Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
P.O. Box 55, 22nd Floor, 20 Queen Street West, Toronto ON M5H 3S8
CP 55, 22e étage, 20, rue queen ouest, Toronto ON M5H 3S8

IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF NORTHERN SECURITIES INC., VICTOR PHILIP ALBOINI, DOUGLAS MICHAEL CHORNOBOY AND FREDERICK EARL VANCE

AND

IN THE MATTER OF DECISIONS OF A HEARING PANEL OF THE INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA DATED JULY 23, 2012 AND NOVEMBER 10, 2012

DECISION AND REASONS
(Section 21.7 and Subsection 8(3) of the *Securities Act*)

Hearing:	February 14, 15 and 20, 2013	
Decision:	December 19, 2013	
Panel:	James E. A. Turner	- Vice Chair and Chair of the Panel
	Judith N. Robertson	- Commissioner
Counsel:	David Hausman Jeffrey A. Kaufman	- For the Applicants
	James D. G. Douglas Charles Corlett	- For the Investment Industry Regulatory Organization of Canada
	Yvonne B. Chisholm Catherine V. Weiler	- For the Ontario Securities Commission

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DECISION AND REASONS

A. INTRODUCTION

[1] Northern Securities Inc. ("**NSI**"), Victor Philip Alboini ("**Alboini**"), Douglas Michael Chornoboy ("**Chornoboy**") and Frederick Earl Vance ("**Vance**") (collectively, the "**Applicants**") brought an application (the "**Application**") under section 21.7 of the Securities Act, R.S.O. 1990, c. S.5, as amended (the "**Act**") for a hearing and review by the Ontario Securities Commission (the "**Commission**") of a decision on the merits and on sanctions and costs (*Re Northern Securities* (2012) IIROC 63, the "**IIROC Decision**") of a hearing panel (the "**IIROC Panel**") of the Investment Industry Regulatory Organization of Canada ("**IIROC**"). The hearing conducted by the IIROC Panel on the merits and on sanctions and costs is referred to as the "**IIROC Hearing**".

[2] The Application was heard over three days on February 14, 15, and 20, 2013 (the "**Application Hearing**"). These are our reasons and decision on the Application.

1. The Applicants

[3] The following background facts were admitted by the Applicants in the IIROC Hearing and are set out in paragraph 4 of the IIROC Decision:

> 1. NSI is a Type 2 introducing broker. At all material times, being from 2006 to 2011, NSI was a registrant of the IDA, and subsequently IIROC. At all material times, NSI was also registered as an Investment Dealer and was a Participating Organization of the Toronto Stock Exchange ("TSX") and therefore was a Participant under the Universal Market Integrity Rules ("UMIR").
>
> 2. NSI is a full service firm with its head office in Toronto, Ontario. NSI carries on retail trading, institutional trading and corporate finance work.
>
> 3. Alboini has been NSI's Ultimate Designated Person ("UDP") and its Chief Executive Officer ("CEO") since June 1999. Alboini has also been a Registered Representative ("RR") at NSI since at least 1999.
>
> 4. Chornoboy has been NSI's Chief Financial Officer ("CFO") since June 2006 and Vance has been NSI's Chief Compliance Officer ("CCO") since October 2006.
>
> 5. At all material times, Alboini, Chornoboy and Vance were registrants of the IDA and, subsequently, IIROC.
>
> 6. NSI was at all material times wholly owned by Northern Financial Corporation ("NFC").

7. NFC is a public company and its shares are traded on the TSX.

8. At all material times, Alboini was a shareholder of NFC and its President and CEO.

9. Jaguar Financial Corporation ("Jaguar") is a publicly traded company whose shares are traded on the TSX. At all material times, NFC and Alboini were shareholders of Jaguar and Alboini was its President and CEO. During the material time, Jaguar opened and held multiple accounts at NSI, and Alboini was the RR for all of those accounts.

10. Chornoboy has been the CFO for NFC since June 2006 and for Jaguar since December 2006.

11. At all material times, Jaguar, NFC and NSI shared their physical premises.

We have adopted the foregoing definitions for purposes of these reasons.

2. History of the Matter

(a) The IIROC Allegations

[4] IIROC issued a Notice of Hearing on July 29, 2011, setting out the allegations against the Applicants. The allegations that were addressed at the IIROC Hearing were the following:

> Count 1
>
> Between August and November 2008, Alboini, as Ultimate Designated Person and a Registered Representative at NSI, engaged in a trading practice which improperly obtained access to credit for his client, Jaguar Financial Corporation, and in doing so risked the capital of both NSI and its carrying broker, thereby engaging in business conduct unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1.
>
> Count 2
>
> Between August and November 2008, Vance, as Chief Compliance Officer, failed to adequately supervise Alboini's trading activity involving Jaguar Financial Corporation and other NSI clients, contrary to IIROC Dealer Member Rules 1300.1, 1300.2, and 2500.
>
> Count 3
>
> From 2006 to 2010, NSI, Alboini, as Ultimate Designated Person, and Vance, as Chief Compliance Officer, repeatedly failed to ensure that:
>
> > (a) NSI corrected deficiencies found in three business conduct compliance reviews and one trading conduct review; and

(b) NSI had adequate policies, procedures and practices in place;

thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By-law 29.1, IIROC Dealer Member Rule 29.1, UMIR 7.1 and UMIR Policy 7.1.

Count 5(a)

NSI, Alboini, as Ultimate Designated Person, and Chornoboy, as Chief Financial Officer from February 2008 to February 2009, filed or permitted to be filed inaccurate Monthly Financial Reports which failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital, contrary to IDA By-law 17.2, and IIROC Dealer [*sic*].

(IIROC Decision, *supra*, at para. 2)

We will refer to these allegations as **Count 1**, **Count 2**, **Count 3** and **Count 5(a)**, respectively.

[5] At the beginning of the IIROC Hearing, IIROC Staff withdrew the allegations in Count 4 and Count 5(b) of the IIROC Notice of Hearing (IIROC Decision, *supra*, at para. 3).

(b) The IIROC Decision

[6] The merits portion of the IIROC Hearing was held on May 7 to June 1, July 3, 4, and 23, 2012. The IIROC Panel issued a formal decision and findings on the merits on July 23, 2012, with reasons to follow (IIROC Decision, *supra*, at para. 43; see paragraph 288 of these reasons).

[7] The IIROC sanctions and costs hearing was held on October 11 and 12, 2012.

[8] The IIROC Panel released the IIROC Decision on November 10, 2012. That decision included written reasons for the IIROC Decision on the merits and as to sanctions and costs.

[9] In the IIROC Decision, the IIROC Panel found that IIROC Staff had proved the allegations contained in Count 1, Count 2, Count 3 and Count 5(a). Specifically, the IIROC Panel's findings were as follows:

Count 1: Between August and November 2008, Alboini, as Ultimate Designated Person and a Registered Representative at NSI, engaged in a trading practice which improperly obtained access to credit for his client, Jaguar Financial Corporation, and in doing so risked the capital of both NSI and its carrying broker, thereby engaging in business conduct unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1.

Count 2: Between August and November 2008, Vance, as Chief Compliance Officer, failed to adequately supervise Alboini's trading activity involving Jaguar Financial Corporation and other NSI clients, contrary to IIROC Dealer Member Rules 1300.1, 1300.2, and 2500.

Count 3: From 2006 to 2010, NSI, Alboini, as Ultimate Designated Person, and Vance, as Chief Compliance Officer, repeatedly failed to ensure that NSI corrected deficiencies found in three business conduct reviews and one trading review, thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.

Count 5(a): NSI, Alboini, as Ultimate Designated Person, and Chornoboy, as Chief Financial Officer, from February 2008 to February 2009, filed or permitted to be filed inaccurate Monthly Financial Reports which failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital, contrary to IDA By-law 17.2 and IIROC Dealer [*sic*].

(IIROC Decision, *supra*, at para. 143)

[10] The IIROC Panel imposed the following sanctions and costs in the IIROC Decision:

Alboini: The Panel orders that Alboini pay a fine in the amount of $500,000 in respect of Count 1, in the amount of $100,000 in respect of Count 3 and in the amount of $25,000 in respect of Count 5(a), for a total fine of $625,000, and that Alboini pay costs in the amount of $125,000, such total fine and costs to be paid within 30 days of the date of the decision. The Panel also orders that Alboini disgorge the commissions earned by him in respect of the trades made in NSI's TA Account between August and November 2008, the amount thereof to be disclosed to IIROC by NSI and paid within 30 days of the date of this decision. The Panel also orders that Alboini be suspended from approval by or registration with IIROC in all capacities for two years commencing 14 days after the date of this decision, and that Alboini be permanently barred from approval by, or registration with IIROC as a UDP anywhere in the industry commencing 14 days after the date of this decision.

Vance: The Panel orders that Vance pay a fine of $25,000 in respect of Count 2 and a fine of $25,000 in respect of Count 3 for a total fine of $50,000, and that Vance pay costs in the amount of $50,000, such total fine and costs to be paid within 30 days of the date of the order. In addition, the Panel orders that Vance be suspended from approval by, or registration with IIROC in any supervisory capacity including acting as Chief Compliance Officer anywhere in the industry, for a period of 3 months commencing 14 days after the date of this order in respect of Count 2 and the same suspension for concurrent period [*sic*] of 3 months in respect of Count 3.

NSI: The Panel order [*sic*] that NSI pay a fine of $250,000 in respect of Count 3 and a fine of $50,000 in respect of Count 5(a), for a total fine of $300,000, and that NSI pay costs in the amount of $150,000, such total fine and costs to be paid within 30 days after the date of this decision.

Chornoboy: The Panel orders that Chornoboy pay a fine of $25,000 in respect of Count 5(a) and that he pay costs in the amount of $15,000, such fine and costs to be paid within 30 days after the date of this decision.

(IIROC Decision, *supra*, at paras. 254 to 257; see Schedule B)

The Application and Motion for a Stay

[11] On August 20, 2012, following the IIROC Panel's decision on the merits, the Applicants made the Application to the Commission requesting that the IIROC Decision be set aside, that the Commission dismiss or stay any further proceedings by IIROC relating to the IIROC allegations, and, in the alternative, that a new hearing be held before an independent IIROC panel.

[12] After the issuance of the IIROC Decision on the merits and with respect to sanctions and costs on November 10, 2012, the Applicants brought a motion to stay the sanctions and costs imposed on the Applicants by the IIROC Panel pending the determination of the Application. On November 19, 2012, the Commission granted a stay of the IIROC Decision until December 18, 2012, and the stay motion was adjourned to December 17, 2012 (*Re Northern Securities Inc.* (2012), 35 O.S.C.B. 10676). On December 17, 2012, the Commission ordered that the stay be extended until February 22, 2013 and that the hearing of the Application be scheduled for February 14, 15 and 20, 2013 (*Re Northern Securities Inc.* (2013), 36 O.S.C.B. 136).

[13] On the first day of the Application hearing, the Applicants requested that the stay of the IIROC Decision be extended pending the Commission's decision on the Application. IIROC Staff and Commission Staff did not oppose that extension. By order dated February 20, 2013, the Commission ordered that the stay be extended until 30 days after the issuance of the decision and reasons of the Commission on the Application or until further order of the Commission (*Re Northern Securities Inc.* (2013), 36 O.S.C.B. 2044).

B. PRELIMINARY MOTION

1. The New Evidence Motion

Applicants' Motion

[14] On the first day of the Application Hearing, the Applicants brought a motion to introduce new evidence that was not before the IIROC Panel. The new evidence included an affidavit of Alboini sworn January 31, 2013, an affidavit of Glen McFarland sworn February 1, 2013, and the biographies of two members of the IIROC Panel. The new evidence related to:

(a) financial commitments received by Alboini from third party investors;

(b) background financial information regarding the cross guarantees between the Jaguar Main Account and Jaguar Project Accounts;

(c) fees received by NSI through its dealings with the Jaguar Project Accounts;

(d) the consequences and impact of the IIROC Decision on sanctions and costs on the Applicants; and

(e) the biographies of two members of the IIROC Panel.

