decision itself and by case law cited to us by IIROC Staff.

[135] For example, in a previous RS decision, *In the matter of Michael Bond*, RS Decision dated March 7, 2007 (RS 2007-001) ("***Bond***"), a proprietary trader was found to have entered orders to create an artificial bid price in three stocks. The hearing panel in *Bond* found that by placing orders that were not consistent with actual demand for the stocks, Bond contravened UMIR Rule 2.2 and Policy 2.2:

> The Panel notes that orders placed so late in the trading session for thinly traded stocks were unlikely to be filled. In the absence of any other explanations, the panel is not satisfied with Bond's explanation that he wished to acquire additional stock and concludes that his intention was to create an artificial bid to influence management's perception and/or to influence the market's perception in general.
>
> (*Bond, supra* at page 5)

[136] Similarly, in the 1990 Toronto Stock Exchange decision *Re D.K. Trevor-Wilson*, [1990] T.S.E.D.D. No. 20, a panel of the Toronto Stock Exchange found that a trader who placed bids less than the price of the last sale contravened Toronto Stock Exchange prohibitions against establishing artificial prices. That decision states at page 5:

A statement made to Mr. A. Derek Hatfield, an Exchange investigator by Mr. Trevor-Wilson on January 30, 1990 which was admitted in evidence, in part, reads:

> Q. On the 11/Jan/90, you put in a bid of $1.00 at 15.59.6, what can you tell me about this?
>
> A. Someone had put in $0.01 for 10,000 shares which is ridiculous. There were no other bids and I waited all day to see if other bids would show. So I put in a bid of $1.00 in order to make my position in the stock not be worthless on the books bearing in mind that I was well under the last sale of the stock which was at $1.25 on the 08/Jan/90. The exactly same thing happened on the 12th and the 15th only the prices would be different, but all below the last sale. They all were done for the same reason, the evaluation of my account for my firm. This to me is not a new thing, its [*sic*] a very common practice on the street, to make inventory positions look better on a daily, weekly or monthly basis as long as you don't go over the last sale which is illegal.

We think that this statement makes it clear that bids were made by him for the purpose of increasing the inventory value of the shares which he had purchased and not for the purpose of establishing a genuine market in the shares.

[137] However, we do not agree with IIROC Staff's contention that a rejection of the proposition that a bid in the context of the market could be artificial was "the cornerstone of the hearing Panel's reasons for excusing TDSI's supervisory failures" (Factum of IIROC Staff at para. 95). In fact, throughout the entire analysis of the four allegations against TDSI (Decision, *supra* at paras. 393 to 456) the only mention of the proposition that a bid could not be artificial provided it was in the context of the market occurs in paragraph 369 where the IIROC Hearing Panel reiterates its dismissal. Contrary to IIROC Staff's position, it does not appear to us that the argument regarding the "context of the market" formed the basis for the dismissal by the IIROC Hearing Panel of the allegations concerning TDSI's supervision.

[138] In its Decision, the IIROC Hearing Panel delineated several factors that would contribute to a finding of artificial bidding, with the bid price being one element. The IIROC Hearing Panel considers evidence from Cooper that factors other than "the context of the market" would be used to detect artificial bidding. We see that in the case of Nott and Sadeghi, when others factors were present, TDSI did identify late bids in the context of the market as potentially artificial.

[139] Rather than being the "cornerstone" of the IIROC Hearing Panel's Decision with respect to TDSI, we find that the Discussion amounts to a critique of one element of TDSI's after-the-fact compliance monitoring system. The IIROC Hearing Panel notes that the automated, after-the-fact monitoring system implemented by TDSI was not programmed to select late bids for further review if they were priced below the last sale. It does not invalidate the overall finding of adequate supervision for the IIROC Hearing Panel to express a criticism of one element of that regime.

[140] Finally, we acknowledge that the concluding statement of the Discussion, "[t]he approach to bidding set out in these reasons closes the book on the practice of bidding within the context of the market in order to maintain the value of a stock and opens a new book of bidding with true market supply and demand" (Decision, *supra* at para. 465), is somewhat hyperbolic and is at odds with IIROC rules, RS warnings and previous cases. However, we do not take this statement to mean that the IIROC Hearing Panel considered that the practice of artificial bidding within the context of the market had been countenanced by TDSI or IIROC rules or that its Decision was novel in endorsing a new practice of bidding in accordance with "true market supply and demand".

[141] Notwithstanding the finding in the Decision that TDSI met its obligations under UMIR Rule 7.1 and Policy 7.1, it appears to us that the IIROC Hearing Panel took the opportunity to clearly reinforce IIROC's expectation that Participants should put in place adequate procedures and technologies to supervise for closing orders that are in the context of the market, but are nonetheless artificial.

[142] We do not agree that the IIROC Hearing Panel erred in finding that the TDSI Traders breached UMIR Rule 2.2 and Policy 2.2, while not making a corresponding finding against TDSI for its failure to supervise the TDSI Traders. As noted above, the IIROC Hearing Panel recognized the multiple components in TDSI's system of supervision: the surveillance technology, as well as the additional layer of supervision requiring judgment by the trade desk supervisors and by Compliance, and found them to be adequate.

[143] Ultimately, we accept that the IIROC Hearing Panel came to its conclusion about the adequacy of TDSI's supervision on grounds other than that TDSI had an erroneous understanding of what they were supervising for. The fatal flaw referenced by the IIROC Hearing Panel refers to only one element of a compliance and supervision system, and not the system in its entirety. The IIROC Hearing Panel analyzed various parts of TDSI's compliance and supervisory system and, considering them together, concluded that the system was acceptable.

[144] For these reasons, we do not find that the IIROC Hearing Panel erred in law or proceeded on an incorrect principle when it dismissed the allegations against TDSI.

VI. CONCLUSION

[145] Over a 24-day hearing, the IIROC Hearing Panel heard substantial evidence, including testimony by individuals principally responsible for supervision of the TDSI Traders. Following the hearing, the IIROC Hearing Panel issued its lengthy Decision, in which its analysis with respect to all the allegations is set out. The evidence relied on is laid out in great detail by the IIROC Hearing Panel in its Decision, and the conclusion following consideration of that evidence, that TDSI had adequate supervisory practices and procedures, is defensible.

[146] While it is possible that we may have come to a different conclusion on the evidence, it is not our role to second-guess the reasoned Decision of the IIROC Hearing Panel. We do not find anything so objectionable about the Decision that would provide the grounds required to intervene in the Decision.

[147] Nor do we find that the IIROC Hearing Panel's statement regarding the erroneous understanding of UMIR was central to its findings with respect to TDSI's supervision of the TDSI Traders. The Decision makes clear the obligation of Participants to supervise both trades and orders, including orders that are in the context of the market, so as to comply with their obligations under UMIR Rule 7.1 and Policy 7.1. We do not find an error of law or principle in the IIROC Hearing Panel's Decision.

[148] The Application is dismissed.

Dated at Toronto this 19th day of July, 2013.

"Mary G. Condon" *"Judith N. Robertson"*

Mary G. Condon Judith N. Robertson