[15] The Applicants submitted that if the Commission determined that it should intervene in the IIROC Decision because one or more of the grounds set out in *Re Canada Malting Co.* (1986), 33 9 O.S.C.B. 3566 ("***Canada Malting***") applied (see paragraph 49 of these reasons), then any evidence would be admissible, not just new and compelling evidence.

[16] The Applicants submitted that there must be a "full record" before the Commission in order for the Commission to make any determination on the Application. The Applicants submitted that there was not a "full record" without the new evidence they proposed to introduce. The Applicants also submitted that they had taken a restrained approach in determining the new evidence that should be before the Commission on the Application.

IIROC Staff's Submission

[17] IIROC Staff submitted that there were two issues on the motion that the Commission must decide: (i) the scope of the Commission's discretion to admit new evidence on a hearing and review under section 21.7 of the Act, and (ii) whether the new evidence proposed to be introduced was "new and compelling" evidence that should be admitted.

[18] IIROC Staff submitted that any new evidence must be "new and compelling" evidence that was not before the IIROC Panel (in accordance with the fourth ground set out in *Canada Malting*; see paragraph 49 of these reasons). Once it is determined that the evidence is "new and compelling", then the Commission has the discretion whether to admit it or not. IIROC Staff submitted that none of the evidence proposed to be introduced was "new and compelling" and that all of that evidence could have been put before the IIROC Panel at the IIROC Hearing.

[19] IIROC Staff submitted that the evidence referred to in Alboini's affidavit was not new because it was known to the Applicants at the time of the IIROC Hearing on the merits, and it was not compelling because it would not have changed the IIROC Panel's decision.

[20] IIROC Staff also submitted that the evidence in the affidavit of Glen McFarland was not new because it was available to the Applicants at the time of the IIROC Hearing and was not compelling because it was hearsay, unaudited and wholly unsupported by any documentary evidence.

[21] IIROC Staff also submitted that the biographies of the two IIROC Panel members were not admissible on the Application because it is not open to or appropriate for the Commission to examine the degree of expertise of individual panel members. Further, that information was not "new and compelling".

Commission Staff's Submissions

[22] Commission Staff supported the IIROC request not to admit the new evidence and made the following submissions.

[23] Commission Staff noted that *Canada Malting* establishes the grounds upon which the Commission may interfere with the decision of a self-regulatory organization ("**SRO**").

[24] Commission Staff submitted that the new evidence relating to the background of the members of the IIROC Panel should not be admitted because the proper time and place to have impugned the experience of those panel members was at the IIROC Hearing. Commission Staff referred to the decision in *Re Youden* [2005] I.D.A.C.D. No. 52 ("***Youden***"), where the expertise of an Investment Dealers Association ("**IDA**") panel was objected to at the time the hearing was taking place. In *Youden,* the respondent argued that the IDA panel did not possess the necessary specialized expertise to adjudicate the case. That panel found that it did possess the necessary expertise (*Youden, supra,* at paras. 75 and 77) and summarized the relevant law as follows:

> In *Re Gareau, supra,* the law concerning both the application of the appropriate standards and the composition of hearing panels in relation to self-governing professions was, in our opinion, correctly set out. At page 14 of that decision, the Hearing Panel stated:
>
> > Also with respect to appropriate standards, superior courts in Canada have made clear that members of self-governing professions are uniquely and best qualified to establish the standards of professional conduct. Thus, a hearing panel of three, two of whom are members or former members of the profession, possess a specialized knowledge with respect to both ethics and standards that can be applied in a particular case. In *Re Milstein and Ontario College of Pharmacy. Et al.* (1977), 72 D.L.R. (3d) 2, Corey J., of the Ontario High Court, confirmed this principle and went on to say at p. 234:
> >
> > > Members of the profession can best determine whether the conduct of a fellow member has fallen below the requisite standards and determine the consequences. The peers of the professional person are deemed to have and, indeed, they must have special knowledge, training and skills that particularly adapts them to formulate their own professional standards and to judge the conduct of a member of their profession. No other body could appreciate as well the problems and frustrations that beset a fellow member.
>
> …
>
> Similarly in *Ripley and the Investment Dealers Assoc. (Business Conduct Committee),* [1990] N.S.J. No. 295, the Nova Scotia Supreme Court stated:
>
> > I agree with the respondent's statement that to require that evidence be given in proof of such issues as basic ethics and honesty would be an affront to the common sense, experience and

> intelligence of every professional Disciplinary Committee.
>
> (*Youden, supra,* at para. 76)

[25] Commission Staff submitted that the same principles apply to IIROC and Commission panels.

Law Regarding "New and Compelling" Evidence

[26] The Commission has addressed in previous decisions what constitutes "new and compelling" evidence for purposes of *Canada Malting* and the Commission's discretion to admit such evidence.

[27] In *Re HudBay Minerals Inc.* (2009), 32 O.S.C.B. 3733 ("***HudBay***"), the Commission stated that, on a hearing and review under section 21.7 of the Act, the Commission has original jurisdiction to make a decision and can in its discretion admit new evidence that was not before the decision maker below. The Commission stated at paragraph 112 of *HudBay* that:

> … In our view, we are entitled to consider not only the information and documents that were before the TSX in making its decision but also the additional information and evidence before us on this Application *(recognizing, however, that the Commission has the discretion to determine the evidence that it is prepared to admit in a review under section 21.7 of the Act).*
>
> [emphasis added]

[28] The Commission has taken a restrained approach in exercising its discretion to allow new and compelling evidence to be tendered. Specifically, in *Hahn*, the Commission emphasized that it is "… concerned with parties classifying as new, evidence which that party knew or ought to have known at the time of the [ruling below]" (*Hahn*, *supra*, at para.196). Further, the Commission addressed what is meant by "new and compelling evidence":

> Absent, compelling explanatory evidence to the contrary, we are of the view that in the circumstances of this case, *"new" means information that was not known to the party purporting to introduce it as new at the time of the SRO's decision.* …
>
> In our view, that information would be considered *"compelling" if it would have changed the SRO's decision, had it been known at the time of the decision.*
>
> [emphasis added]
>
> (*Hahn, supra,* at paras.197 and 198)

2. Decision on the New Evidence Motion

[29] In an oral ruling on February 14, 2013, we dismissed the Applicants' motion to tender new evidence.

[30] There is no general right of a party to introduce additional evidence on an application to us under section 21.7 of the Act. In order to establish that we should permit the introduction of additional evidence, the applicable test is whether or not that evidence is "new and compelling" within the meaning of *Canada Malting*.

[31] With respect to the five categories of new evidence proposed to be introduced (referred to in paragraph 14 above), we found that the first three categories were not new evidence. That evidence could have been submitted to the IIROC Panel in the IIROC Hearing. Further, we doubted whether that evidence would have been compelling within the meaning of *Hahn* (see paragraph 28 above).

[32] With respect to whether evidence on the impact of the sanctions imposed on the Applicants is new or compelling evidence, we note that evidence could have been submitted to the IIROC Panel in connection with its consideration of potential sanctions. The potential impact of sanctions on the Applicants was a relevant consideration for the IIROC Panel in imposing sanctions and the IIROC Panel was alive to that issue. The Applicants were also aware that the potential impact of sanctions on the Applicants would be an issue. Further, we do not accept that, as a general principle, a respondent should be entitled after the imposition of sanctions to submit new evidence as to the impact that those sanctions would have on the respondent. (This proposition does not apply to the hearing *de novo* on sanctions and costs as a result of our conclusion in paragraph 305 of these reasons (see paragraph 344 of these reasons).

[33] In our view, it was not appropriate for us to inquire into the specific expertise of the members of the IIROC Panel. Absent extraordinary circumstances, a panel constituted by IIROC should be treated as having the necessary expertise to address the matters before it. Further, if the Applicants wished to challenge the expertise of the IIROC Panel, that challenge should have been made to the IIROC Panel at the commencement of the IIROC Hearing, not after the hearing on the merits and after sanctions were imposed. In any event, that evidence was not new and was unlikely to have been compelling within the meaning of *Hahn*.

[34] Based on the foregoing, we did not permit the introduction by the Applicants of the evidence referred to in paragraph 14 above).

C. ISSUES RAISED BY THE APPLICATION

[35] The principal issues we must determine on this hearing and review are the following:

1. What is the standard of review applicable to our consideration of the Application?

2. Did the IIROC Panel proceed on an incorrect principle or err in law in making its findings on Counts 1, 2, 3 and/or 5(a)?[1]

[1] Based on the evidence and submissions to us, none of the other grounds for intervention based on *Canada Malting* were in issue (see paragraphs 49 and 50 of these reasons).

3. Was the sanctions and costs hearing procedurally unfair to the Applicants and were the sanctions and costs imposed on the Applicants proportionate to their misconduct?

4. Was there a reasonable apprehension that the members of the IIROC Panel were biased?

D. RELEVANT LAW

1. Mandate of the Commission and Authority to Review Decisions of an SRO

[36] Section 21.7 of the Act authorizes the Commission to conduct a hearing and review of a decision of an SRO, such as IIROC. That section 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.

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

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

[38] The Commission's power on review must be exercised in accordance with the two fundamental purposes of the Act: (i) to provide protection to investors from unfair, improper or fraudulent practices, and (ii) to foster fair and efficient capital markets and confidence in capital markets (Section 1.1 of the Act).

[39] In addition, the Act sets out important principles that the Commission will apply in pursuing the purposes of the Act. Relevant to this matter are the following principles:

> …
>
> 2. The primary means for achieving the purposes of this Act are,
>
> …
>
> iii. Requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.
>
> …

4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.

(Section 2.1 of the Act)

2. Recognition and Role of SROs

[40] SROs, such as IIROC, operate within a regulatory framework, subject to the oversight of the Commission. Each SRO regulates its own members and industry and is recognized by the Commission by order. The *IIROC Recognition Order*, (2008) 31 O.S.C.B. 5615, as amended, (the "**Recognition Order**") states that:

> The Commission recognizes IIROC as a self-regulatory organization pursuant to subsection 21.1(1) of the Act ...
>
> (Recognition Order, *supra*, at p. 5616)

[41] The Recognition Order states that IIROC has an obligation to:

> …
>
> c. establish, administer and monitor its rules, policies and other similar instruments (Rules);
>
> d. enforce compliance with its Rules by Dealer Members and others subject to its jurisdiction;
>
> …
>
> (Recognition Order, *supra*, at p. 5615)

[42] The Recognition Order contains detailed terms and conditions with which IIROC must comply in carrying out its regulatory functions, including requirements that IIROC regulate to serve the public interest in protecting investors and market integrity and that IIROC establish and maintain rules ("**IIROC Rules**" or "**Rules**") that (i) are designed to prevent fraudulent and manipulative acts and practices, (ii) promote just and equitable trading practices, and (iii) impose a duty to act fairly, honestly and in good faith.

[43] IIROC is required by the Act to "regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices" (subsection 21(4) of the Act). This role has been recognised in the case law The Court stated in *Re Derivative Services Inc.*, [1999] I.D.A.C.D. No. 29 ("***Derivative Services***") at para. 27; (2002), 25 O.S.C.B. 8279 (O.S.C); aff'd [2005] O.J. No. 2118 (Div. Ct.); leave to appeal to Court of Appeal denied) that:

> Once recognized, stock exchanges and SRO's are required to "regulate the operations and the standards of practice and business conduct" of their members and their members' representatives in accordance with their by-laws, rules, regulations, policies, procedures, interpretations and practices (OSA, ss. 21(4) and 21.1(3)). The OSC may make any decision that it considers to be in the public

interest with respect to any of such rules and practices (OSA, ss. 21(5) and 21.1 (4)), and a recognized stock exchange or SRO must obtain approval of the Commission before it may surrender its recognition (s. 21.4)

[44] IIROC is required under the Recognition Order to carry out its regulatory functions and to adopt Rules to do so. The terms and conditions to which IIROC is subject include the following:

> **8. Performance of Regulatory Functions**
>
> a. IIROC must set Rules governing members and others subject to its jurisdiction.
>
> b. IIROC must administer and monitor compliance with the Rules and securities laws by members and others subject to its jurisdiction and enforce compliance with the Rules by Dealer Members, including ATSs, and others subject to its jurisdiction. In addition, IIROC will provide notice to the Commission of any violations of securities legislation of which it becomes aware.
>
> **9. Rules**
>
> a. IIROC must establish and maintain Rules that:
>
> …
>
> (ii) are designed to:
>
> (A) ensure compliance with securities laws,
>
> (B) prevent fraudulent and manipulative acts and practices,
>
> (C) promote fair and equitable principles of trade and the duty to act fairly, honestly and in good faith,
>
> …
>
> (G) provide for appropriate discipline of those whose conduct it regulates;
>
> …

(Recognition Order, *supra*, Appendix A at p. 7)

[45] Accordingly, IIROC has an obligation (i) under the Act to regulate the standards of practice and business conduct of its members, and (ii) under the Recognition Order to establish, administer, and enforce Rules related to the proper business conduct of IIROC members.

[46] The Commission has oversight responsibility with respect to IIROC and the implementation and enforcement of its Rules. The Commission has the following authority, among others, with respect to IIROC Rules:

> **Commission powers** – The Commission may, if it is satisfied that to do so would be in the public interest, make any decision with respect to any by-law, rule,

> regulation, policy, procedure, interpretation or practice of a recognized self-regulatory organization.
>
> (Subsection 21.1(4) of the Act)

Under section 21.7 of the Act, any person directly affected by a direction, decision, order or ruling of an SRO may apply to the Commission for a hearing and review of the direction, decision, order or ruling.

[47] Accordingly, IIROC operates within a regulatory framework under which the Commission exercises substantial regulatory oversight. The proper enforcement by IIROC of its Rules is an important regulatory function that is exercised by IIROC in the best interests of investors and Ontario capital markets.

3. Grounds for Intervention in an SRO's Decision

[48] A hearing and review under section 21.7 of the Act is broader in scope than an appeal, which is usually limited to determining whether there has been an error in law or the contravention of a principle of natural justice (*Re Boulieris* (2004), 27 O.S.C.B. 1597 ("***Boulieris***") at para. 30; *Re Magna Partners Ltd.* (2011) 34 O.S.C.B. 8697 ("***Magna Partners***") at para. 41; and *Re Taub* (2007), 30 O.S.C.B. 4739 ("***Taub***") at para. 31).

[49] While the Commission has broad discretion under section 21.7 of the Act to intervene in a decision of an SRO, in practice the Commission has taken a more restrained view of that discretion. The Commission has held that there are five grounds upon which the Commission may intervene in a decision of an SRO. Those five grounds were established in *Canada Malting*, which was a hearing and review by the Commission of a decision of the Toronto Stock Exchange (now TSX). Those grounds are the following:

> 1. the [SRO] has proceeded on an incorrect principle;
>
> 2. the [SRO] has erred in law;
>
> 3. the [SRO] has overlooked material evidence;
>
> 4. new and compelling evidence is presented to the Commission that was not presented to the [SRO]; and
>
> 5. the Commission's perception of the public interest conflicts with that of the [SRO].
>
> (*Canada Malting*, *supra*, at 3587)

[50] The principal question on the Application is whether the IIROC Panel proceeded on an incorrect principle or erred in law. The introduction of new evidence was addressed separately on a motion brought by the Applicants (see paragraph 14 of these reasons). We have no reason to believe that the IIROC Panel overlooked material evidence or that our perception of the public interest conflicts with that of the IIROC Panel.

[51] The *Canada Malting* test has been endorsed in a number of subsequent Commission decisions, including *Boulieris, supra,* at para. 31, *HudBay, supra,* at para. 105, *Re Kasman and Anderson,* (2009) 32 OSCB 5729 at para. 44 and *Magna Partners, supra,* at para. 45.

[52] The Panel in *HudBay* commented on the Commission's jurisdiction where one of the grounds for intervention in *Canada Malting* applies:

> If the Commission concludes after considering and assessing these grounds that it ought to intervene in a decision pursuant to section 21.7 of the Act, the Commission then exercises original jurisdiction with respect to the ensuing hearing and review, as opposed to a more limited appellate jurisdiction (*Taub, supra,* at para. 29; *Re Boulieris* (2004), 27 O.S.C.B. 1597 ("*Boulieris*") at para. 28). As a result, the hearing and review is in the nature of a hearing *de novo* and new evidence may be tendered.
>
> In a hearing *de novo*, the Commission is free to substitute its own judgement for that of the TSX (*Taub, supra,* at para. 30). Such a hearing and review is broader in scope than an appeal, which is usually limited to determining whether there has been an error in law or whether a rule of natural justice has been contravened (*Taub, supra,* at para. 31 and *Boulieris, supra,* at para. 30).
>
> However, the Commission may also intervene if a decision is not made fairly; for example, where the Commission finds there was no evidence upon which the relevant conclusions could be supported (*Security Trading Inc. and the Toronto Stock Exchange* (1994), 17 O.S.C.B 6067 at 6105*;* see also *Berry, supra*, at para. 60).
>
> As noted above, the Commission may also intervene in a decision of a self-regulatory organization when that decision does not reflect the Commission's view of the public interest.
>
> (*HudBay, supra,* at paras. 106 to 109)

[53] Accordingly, when one of the grounds established in *Canada Malting* applies, the Commission may confirm the decision under review or make such other decision as the Commission considers proper. In that event, the Commission is free to substitute its judgment for that of the SRO (*Boulieris, supra,* at para. 29; aff'd (2005), 198 O.A.C. 81 (Div. Ct.) at para. 32 and *HudBay, supra,* at paras. 106 to 109).

4. Deference to IIROC Decisions

[54] It is only in rare circumstances that the Commission will intervene in an SRO decision. To do so, the Commission must be satisfied that the applicant has met the "heavy burden" and high threshold of demonstrating that its case fits within at least one of the five grounds for intervention identified in *Canada Malting*.

[55] The Commission stated in *HudBay* that:

> We recognize, however, that if the Commission is too interventionist in reviewing decisions made by an exchange [SRO], that would introduce an unacceptable degree of uncertainty in our regulatory regime and in capital markets. In *Canada Malting*, the Commission stated:
>
> > The TSE supported the Applicants in their request for standing. However, it went on to note the difficulty that would be created for listed companies if the TSE could be second-guessed by the OSC on the initiative of a company's shareholders every time a notice for filing is accepted under By-law 19.06 [the predecessor of section 604 of the TSX Manual].
> >
> > If the right of appeal meant that the OSC were to review every decision of the TSE on the merits, then companies issuing securities would be faced with the possibility of subsequently being forced to unwind the transaction or face delisting or trading sanctions on the basis that the Commission had decided to substitute its discretion for that of the TSE under By-law 19.06. In our view, this would introduce an unacceptable degree of uncertainty into the capital markets.
>
> (*Canada Malting, supra,* at 3588 and 3589)
>
> We agree with the caution reflected in that statement. Only in very rare circumstances should the Commission substitute its decision for that of the TSX. Subject to the discussion below, before the Commission intervenes in a decision of the TSX pursuant to section 21.7 of the Act, it should ensure that the applicant has met the heavy burden of demonstrating that its case fits squarely within at least one of the five grounds for intervention identified in *Canada Malting*.
>
> (*HudBay, supra,* at para. 114; see also *Re Vitug* (2010), 33 O.S.C.B. 3965) ("***Vitug***") at para. 44)

[56] Therefore, in practice, the Commission takes a restrained approach to the exercise of its discretion in connection with an application under section 21.7 of the Act:

> The Commission generally shows deference to the decisions of the TSX, particularly in the areas of the TSX 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.*
>
> [emphasis added]
>
> (*HudBay, supra,* at para. 103)

[57] The Commission takes this restrained approach in recognition of the specialized knowledge and expertise of an SRO. The Commission affords particular deference to an SRO decision when the SRO is interpreting and applying its own rules. The Commission "recognizes that the SROs are uniquely positioned to hear the facts and decide a case based on their expertise" (*Vitug, supra,* at para. 45).

[58] The Supreme Court of Canada has acknowledged the specialized role that SROs such as IIROC play within the securities regulatory framework. IIROC, as an SRO, is charged with regulating and disciplining its members who are engaged in "a highly specialized activity which requires specific knowledge and expertise" (*Pezim* v. *British Columbia (Superintendent of Brokers)* [1994] 2 S.C.R. 557 at para. 60).

[59] In *Derivative Services*, the Commission commented on its reliance on SROs in regulating capital markets:

> … Recognition as an [SRO] is premised on the expertise of an industry organization like the Association which can establish standards of business conduct for its members, frequently higher than those that would be imposed by the OSC, and which may bring to bear on technical issues and other matters a deeper understanding of industry practices, both in its rulemaking and in disciplinary and approval proceedings. The legislative scheme is also premised on a greater likelihood of compliance by members and their personnel with rules established and enforced by the private sector through its self-regulatory activities, but subject to regulatory supervision by the OSC.
>
> (*Derivative Services, supra,* at para. 62)

[60] The British Columbia Securities Commission has commented on IIROC's particular expertise:

> The Commission has recognized IIROC as a self-regulatory body under section 24 of the Act. Section 26 requires a recognized self-regulatory body "to regulate the operations, standards of practice and business conduct of its members." This includes disciplining members for contraventions of the self-regulatory body's rules. As a matter of administrative practice, the Commission relies on IIROC to perform this function and has done so for many years. Over that time, IIROC has developed considerable expertise in dealing with member discipline matters.
>
> (*Re Dirk Christian Lohrisch,* 2012 BCSECCOM 237 at para. 23)

[61] Accordingly, the Commission recognizes IIROC's specialized knowledge and expertise and will give a high level of deference to decisions of an IIROC panel within its area of expertise, including factual determinations and decisions related to the interpretation and application of IIROC Rules. In this respect, an IIROC panel is entitled to (i) establish appropriate standards of conduct through the interpretation and application of IIROC Rule 29.1, and (ii) conclude that IIROC Rules impose obligations of honesty and fairness on a Dealer Member in its dealings with other Dealer Members (see paragraph 253 of these reasons). Further, an IIROC panel has a broad discretion to control its own hearing processes. The Commission will not intervene in any such

IIROC decision simply because it might have made a different decision (*Hahn, supra*, at paras. 81 and 83; and *HudBay, supra*, at para. 103).

5. Standard of Proof on a Balance of Probabilities

[62] It is well settled that the standard of proof in proceedings before the Commission is the civil standard of proof on a balance of probabilities. That means that the Commission determines whether a fact or matter is more likely than not to have occurred.

[63] In *F. H.* v. *McDougall*, the Supreme Court of Canada stated that "the evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*F. H.* v. *McDougall*, [2008] S.C.J. No. 54 at para. 46).

6. Relevant IIROC Rules

[64] The IIROC Decision refers to and makes findings under a number of different provisions of the IIROC Rules and under IDA By-law 29.1. The relevant provisions of these Rules and the IDA By-law are set out in Schedule A to these reasons.

7. Specialized Industry Knowledge

[65] As discussed above, the case law has recognized that hearing panels of an administrative tribunal and a disciplinary board of a self-governing profession have specialized knowledge and can establish and apply appropriate standards:

> [W]ith respect to appropriate standards, superior courts in Canada have made clear that members of self-governing professions are uniquely and best qualified to establish the standards of professional conduct. Thus, a hearing panel of three, two of whom are members or formers members of the profession, possess a specialized knowledge with respect to both ethics and standards that can be applied in a particular case. In *Re Milstein and the Ontario College of Pharmacy, et al.* (1977), 72 D.L.R. (3d) 2, Corey J., of the Ontario High Court, confirmed this principle and went on to say at p. 234:
>
> > Members of the profession can best determine whether the conduct of a fellow member has fallen below the requisite standards and determine the consequences. The peers of the professional person are deemed to have and, indeed, they must have special knowledge, training and skills that particularly adapts them to formulate their own professional standards and to judge the conduct of a member of their profession. No other body could appreciate as well the problems and frustrations that beset a fellow member.
>
> (*Re Gareau*, [2005] I.D.A.C.D. No. 25 ("***Re Gareau***") at para. 29)

[66] However, relying on expert industry knowledge is not a substitute for evidence. Specialized industry knowledge is of assistance to understand evidence, legal requirements and standards but it cannot create and fill gaps in evidence. The British Columbia Superior Court has stated that:

> For those two reasons I am satisfied that the adjudicators erred. Firstly, in conducting the extrapolation and using it as a basis for its decision without giving the petitioners the opportunity of leading evidence or making submissions on the subject. Secondly, by utilizing their own knowledge and training as a substitution for evidence that was essential to bridge the gap between the reading at the time of the test and the reading at the time of the driving. In my opinion the use of specialized training cannot be a substitute for evidence. It should not be used to bridge a gap in evidence. Specialized training may be of assistance in understanding and evaluating evidence but it is not a substitute for evidence. Perhaps this distinction is subtle but in my view it is critical.
>
> (*Dennis* v. *British Columbia (Superintendent of Motor Vehicles)*, [1999] B.C.J. No. 1568 (SC) at para. 25).

That principle is undoubtedly correct.

[67] Courts and tribunals can take judicial notice of certain facts. Judicial notice is described as follows:

> Judicial notice is the acceptance by a court or judicial tribunal, in a civil or criminal proceeding, without the requirement of proof, of the truth of a particular fact or state of affairs. Facts which are (a) so notorious or generally accepted as not to be the subject of debate among reasonable persons; or (b) capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy, may be noticed by the court without proof of them by any party. The practice of taking judicial notice of facts is justified. It expedites the process of the courts, creates uniformity in decision-making and keeps the courts receptive to societal change. Furthermore, the tacit judicial notice that surely occurs in every hearing is indispensable to the normal reasoning process.
>
> (Sopinka, Lederman & Bryant, *The Law of Evidence in Canada*, 3d ed. (Markham: LexisNexis, 2009), at page 1268)

[68] Accordingly, the test to establish judicial notice is a high one.

8. Expert Evidence

[69] In its decision and reasons dated May 18, 2012, the IIROC Panel refused to allow the Applicants to submit as evidence an expert report or call an expert witness to address the industry practice with respect to the use of an accumulation account (see *Re Northern Securities* (2012) IIROC 35). Expert testimony is generally permitted only where the evidence is relevant and necessary to assist the trier of fact in making a decision (*R.* v. *Mohan*, [1994] 2 S.C.R. 9 ("***Mohan***") at para. 17). The Court stated in *Mohan* that:

> This pre-condition is often expressed in terms as to whether the evidence would be helpful to the trier of fact. The word "helpful" is not quite appropriate and sets too low a standard. However, I would not judge necessity by too strict a standard. What is required is that the opinion be necessary in the sense that it provide information "which is likely to be outside the experience and knowledge of a judge or jury"; as quoted by Dickson J. in *R.* v. *Abbey*, *supra*. As stated by Dickson J., the evidence must be necessary to enable the trier of fact to appreciate the matters in issue due to their technical nature. In *Kelliher (Village of)* v. *Smith*, [1931] S.C.R. 672, at p. 684, this Court, quoting from *Beven on Negligence* (4th ed. 1928), at p. 141, stated that in order for expert evidence to be admissible, "[t]he subject-matter of the inquiry must be such that ordinary people are unlikely to form a correct judgment about it, if unassisted by persons with special knowledge". More recently, in *R.* v. *Lavallee*, *supra*, the above passages from *Kelliher* and *Abbey* were applied to admit expert evidence as to the state of mind of a "battered" woman. The judgment stressed that this was an area that is not understood by the average person.
>
> (*Mohan*, *supra*, at para. 22)

[70] In our view, the legal principles applicable to the admission of expert evidence are accurately and appropriately described in the IIROC Panel's reasons (see the discussion commencing at paragraph 244 of these reasons relating to the expert evidence proposed to be introduced by the Applicants).

9. Procedural Fairness

[71] The Applicants were entitled to a high level of procedural fairness in the conduct of the IIROC Hearing. Procedural fairness has two branches:

(i) the right to be heard; and

(ii) the right to an independent and impartial decision-maker.

The right to be heard includes the right to adequate notice of the issues to be addressed by the IIROC Panel and the effective opportunity to put forth evidence and submissions pertinent to the questions in issue. The rule against bias requires an independent and impartial decision-maker.

10. Test for Reasonable Apprehension of Bias

[72] The Applicants submit that the IIROC Panel displayed bias. The test for determining whether bias exists was established by the Supreme Court in *Newfoundland Telephone Co.* v. *Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 ("***Newfoundland Telephone***") where the Court stated:

> To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of the adjudicator.
>
> (*Newfoundland Telephone*, *supra*, at para. 22)

[73] Whether a reasonable apprehension of bias exists must be "evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail" (*R.* v. *R.D.S.* [1997] 3 S.C.R. 484 ("***R.D.S***.") at para. 37). The reasonable person for purposes of this test is "not a 'very sensitive or scrupulous' person, but rather a right-minded person familiar with the circumstances of the case" (*R.D.S., supra,* at para. 36). Justice de Grandpre in *Committee for Justice and Liberty et al* v. *National Energy Board*, [1978] 1 S.C.R. at p. 394 ("***National Energy Board***") characterized the proper test as what an informed person, viewing the matter realistically and practically, and having thought the matter through, would have concluded (*National Energy Board* at p. 372).

[74] The Commission applied the test for reasonable apprehension of bias in *Re Norshield* (2009), 32 O.S.C.B. 1249 ("***Norshield***") (appeal dismissed *Xanthoudakis* v. *Ontario Securities Commission*, 2011 ONSC 4685 (Div. Ct.)). In *Norshield*, the Commission reviewed and summarized the case law regarding reasonable apprehension of bias:

> We also take note that Mr. Justice Cory, in *R.D.S., supra,* at para. 111, commented on the test for finding a reasonable apprehension of bias in *Committee for Justice and Liberty*. In discussing the test set out by Mr. Justice de Grandpré as set out above, Mr. Justice Cory added the following:
>
> > This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. See *Bertram, supra,* at pp. 54-55; *Gushman, supra,* at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": *R.* v. *Elrick*, [1983] O.J. No. 515 (H.C.), at para. 14. See also *Stark, supra,* at para. 74; *R.* v. *Lin*, [1995] B.C.J. No. 982 (S.C.), at para. 34. [Emphasis in original]

[75] Mr. Justice Cory also found that the onus was on the applicant to prove that a reasonable apprehension of bias existed (see *R.D.S., supra,* at para. 114). The threshold for finding real or perceived bias is high, because such a finding calls into question an element of judicial integrity:

> Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.
>
> (*R.D.S., supra,* at para. 113; *Norshield, supra,* at paras. 62-63)

[76] There is a presumption that judges will properly carry out their oath of office (see *R.D.S., supra,* at para. 117). Similarly, there is a presumption that members of the Commission will act fairly and impartially in discharging their adjudicative responsibilities. The Ontario Court of Appeal has held that the presumption of fairness and impartiality applies to Commissioners:

> Securities Commissions, by their very nature, are expert tribunals, the members of which are expected to have special knowledge of matters within their jurisdiction. They may have repeated dealings with the same parties in carrying out their statutory duties and obligations. *It must be presumed, in the absence of any evidence to the contrary, that the Commissioners will act fairly and impartially in discharging their adjudicative responsibilities and will consider the particular facts and circumstances of each case*. [Emphasis added]
>
> (*E. A. Manning Ltd.* v. *Ontario Securities Commission* (1995), 23 O.R. (3d) 257 (C.A.) ("***E. A. Manning***") at p. 267)

[77] These principles apply to the question whether the IIROC Panel displayed a reasonable apprehension of bias as alleged by the Applicants.

11. Proportionality of Sanctions Imposed

Lack of Proportionality

[78] When determining sanctions to be imposed on a respondent, an SRO (and the Commission) must apply the principle of proportionality. That means that the sanctions imposed must be proportionate to both the specific conduct of the respondent, and to the particular circumstances of the respondent including, for instance, the size of the respondent and the impact sanctions may have. The failure to impose proportionate sanctions constitutes an error in principle or in law within the meaning of *Canada Malting*. In *Magna Partners, supra*, the Commission concluded that there was a lack of proportionality in the sanctions imposed by an IIROC hearing panel and substituted what it considered to be the appropriate sanctions in the circumstances.

E. SUBMISSIONS OF THE PARTIES

[79] The following is a summary of the key submissions made by each party on the issues before us.

1. Summary of the Applicants' Submissions

Standard of Review and Deference

[80] The Applicants submitted that *Canada Malting* does not prescribe a reasonableness standard for review as would apply to appellate review under the principles in *Dunsmuir* v. *New Brunswick (Board of Management)*, [2008] 1 S.C.R. 190 ("***Dunsmuir***"). Rather, the standard is correctness on all legal, procedural and jurisdictional issues. Further, in the Applicants' submission, the Commission should defer only to factual determinations made by the IIROC Panel where those factual determinations are based on its specialized expertise. The Applicants submitted that, regardless of the IIROC Panel's specialized expertise, factual determinations should receive no deference if those factual findings were not based on any evidence or if the IIROC Panel overlooked or disregarded material evidence.

[81] The Applicants submitted that if the Commission finds that one or more of the grounds in *Canada Malting* apply, the Commission may address the matter by way of a hearing *de novo* and can consider new evidence.

Count 1

IIROC Panel's Decision

[82] The IIROC Panel found that Alboini, as UDP and an RR at NSI, engaged in a trading practice which improperly obtained access to credit for his client, Jaguar, and in doing so risked the capital of both NSI and Penson, its carrying broker, thereby engaging in business conduct unbecoming or detrimental to the public interest, contrary to IIROC Rule 29.1 (IIROC Decision, *supra*, at para. 143).

[83] The IIROC Panel set out four reasons for its finding that Jaguar's access to credit was "improper": (i) NSI's average price accumulation account (the "**TA Account**") was used improperly to obtain access to credit for Jaguar, (ii) Jaguar was not creditworthy when the securities were purchased in the TA Account, (iii) Alboini acted in a conflict of interest between his duties to NSI and his financial interest in Jaguar, and (iv) Alboini misled Penson about Jaguar's creditworthiness (IIROC Decision, *supra*, at paras. 45-69). The IIROC Panel stated that it "need be successful on only one of these issues for the Panel to conclude that the access to credit was "improper"" (IIROC Decision, *supra*, at para. 45).

[84] The Applicants disputed all four of the reasons supporting the IIROC Panel's conclusion that the use of the TA Account was improper. The Applicants also disputed the IIROC Panel's finding that Alboini's actions posed a risk to the capital of both NSI and Penson.

Alboini did not improperly obtain credit for Jaguar

The TA Account was used appropriately

[85] The Applicants submitted that, under NSI's policies and procedures, an average price accumulation account such as the TA Account was to be used as follows:

> … to accumulate stock in inventory in cases where clients do not wish small fills for larger orders. These accounts are to be used only for institutional accumulation or in the occasional circumstances for a large order from an individual. The trailer of the order must be marked indicating the name of the client and the fact that the trade was completed as an average price trade.
>
> (IIROC Decision, *supra*, at para. 54)

[86] The Applicants submitted that investment dealers maintain client accumulation accounts to facilitate trading by non-retail customers. The circumstances in which a client accumulation account may be used are not prescribed by IIROC rules. One purpose of a client accumulation account is to allow customers to acquire a large position in a security for an average price where the position is accumulated over a period extending beyond a single trading session. Clients may also use a client accumulation account to acquire a "toehold" position in a security over the

course of several trading sessions in anticipation of a take-over bid or engaging in a shareholder activist campaign. The Applicants were using the TA Account to purchase securities for this purpose. NSI had opened 10 separate project accounts, each related to a separate share accumulation program in respect of a different issuer. Different clients of NSI had interests in the various project accounts (we refer to the 10 project accounts collectively as the "**Project Accounts**"). Using a client accumulation account preserves anonymity because trade tickets used for the accumulation trades do not identify the client by name or account number. The Applicants submitted that the TA Account was properly used by Alboini and NSI for these purposes.

[87] The IIROC Panel found, based on the evidence before it, that the orders made in the TA Account for the various Project Accounts were not large orders, but rather were day orders that were accumulated and assigned an average price for ticketing purposes. The IIROC Panel found that Alboini's use of the TA Account was not in accordance with either NSI's policies and procedures or accepted industry practice (see paragraph 225 of these reasons).

[88] The Applicants submitted that the TA Account was used appropriately because (i) using the TA Account to acquire "toehold" positions was proper, and (ii) the payment for shares accumulated in the TA Account was proper.

[89] The Applicants submitted that there was nothing wrong with Jaguar using the TA Account to acquire confidential "toehold" positions in securities over the course of several trading sessions. The Applicants submitted that as long as the customer has committed to acquire the accumulated position, the customer is the beneficial owner of the securities even though they are in a form of "house" account (in this case, the "house" account was NSI's TA Account).

[90] The Applicants took issue with the IIROC Panel's finding that "the orders in the TA Account were "not large orders" but were "day orders" that were accumulated and assigned an average price for ticketing purposes" (IIROC Decision, *supra*, at para. 60). The Applicants submitted that neither the NSI Policy Manual nor any IIROC rule, interpretation or notice provides that orders needed to be for a fixed number of shares rather than all available shares up to a specific threshold. According to the Applicants, the latter type of order would be an example of a large order and not a day order.

[91] The Applicants submitted that the IIROC Panel erred in finding that the orders for the Virtek, Tiomin, and HudBay shares (each related to a different Project Account) were not large orders. The Applicants submitted that they were clearly large orders in the context of the project objectives.

[92] The Applicants submitted that the payment scheme for shares accumulated in the TA Account was proper. The Applicants noted that IIROC Member Regulation Notice MR-0280 - *Average Price Accounts-Margin Requirements* ("**Notice MR-0280**") contemplates circumstances in which a member firm can advance credit to a customer between the settlement date of accumulation trades and the ticketing out of the accumulated position to the client. In light of this, the Applicants submitted that there was no basis to conclude that it was improper for a customer to have obtained this credit if the member was willing to advance it (see the discussion of this issue commencing at paragraph 236 of these reasons).

[93] The Applicants submitted that the IIROC Panel made an error in law by relying on its own industry knowledge of what is considered acceptable "ticketing out" practices. "Ticketing out" refers to the transfer of a security position in an accumulation account to the client. When the securities are "ticketed out", the client pays for the securities. Specifically, the Applicants objected to the following statement made by the IIROC Panel:

> … It is industry practice to ticket out when a trade has concluded and to collect funds at that point. If the account is being used for a true accumulation, payment might be delayed until the accumulation has been completed if the creditworthiness of the client is not in question but it should never be delayed beyond completion of the accumulation. …
>
> (IIROC Decision, *supra,* at para. 63; see paragraph 238 of these reasons).

[94] The Applicants submitted that, since no evidence as to the "industry practice" was tendered at the IIROC Hearing, it was inappropriate for the IIROC Panel to have made such a central finding as a matter of judicial notice.

Jaguar was creditworthy

[95] The Applicants made four submissions to support their position that Jaguar was creditworthy at the time of the purchases in the TA Account.

[96] First, the Applicants submitted that the IIROC Panel erred in disregarding Alboini's personal guarantees of Jaguar's obligations to NSI. The Applicants submitted that Alboini had personally guaranteed Jaguar's obligations to NSI since November 19, 2007 and that he had a net worth in excess of $5 million, which was more than sufficient to satisfy Jaguar's maximum under-margin position.

[97] Second, the Applicants submitted that the IIROC Panel erred by not taking into account the participation of outside investors in three Project Accounts. According to the Applicants, Jaguar had substantial commitments from outside investors for three of the accumulations in the TA Account.

[98] Third, the Applicants submitted that the IIROC Panel incorrectly tied its assessment of Jaguar's creditworthiness to an assessment of whether it held sufficient "marginable" securities or cash to cover the purchases in the TA Account. The Applicants submitted that, according to Notice MR-0280, customer margin does not become relevant to accumulation trades until the position is ticketed out to the customer.

[99] Fourth, the Applicants submitted that the IIROC Panel erred in concluding that Jaguar could not dispose of its holdings in Lakeside Steel and Royal Laser (two of the Project Accounts), thereby rendering Penson unable to enforce its rights to sell those securities to cover the liabilities in the TA Account. The Applicants submitted that under section 2.8 of National Instrument 45-102 – *Resale of Securities*, the holdings in Lakeside Steel and Royal Laser could have been sold at any time by Jaguar or Penson. The Applicants further submitted that the IIROC Panel was wrong to conclude that section 93.4 of the Act applied to restrict the sale of the Lakeside shares. According to the Applicants, section 93.4 of the Act did not prohibit Jaguar

from pledging shares as security to Penson pursuant to the account agreement, nor did it prevent Penson from enforcing its security interest through the sale of those shares.

Alboini did not have a conflict of interest

[100] The Applicants submitted that Alboini was not in a conflict of interest position. According to the Applicants, the IIROC Panel concluded that there was a conflict of interest because it ignored Alboini's financial stake in NSI. The Applicants submitted that Alboini, his company, and his wife had invested approximately $5.6 million in NSI's parent (NFC) by 2008. Alboini's personal investment in Jaguar was much smaller, approximately $1.4 million.

[101] The Applicants' argument was that because Alboini held a larger financial interest in NSI than in Jaguar, Alboini did not have a conflict of interest in not ticketing out the purchases in the TA Account. (NSI had an obligation to fund the carrying costs of those purchases until they were ticketed out.) In any event, the Applicants submitted that any conflict of interest on the part of Alboini was immaterial.

Alboini did not mislead Penson about Jaguar's creditworthiness

[102] The Applicants submitted that there were four reasons why the IIROC Panel was wrong to conclude that Penson was misled about Jaguar's creditworthiness.

[103] First, the Applicants submitted that the IIROC Panel did not have evidence before it to support its finding that Penson was misled. The Applicants noted that IIROC Staff did not call any witness from Penson. In the Applicants' submission, IIROC Staff had to establish by evidence that Penson was misled. Having failed to provide any such evidence, the IIROC Panel's conclusion cannot stand.

[104] Second, the Applicants submitted that the IIROC Panel should have drawn an adverse inference from IIROC Staff's decision not to call any witness to testify on behalf of Penson. The Applicants referred to *Levesque* v. *Comeau* [1970] S.C.R. 1010 as support for their submission that such an adverse inference ought to have been drawn.

[105] Third, the Applicants submitted that the IIROC Panel erred in concluding that Alboini used the TA Account to "hide" Jaguar's trading from Penson. According to the Applicants, Penson would have seen the accumulation trades in the TA Account as they occurred and would have become aware that Jaguar was the client as soon as the position was ticketed out. The Applicants submitted that Penson was alerted via email that outside lenders were participating in certain of the acquisitions through the Project Accounts and it should have known that the funds were subject to a *Quistclose Trust*. [A *Quistclose* trust is a trust created when a creditor has lent money to a debtor for a particular purpose. In the event that the debtor uses the money for any other purpose, the money is held in trust for the creditor. Any inappropriately applied money can then be traced and returned to the creditor. The name of such a trust is based on the House of Lords decision in *Barclays Bank Ltd* v. *Quistclose Investments Ltd*. [1968] UKHL 4 (31 October 1968)].

[106] Fourth, the Applicants submitted that the IIROC Panel erred in its understanding and conclusion with respect to the "cross guarantees" between the Jaguar Main Account and the

Project Accounts. The Applicants submitted that Penson was alerted by e-mail that outside investors were participating in certain of the Project Accounts and Penson should have known that the funds were subject to a *Quistclose Trust*.

[107] The Applicants submitted that the IIROC Panel's decision is unclear why it concluded that Alboini misled Penson with respect to cross-guarantees. The Applicants submitted that the "cross guarantees" were not dependent on Jaguar's eligibility for margin or the liquidity of Jaguar's portfolio investments. Further, the Applicants submitted that Jaguar was both the guarantor and the party whose obligations were guaranteed, so any cross-guarantee was meaningless. Penson had full recourse to assets in any of the Jaguar accounts.

Alboini's actions did not pose a risk to NSI's or Penson's capital

[108] The Applicants submitted that Penson and NSI were in the business of taking on reasonable market risks. It was reasonable for NSI to have taken on the risk exposure through the trading in the TA Account and Alboini was best placed to weigh the risks and benefits. The Applicants submitted that because NSI itself was the only stakeholder that was affected (other NSI clients were not subject to any risk because their accounts were carried by Penson), it was not appropriate for IIROC to second-guess NSI's business judgment in this regard.

[109] The Applicants also submitted that Penson had the responsibility for accounting for the required margin for all NSI customer accounts and Penson had the benefit of a comfort deposit from NSI.

There was no risk to the capital of Penson

[110] The Applicants submitted that Penson paid for the shares accumulated in the TA Account. Therefore, Penson was aware of its cash position at all times. Accordingly, Alboini was not the cause of any unforeseen risk to Penson. There was no evidence that Alboini was aware of how Penson was treating the securities accumulated in the TA Account as a matter of providing margin or for purposes of its regulatory capital. The Applicants submitted that there was no risk to Penson because Jaguar was not a client of Penson; NSI was the client.

There was no risk to the capital of NSI

[111] The Applicants submitted that it was reasonable for NSI to have taken on the risk of exposure to a Jaguar default in order to obtain the financial benefits from the market accumulations in the TA Account. The Applicants submitted that Alboini was best placed to weigh the risks and benefits of those purchases.

Count 2

IIROC Panel's decision

[112] The IIROC Panel found that Vance, as Chief Compliance Officer, failed to adequately supervise Alboini's trading activity involving Jaguar and other NSI clients, contrary to IIROC Rules 1300.1, 1300.2, and 2500. Specifically, the IIROC Panel found that Vance failed to make sufficient inquiries as a result of the following red flags: (i) Alboini opening the 10 new Project

Accounts for Jaguar; (ii) the new client application forms ("**NCAFs**") for the 10 Project Accounts were incomplete; and (iii) the investors in the Project Accounts were also NSI clients (IIROC Decision, *supra*, at para. 105).

Vance did not fail to adequately supervise Alboini's trading activity

[113] Vance submitted that he understood the reason why the Project Accounts were opened and that the opening of multiple Project Accounts was not a "red flag" because doing so was not contrary to NSI's policies and procedures, any IIROC Rule or any requirement of applicable securities law.

[114] Vance also submitted that none of the missing information on the NCAFs was linked to any of the issues regarding Alboini's trading that was the subject of the IIROC Hearing.

[115] Vance submitted that the fact that outside investors in the Project Accounts were NSI clients was not a "red flag" because investors in Jaguar and NFC projects were usually NSI clients. It was simply Alboini's practice, for the sake of administrative convenience, to have outside investors open accounts at NSI. Vance therefore saw nothing unusual or untoward in NSI clients being investors in the Project Accounts. Furthermore, the investors were sophisticated market participants and there was not a single instance in which they suffered any loss as a result of their participation in the Jaguar projects.

[116] Vance also noted that he had no responsibility for supervising Alboini's activities as an officer and director of Jaguar.

[117] In any event, Vance submitted that IIROC Rules 1300.1, 1300.2 and 2500 pertain only to Dealer Members and not to individuals as directors, officers or employees of a Dealer Member. Accordingly, the IIROC Panel did not have jurisdiction to impose sanctions on Vance under Count 2.

Count 3

IIROC Panel's decision

[118] The IIROC Panel found that Alboini, as UDP, and Vance, as Chief Operating Officer, repeatedly failed to ensure that NSI corrected deficiencies found in three IIROC business conduct compliance reviews and one trading conduct review (the deficiencies were: failures in external employee account supervision, failure to maintain adequate grey and restricted lists and procedures, failure to maintain adequate physical barriers to contain corporate finance information, failure to develop and maintain a 90-day training programme for new recruits and failure to adequately supervise trading conduct, including audit trail, order markers, grey lists and short sale markers), thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By-law 29.1 and IIROC Rule 29.1 (IIROC Decision, *supra*, at para. 143).

[119] The Applicants submitted that the IIROC Panel did not have a legal or factual basis upon which to conclude that Alboini and Vance failed to ensure that NSI corrected the deficiencies.

The IIROC Panel did not have jurisdiction to find repeated deficiencies

[120] The Applicants submitted that while IIROC can investigate or bring proceedings based on UMIR violations that occurred prior to the merger of the IDA and Market Regulation Services Inc. ("**RS**"), a proceeding under IIROC Rules alleging repeat deficiencies cannot be founded on UMIR violations that occurred prior to the merger. The Applicants submitted that the IIROC Panel lacked the jurisdiction to find repeated deficiencies under IIROC Rule 29.1 that reached back before the merger of the IDA with RS because, before the merger, there was a different regulatory regime under which Rule 29.1 did not apply to UMIR.

The IIROC Panel Applied the Wrong Standard

[121] The Applicants submitted that the IIROC Panel did not make any findings with respect to the alleged deficiencies. Instead, the IIROC Panel referred to *Dunsmuir* and deferred to IIROC Staff's conclusions because those conclusions were not arbitrary, unreasonable, contrary to law or beyond its jurisdiction. In other words, the IIROC Panel acted as if it was an appeal tribunal instead of as a tribunal exercising original jurisdiction. The Applicants also submitted that *Questrade* did not relieve the IIROC Panel from the obligation to make its own independent findings and determinations.

[122] Accordingly, the Applicants submitted that the IIROC Panel applied the wrong standard and should have made findings based on the evidence before it and should not have deferred to the position of IIROC Staff.

[123] The Applicants also submitted that IIROC merely provides guidelines regarding grey and restricted lists and there are no laws or rules relating to them. Further, the Applicants submitted that a Dealer Member implements policies and procedures for information containment under OSC Policy 33-601 in order to afford a dealer a defence under subsection 175(3) of the regulations to the Act for alleged breaches of section 76 of the Act. Accordingly, the maintenance of grey and restricted lists is not a legal requirement.

[124] The Applicants also submitted that the IIROC Panel did not take NSI's corrective measures into account in assessing whether NSI responded appropriately to the alleged deficiencies.

Count 5(a)

IIROC Panel's decision

[125] The IIROC Panel found that NSI, Alboini, as UDP, and Chornoboy, as CFO, filed or permitted to be filed with IIROC inaccurate monthly financial reports that failed to account for leasehold improvement costs thereby misstating NSI's risk adjusted capital contrary to IDA By-law 17.2 and IIROC Rule 17.2 (IIROC Decision, *supra*, at para. 143).

[126] Chornoboy admitted at the IIROC Hearing that he made errors in preparing the financial reports (IIROC Decision, supra, at para. 137). The IIROC Panel concluded that he therefore admitted that he breached IDA By-law 17.2 and IIROC Rule 17.2.

[127] Alboini disputed that he was responsible or culpable for this conduct.

The IIROC Panel did not have a legal basis for its finding

[128] The Applicants submitted that Alboini, as UDP, was not responsible for every error on the part of every employee of NSI and is entitled to rely on Chornoboy and NSI's auditors. The Applicants submitted that IIROC Rule 17.2 does not apply to individuals, but only to the Dealer Member itself.

Procedural Fairness and Bias

[129] The Applicants submitted that the IIROC Panel breached the principle of procedural fairness and acted in a biased manner, thereby rendering its decision void.

The proper test for reasonable apprehension of bias

[130] The Applicants submitted that the proper test for determining whether bias exists was that articulated in *National Energy Board* (see paragraph 73 of these reasons). The Applicants also submitted that they brought a motion before the IIROC Panel on May 18, 2012 alleging bias which was as soon as they determined that bias could be an issue.

Comments made by Members of the IIROC Panel

[131] The Applicants identified three series of comments made by the IIROC Panel that the Applicants submitted demonstrated a reasonable apprehension bias.

[132] First, the Applicants submitted that the members of the IIROC Panel made extraneous comments about the public perception of IIROC in imposing sanctions, including allegedly disparaging comments made by Alboini reported in the media with respect to a previous IIROC enforcement proceeding against NSI. The Applicants submitted that those statements were extraneous to the determination by the IIROC Panel of appropriate sanctions in this proceeding. The Applicants submitted that consideration of such an irrelevant matter causes a panel to lose jurisdiction.

[133] Second, the Applicants submitted that the IIROC Panel was influenced by an extraneous, and therefore irrelevant, consideration when a member of the IIROC Panel commented on the costs that would be borne by IIROC Dealer Members not a party to the proceeding if costs were not paid by the Applicants.

[134] Third, the Applicants submitted that the IIROC Panel was dismissive of the one-year ban from registration in all capacities that had been requested by IIROC Staff against Alboini. The Applicants submitted that this evidenced bias because IIROC Staff didn't request a longer ban and there was no evidentiary basis for imposing a lifetime ban on Alboini as UDP.

The exclusion of expert evidence

[135] The Applicants submitted that by taking the position that the IIROC Panel had the expertise to decide the issues on Count 1, the IIROC Panel acknowledged that expert evidence

was required or at least would have been of value. In the Applicants' submission, by denying the Applicants the opportunity to adduce their own expert evidence, there was a breach of procedural fairness to them.

[136] Further, the Applicants submitted that by acting as both triers of fact and as experts, the IIROC Panel effectively shielded its expert opinion from scrutiny and prevented cross-examination by the Applicants on them.

The IIROC Panel's consideration of NSI's Risk Trend Report

[137] IIROC prepares a risk trend report ("**RTR**") for all member firms that assesses a firm's level of regulatory risk. An RTR sets out IIROC's conclusion as to the risk rating for each firm. That report is confidential and is used only by IIROC for its own purposes, although a copy is sent to the Dealer Member.

[138] IIROC Staff did not introduce the NSI RTR into evidence, but references were made to it in the testimony of Ms. Jensen and IIROC Staff produced the standard form cover document that is attached to all RTRs which provides that the RTR is a confidential document.

[139] While the NSI RTR was not in evidence, the Applicants submitted that (i) the IIROC Panel erred in treating the breach of confidence with respect to the NSI RTR as an evidentiary matter rather than an issue of procedural fairness, and (ii) the IIROC Panel was improperly influenced by the conclusion in the RTR that NSI was a high risk firm. The Applicants submitted that this resulted in a breach of procedural fairness.

[140] The Applicants also submitted that the Applicants had a legitimate expectation that the RTR would not form part of the evidence against them at the IIROC Hearing because IIROC had promised that the NSI RTR would not be used against them (because all such reports are confidential). By treating the breach of confidence that resulted from the references to the NSI RTR by witnesses as an evidentiary matter, the breach of confidence was never cured.

[141] The Applicants also submitted that the NSI RTR risk rating was not relevant to the issues before the IIROC Panel. By permitting references to this irrelevant evidence, the IIROC Panel exceeded its jurisdiction. Further, the references to the NSI RTR were a breach of the duty of fairness because the Applicants were barred from directly rebutting the report's conclusions.

[142] The Applicants also submitted that the IIROC Panel's imposition on Alboini of a lifetime UDP ban demonstrated that the "high risk stigma" from the NSI RTR influenced the decision of the IIROC Panel.

Limitation Period

Counts 1 and 3 were statute barred

[143] The Applicants submitted that the agreement between IIROC and its Dealer Members is an "arbitration agreement" within the meaning of the *Arbitration Act, 1991,* S.O. 1991, c.17 ("***Arbitration Act***"). A claim pursuant to an arbitration agreement may be statute barred under the *Limitations Act, 2002*, S.O. 2002, c.24, Sch. B ("***Limitations Act***").

[144] The Applicants submitted that under the *Limitations Act*, IIROC was required to commence its proceeding within two years of the date of its discovery of the claim. On this basis, the limitation period with respect to Counts 1 and 3 had expired before the IIROC proceeding was commenced.

Sanctions and Costs

Financial penalties cannot be imposed

[145] The Applicants submitted that a penalty under an agreement is not enforceable if: (i) there is an inequality of bargaining power between the parties, and (ii) the penalty is unfair (*Birch* v. *Union of Taxation Employees, Local 70030,* 93 O.R. (3d) 1(C.A.) ("***Birch***") at para. 45). The Applicants submitted that there is no question that there is an inequality of bargaining power between IIROC and its members and that imposing fines for "public interest" violations of IIROC Rule 29.1, particularly if the conduct does not involve theft, fraud, or any other tortious or criminal act, is unfair. Therefore, the financial penalties imposed by the IIROC Panel are not enforceable. The Applicants also noted that the Commission itself cannot impose financial sanctions for conduct contrary to the public interest; in order to do so, there must be a breach of Ontario securities law.

The sanctions imposed were not proportionate

[146] The Applicants submitted that the primary purpose of sanctions is to ensure that the outcome of the matter conforms to industry expectations (*Mills (Re)* [2001] I.D.A.C.D. No. 7, April 7, 2001 ("***Mills***")); the ultimate purpose being prevention rather than punishment. The Applicants submitted that the financial sanctions imposed have no deterrent value at all, and will seriously impair, if not prevent, Alboini and NSI from salvaging and rebuilding NSI's brokerage business. Specifically, the sanctions imposed affected the Applicants' livelihood, damaged their reputations and suspended their business.

[147] The Applicants submitted that the IIROC Panel's punitive approach to sanctions is evidenced by the fact that it imposed sanctions on Alboini greater than those requested by IIROC Staff. For Count 1, IIROC Staff requested a one-year suspension of Alboini from registration in all capacities. Instead, the IIROC Panel ordered a two-year suspension from registration in all capacities and a permanent UDP ban. For Count 3, IIROC Staff requested a six-month suspension of Alboini from serving as UDP (to be served concurrently with the suspension in relation to Count 1). Instead, the IIROC Panel ordered a one-year suspension from registration in all capacities (to be served concurrently with the two-year suspension in relation to Count 1) and a permanent UDP ban.

The Costs imposed by the IIROC Panel

[148] The Applicants submitted that costs are an element of sanctions and should be taken into account in determining the overall disposition of a matter. The Applicants also submitted that pursuing a defence on the merits to IIROC allegations should not result in increased costs to the Applicants. Further, the Applicants submitted that costs for outside legal counsel retained by IIROC Staff should not be passed on to the Applicants.

2. Summary of IIROC Staff's Submissions

Standard of Review

[149] IIROC Staff submitted that the Commission should only intervene in the IIROC Decision if the Applicants establish that they have met the heavy burden of showing that the Application falls within one of the five grounds identified in *Canada Malting*.

[150] IIROC Staff also submitted that the Commission, in practice, takes a "restrained approach" to applications for a hearing and review of a decision of an SRO under section 21.7 of the Act (see, for instance, *Boulieris*, *HudBay*, and *Taub*, *supra*). Further, IIROC Staff submitted that the Commission will show greater deference to a decision of an SRO with respect to issues squarely within the SRO's expertise or jurisdiction.

Count 1

IIROC Decision

[151] IIROC Staff submitted that the IIROC Panel's findings are supported by the evidence adduced at the IIROC Hearing. Specifically, the IIROC Panel found that Alboini, as UDP and an RR at NSI, engaged in a trading practice that improperly obtained access to credit for his client, Jaguar, and in doing so risked the capital of both NSI and Penson, its carrying broker, thereby engaging in business conduct unbecoming or detrimental to the public interest, contrary to IIROC Rule 29.1 (IIROC Decision, *supra*, at para. 143)

[152] IIROC Staff also submitted that the IIROC Panel was correct in finding that Alboini's actions posed a risk to the capital of both NSI and Penson.

The TA Account was used improperly

[153] IIROC Staff made two submissions in support of its submission that Alboini's use of the TA Account was improper.

[154] First, IIROC Staff submitted that the TA Account was used by NSI to accumulate shares, which improperly provided free (and otherwise unavailable) margin financing to Jaguar. IIROC Staff submitted that the TA Account should not have been used in this manner because the provision of otherwise unavailable financing is not the purpose of an average price accumulation account. According to IIROC Staff, and as observed by the IIROC Panel in the IIROC Decision, the purpose of an average price accumulation account is:

> … to accumulate stock in inventory in cases where clients do not wish small fills for large orders. These accounts are to be only for institutional accumulation or in the occasional circumstances for a large order from an individual. The trailer of the order must be marked indicating the name of the client and the fact that the trade was completed as an average price trade.
>
> (IIROC Decision, *supra*, at para. 54, quoting the NSI Policies and Procedures Manual)

[155] IIROC Staff submitted that there was no reason to leave two large blocks of Virtek shares in the TA Account until September 25, 2008 (when such shares had been purchased on September 4, 2008 and September 10, 2008), other than to give Jaguar free financing at a cost to NSI. That is not the purpose for which an average price accumulation account should be used. IIROC Staff submitted that Alboini, on behalf NSI, delayed the ticketing out of shares from the TA Account until after financing to purchase the securities was in place, which was often well after the purchases were made in the TA Account.

[156] Second, IIROC Staff noted that the Applicants submitted that the IIROC Panel made an error in law by relying on its own industry knowledge of acceptable "ticketing out" practices. IIROC Staff submitted that IIROC panels frequently make findings regarding appropriate standards in the absence of express rules or policies. IIROC Staff noted that Alboini himself testified that, because of the IIROC proceeding, he changed the practice and began to ticket out earlier. IIROC Staff submitted that this demonstrated that Alboini recognized that the previous ticketing out practice was improper.

Jaguar was not creditworthy

[157] IIROC Staff made two submissions in support of its submission that Jaguar was not creditworthy at the time of the trades in the TA Account.

[158] First, IIROC Staff submitted that there was no evidence before the IIROC Panel as to Alboini's net worth. Therefore, it is not true that the IIROC Panel disregarded evidence that Alboini had personally guaranteed Jaguar's obligations. Further, IIROC Staff submitted that Alboini's supposed personal guarantee of NSI's liabilities is irrelevant to the question of whether Jaguar had sufficient cash or marginable securities to pay for the trades made in the TA Account at the time those trades were made. There was no evidence that Alboini's supposed personal guarantee complied with IIROC Rule 100.15, which imposes requirements that must be met when a person is guaranteeing a client account. One of those restrictions is that a guarantee of a client account must be approved by IIROC. There was no evidence that IIROC approved Alboini's guarantee.

[159] Second, IIROC Staff submitted that the IIROC Panel did, in fact, take into account the participation of outside investors in the various Project Accounts. This is evident from the summary of the investor funds in the various Project Accounts. The IIROC Panel addressed this issue in the IIROC Decision as follows:

> The account statements for the Jaguar Main Account and for the Jaguar Project Accounts as well as the spreadsheet summary of all trading in the accounts contained in Exhibit 7 clearly established that when Alboini arranged to purchase the securities for the various projects, Jaguar did not have the cash or marginable securities to pay for the securities and that Alboini knew that was the case. This is established by the cross-examination testimony of Alboini and Chornoboy and by the trade record documents referred to above.
>
> (IIROC Decision, *supra,* at para. 46)

Alboini's Conflict of Interest

[160] IIROC Staff also submitted that Alboini had a conflict of interest between his responsibility to NSI and his financial interest in Jaguar. IIROC Staff noted that the Applicants submitted that the IIROC Panel ignored Alboini's financial interest in NSI. IIROC Staff submitted that Alboini, as UDP, RR, and CEO at NSI, had an obligation not to take any action that would knowingly expose NSI's credit to out-of-the-ordinary risk, or breach IIROC rules or guidelines. IIROC Staff submitted that Alboini had an obligation as UDP of NSI to ensure the creditworthiness of Jaguar at the time of the trades in the TA Account. Alboini's trades in the TA Account exposed NSI's credit to out-of-the-ordinary risk in order to facilitate trades on behalf of Jaguar, thereby putting Jaguar's interests ahead of NSI's. IIROC Staff submitted that Alboini's financial stake in NSI had no bearing on whether his actions knowingly exposed NSI's credit to out-of-the-ordinary risk or breached IIROC rules or guidelines.

Penson was misled

[161] IIROC Staff made three submissions with respect to the IIROC Panel's finding that Penson was misled regarding Jaguar's creditworthiness.

[162] First, IIROC Staff submitted that the IIROC Panel's findings regarding the cross-guarantees were based on oral testimony and on various e-mails, and not, as argued by the Applicants, on a set of assumptions. Specifically, the IIROC Panel noted that Alboini testified at the IIROC Hearing that there would have been no way for Penson to know that the client placing the orders in the TA Account was Jaguar (IIROC Decision, *supra*, at para. 64).

[163] Second, Vance e-mailed Penson in late September 2008 advising that cross-guarantees existed under which two of the Project Accounts had guaranteed the Jaguar Main Account (IIROC Decision, *supra*, at para. 65). That was not the case. IIROC Staff also noted that an e-mail from Vance to Penson was in evidence that stated "we have cross guaranteed the three (3) Jaguar accounts" (IIROC Decision, *supra*, at para. 65). IIROC Staff also submitted that Alboini was aware that Penson was treating the Jaguar Main Account and two of the Project Accounts as if cross-guarantees existed. There is no evidence that Alboini did anything to correct Penson's misunderstanding.

[164] Third, IIROC Staff submitted that the Applicants' submissions with respect to the *Quistclose Trust* are without merit because they (i) disregard Chornoboy's evidence that Penson required the cross-guarantees for credit purposes, and (ii) do nothing to address Alboini's improper conduct in relation to the guarantees and the treatment by Penson of the Jaguar accounts for credit purposes.

Alboini's conduct exposed NSI and Penson to credit risk

[165] The IIROC Panel concluded that Alboini's conduct exposed the capital of both NSI and Penson to credit risk. IIROC Staff submitted that between August 1, 2008 and November 28, 2008, Jaguar's overall security position was under-margined for all but eight days. That exposed both Penson and NSI to significant credit risk.

[166] IIROC Staff also submitted that, at one point, the aggregate unmargined liabilities of Jaguar in the TA Account and other Jaguar accounts at NSI was $2,964,012, which was enough to erode the entire comfort deposit of approximately $1.7 million maintained by NSI with Penson. That swamped the risk adjusted capital of NSI by a significant margin. The unmargined liabilities exposed NSI to significant risk because NSI would have been deficient in its risk adjusted capital.

[167] In addition, IIROC Staff noted that during at least half of the period at issue, the Jaguar liabilities swamped the "required to margin" ("**RTM**") limit of $700,000 set by Penson. That was the limit imposed by Penson on the total under-margin position of all NSI clients.

[168] IIROC Staff submitted that the evidence adduced at the IIROC Hearing demonstrated that the factors referred to in paragraph 249 of these reasons contributed to exposing NSI and Penson to unusual risk.

[169] Based on the foregoing, IIROC Staff submitted that the Application should be dismissed as it relates to Count 1.

Count 2

IIROC Panel's decision

[170] The IIROC Panel found that Vance, as Chief Compliance Officer, failed to adequately supervise Alboini's trading activity on behalf of Jaguar and other NSI clients, contrary to IIROC Rules 1300.1, 1300.2, and 2500. Specifically, the IIROC Panel found that Vance failed to make sufficient inquiries in response to the following red flags: (i) Alboini opened the 10 new Project Accounts for Jaguar; (ii) the NCAFs for those accounts were incomplete; and (iii) the majority of investors with interests in the Project Accounts were also NSI clients (IIROC Decision, *supra*, at para. 105). IIROC Staff submitted that the IIROC Panel was correct in making these finding.

Vance failed to adequately supervise Alboini's trading activity

Vance's response to the alleged Red Flags

[171] IIROC Staff submitted that Vance had a due diligence obligation under IIROC Rule 1300.1 and should have made further inquiries and not just accepted Alboini's explanations as to why the 10 new Project Accounts were opened.

[172] IIROC Staff also submitted that Vance's failure to ensure the missing information on the NCAFs for the 10 Project Accounts did not meet minimum supervision standards under IIROC rules and was an inadequate response. IIROC Rule 2500 requires that proper documentation be completed when new accounts are opened. The evidence at the IIROC Hearing showed that Vance approved the new accounts (i) with missing NCAFs; (ii) with no registered representative signature (for one of the Project Accounts); (iii) with numerous missing support documents that Vance claimed "may be misfiled"; (iv) with no CCO or senior officer signatures for two other Project Accounts; and (v) four other Project Accounts were opened without compliance department approval (IIROC Decision, *supra*, at para. 105).

[173] IIROC Staff submitted that, by not addressing the fact that investors in the Project Accounts were also NSI clients, Vance's conduct was contrary to the obligations of a Chief Compliance Officer. In support of this submission, IIROC Staff relied on the finding of the IIROC Panel referred to in paragraph 263 of these reasons.

Vance was responsible under IIROC Rule 38.7

[174] IIROC Staff submitted that the IIROC Panel did have jurisdiction to impose sanctions on Vance under Count 2 because, pursuant to IIROC Rule 38.7, Vance was required to monitor and assess compliance by the Dealer Member, and individuals acting on its behalf, with the Rules and applicable securities laws (see IIROC Rule 38.7(h)(i) in Schedule A).

[175] Based on the foregoing, IIROC Staff submitted that the Application should be dismissed as it relates to Count 2.

Count 3

Failure of Alboini and Vance to ensure that NSI corrected deficiencies identified during IIROC compliance and trading reviews

[176] IIROC Staff submitted that the IIROC Panel had evidence before it to properly conclude that Alboini and Vance repeatedly failed to correct the deficiencies found by IIROC Staff in three business conduct compliance reviews and one trading conduct review.

[177] IIROC Staff submitted that the allegation with respect to Count 3 related to the Applicants' failure to correct compliance deficiencies identified by IIROC Staff and not RS as submitted by the Applicants. The conduct in question was within the jurisdiction of IIROC because the conduct occurred after June 1, 2008 (the date of the merger of the IDA and RS to form IIROC) so that any allegation that there was a failure to ensure that deficiencies were corrected was fully within the ambit of the rules of the merged organization.

The IIROC Panel did not improperly defer to IIROC Staff

[178] IIROC Staff submitted that the Applicants' submissions to the effect that the IIROC Panel did not make any findings with respect to the deficiencies ignore the findings made by the IIROC Panel. Specifically, IIROC Staff submitted that the Applicants ignore the statement referred to in paragraph 271 of these reasons as a basis for the IIROC Panel's findings in respect of Count 3:

[179] Further, IIROC Staff submitted that the IIROC Panel did in fact have a legal basis for its deficiency findings. Specifically, the IIROC Panel described the deficiencies found by IIROC Staff in respect of the "physical barriers issue". The final 2007 Business Conduct Compliance report provides that "at the time of the 2007 examination, the floor plans of the new office … did not demonstrate adequate controls to contain potential material and non-public information as follows:

> • A 5 foot wall was the only divider between the Corporate Finance area and the rest of the Member.

> • The computer service room was located within the Corporate Finance area.
>
> • There were two entrances to the Corporate Finance area. One was pass card access only. The other was a divider separating Corporate Finance from other departments, which did not adequately prevent access by other employees.
>
> • The Head of Private Client division [*sic*] was also acting in the capacity of an Investment Banker, and his office was located within the retail area."
>
> (IIROC Decision, *supra,* at para. 121)

[180] IIROC Staff submitted, contrary to the Applicants' position, that the IIROC Panel did take the Applicants' corrective measures into account. IIROC Staff relied in this respect on the following statement from the IIROC Decision:

> This Panel has considered all the actions taken by the Respondents, particularly those of Vance after he joined NSI, and has concluded that they do not outweigh the extensive evidence of the Respondents failure to obey legal and reasonable findings and directives from IIROC, the intentional substitution of their own view of what was required for that of IIROC and the failure to understand, or intentional disregard of, the relationship between the regulator, IIROC, and the Respondents as the regulated parties.
>
> (IIROC Decision, *supra,* at para. 133)

[181] IIROC Staff submitted that NSI did not, over a period of six years, correct the deficiencies identified by IIROC Staff. Accordingly, IIROC Staff submitted that the Application should be dismissed as it relates to Count 3.

Count 5(a)

IIROC Panel's decision

[182] The IIROC Panel found that NSI, Alboini, as UDP of NSI, and Chornoboy, as CFO of NSI, filed or permitted to be filed inaccurate monthly financial reports that failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital contrary to IDA By-law 17.2 and IIROC Rule 17.2 (IIROC Decision, *supra,* at para. 143).

[183] At the IIROC Hearing, Chornoboy freely admitted that he made the errors described in Count 5(a) (IIROC Decision, *supra,* at para. 137). As a result, IIROC Staff submitted that the IIROC Panel was correct in finding that Chornoboy and Alboini breached IIROC Rule 17.2.

[184] In response to the Applicants' submission that IIROC Rule 17.2 applies only to Dealer Members and not to individuals, IIROC Staff submitted that the conduct covered by Rule 17.2 is carried out by an individual and that cases against individuals have been brought under this rule for years. For example, IIROC Staff submitted that the panel in *Re Phillips* [2011] IIROC No. 34 held that "a member is defined to include a registered representative under Rule 29.1".

[185] IIROC Staff also noted that IIROC Rule 29.1 explicitly states that "each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member" must comply with the Rules.

[186] Accordingly, IIROC Staff submitted that the Application should be dismissed as it relates to Count 5(a).

Procedural Fairness

[187] IIROC Staff submitted that the IIROC Panel did not breach the principle of procedural fairness in conducting the IIROC Hearing.

[188] IIROC Staff agreed with the Applicants that the accepted test for bias is established in *National Energy Board*. However, IIROC Staff noted that the Court in that case stated that the grounds for a reasonable apprehension of bias "must, however, be substantial". IIROC Staff also submitted that bias must be "evaluated through the eyes of the reasonable, informed, practical and realistic person who considers the matter in some detail" (*R.D.S., supra,* at para. 37). Further, a finding of bias must be based on the entire factual record.

No reasonable apprehension of bias

[189] IIROC Staff addressed the three series of comments made by the IIROC Panel that the Applicants claim demonstrate that the IIROC Panel's judgment was tainted by a reasonable apprehension bias (i.e., comments about the public perception of IIROC in imposing sanctions, comments regarding the potential costs borne by non-party Dealer Members as a result of the IIROC proceeding, and comments dismissive of the one-year ban of Alboini proposed by IIROC counsel (see the discussion commencing at paragraph 311 of these reasons)).

[190] IIROC Staff submitted that these comments simply showed that the IIROC Panel was working through the issues and that it would be unrealistic to expect a hearing panel to never comment about any peripheral matter.

Exclusion of expert evidence

[191] IIROC Staff submitted that the IIROC Panel declined to admit the expert evidence proposed to be submitted by the Applicants with respect to the use of an accumulation account on the grounds that it was not necessary. That was a discretionary decision fully within the jurisdiction of the IIROC Panel.

[192] IIROC Staff also rejected the Applicants' suggestion that the IIROC Panel, by excluding expert evidence, shielded its expertise from challenge. IIROC Staff submitted that the Applicants did not demonstrate that the IIROC Panel used its specialized knowledge as a substitute for evidence. Rather, the IIROC Panel used its decision making discretion exactly as it was supposed to.

The Confidential Risk Trend Report

[193] IIROC Staff made five submissions as to why the IIROC Panel did not consider the NSI RTR in a way that caused procedural unfairness.

[194] First, IIROC Staff submitted that the Applicants did not object to Ms. Jensen's evidence about that report during her cross-examination. (That submission appears to be inconsistent with the IIROC transcript related to this issue.)

[195] Second, IIROC Staff noted that, in its decision on the Applicants' motion (on May 18, 2012), the IIROC Panel concluded that the NSI RTR would be treated as an evidentiary matter and would be ignored. Further, IIROC Staff noted that the NSI RTR itself was never part of the evidence at the IIROC Hearing.

[196] Third, IIROC Staff submitted that hearing panels have a broad discretion to control their own process and that discretion gives them the ability to admit or exclude evidence and to assign it as much weight as they consider appropriate.

[197] Fourth, IIROC Staff submitted that the NSI RTR was not the only source of information that might classify NSI as a "high risk" firm. IIROC Staff submitted that the other sources of such information included:

> (a) an e-mail dated December 24, 2009 from Mike Prior to Vance, Murray Lund and Maureen Jensen in which Mr. Prior stated "[d]ue to the previous regulatory history with regards to trade supervision and compliance at NSI, *IIROC has classified NSI as a high risk firm* and has adjusted resources and scope accordingly" [emphasis added];
>
> (b) a Sales Compliance Review Head Office Risk Assessment Checklist where NSI was given an average risk ranking of 4.07 on a scale of "1 (very little risk) to 5 (extremely high risk)";
>
> (c) a trade desk review of NSI dated November 3, 2008 where it was noted that "[t]his firm is ranked extremely risky by the FC department";
>
> (d) a sales compliance review supporting document entitled "Head Office SCR Planning Checklist" in which NSI was given a post-Sales Compliance Review average risk ranking of 3.71"; and
>
> (e) NSI 2008 financial and operations compliance examination report where it was noted that "IIROC continues to rank NSI as higher risk relative to all IIROC dealer members due to senior management's lack of progress in dealing with the above issues."

[198] Finally, IIROC Staff submitted that there is a presumption that a hearing panel will act fairly and impartially and there is insufficient evidence to rebut that presumption in this case (*E. A. Manning*, *supra,* at p. 11).

Limitations Period

The Application of the Limitations Act

[199] IIROC Staff submitted that this proceeding is not an arbitration and is not conducted pursuant to an arbitration agreement. IIROC Staff submitted that under the standard form agreement between IIROC and each Dealer Member, that member submits to the disciplinary process set out in the IIROC Rules.

[200] Accordingly, IIROC Staff submitted that section 52 of the *Arbitration Act* does not apply to this proceeding.

Sanctions and Costs

[201] IIROC Staff submitted that the IIROC Panel was within its jurisdiction to impose financial penalties for a breach of IIROC Rule 29.1 because the IIROC Rules expressly contemplate the ability to impose a fine for a contravention of IIROC Rules. Rules 20.33 and 20.34 expressly provide that, upon the conclusion of a disciplinary proceeding, a hearing panel may impose, among other things, a fine for a failure to comply with the provisions of any IIROC Rule.

[202] IIROC Staff submitted that the IIROC Panel based its sanctions on appropriate principles and provided extensive reasons as to the factors that it took into consideration in reaching its decisions. Further, IIROC Staff submitted that IIROC panels should be given a high level of deference with respect to their sanctions decisions (*Re Benarroch,* (2011) 34 O.S.C.B. 2041, at para. 5).

[203] IIROC Staff submitted that the sanctions imposed were appropriate and proportionate to the conduct involved.

[204] IIROC Staff also submitted that the IIROC Panel's costs order was not out of line with the costs assessed in other contested IIROC Hearings. For example, in *Re Shanahan*, [2006] I.D.A.C.D. No. 5, an IIROC Hearing Panel awarded a total of $214,688.15 in costs against three respondents after a lengthy hearing.

[205] Based on the foregoing submissions, IIROC Staff submitted that the Application should be dismissed.

3. Summary of Commission Staff's Submissions

[206] Commission Staff supported the submissions made by IIROC Staff and limited their own submissions to the specific matters summarized below.

[207] Commission Staff submitted that, despite the broad scope of a hearing and review under section 8 of the Act, there is "a high threshold to meet in demonstrating that a decision of an SRO should be overturned" (*Re George Benarroch, et al,* (2010) 33 O.S.C.B. 12043 at para. 18). Commission Staff submitted that, in practice, the Commission takes a "restrained approach" to its jurisdiction under section 8 (*Vitug, supra,* at para. 44).

[208] In particular, Commission Staff submitted that factual determinations attract significant deference because SROs possess a unique expertise (*Vitug, supra,* at para. 45; *HudBay, supra,* at paras. 103-104; *Boulieris, supra,* at paras. 29-30, and *Hahn, supra,* at para. 195).

[209] Commission Staff stated that the Commission relies on the expertise of SROs to assist it in regulating Ontario's capital markets (*Derivative Services, supra,* at page 13).

[210] Commission Staff also submitted that an applicant has a heavy burden of showing that its case falls within one of the five grounds identified in *Canada Malting*. This heavy burden is imposed on applicants to promote certainty and to recognize an SRO's expertise [see *Canada Malting, supra,* at paras. 25-27 and *HudBay, supra,* at para. 114).

Count 1

Industry Standards

[211] Commission Staff submitted that several IIROC and IDA decisions have required hearing panels to draw conclusions as to appropriate industry standards in the absence of an express rule or policy. These include the decisions in *Re Gareau, supra,* at paras. 29-31, *Re Youden, supra,* at para. 76, and *Re Van Hee,* 2008 IIROC 25 at para. 47.

Procedural Fairness

The test for bias

[212] Commission Staff adopted the submissions of IIROC Staff as to the test for determining whether a reasonable apprehension of bias has arisen.

[213] Commission Staff also submitted that the Applicants should have made the allegations of bias to the IIROC Panel, which was not done. Commission Staff submitted that the Applicants should not be allowed to wait for the result of the sanctions and costs hearing and then, having lost, "cry foul" through an allegation of bias.

[214] Commission Staff addressed the three series of comments made by the IIROC Panel that the Applicants claim demonstrated that the IIROC Panel's judgment was tainted by a reasonable apprehension bias (i.e., extraneous comments about the public perception of IIROC, including Alboini's allegedly disparaging comments reported in the media with respect to a previous IIROC enforcement proceeding against NSI, comments regarding the potential costs that would be borne by non-party Dealer Members as a result of the IIROC proceeding, and comments dismissive of the one-year registration ban of Alboini requested by IIROC Staff).

[215] Commission Staff submitted that these comments should be viewed in context. None of the comments – taken individually or together – gave rise to a reasonable concern as to bias in the mind of a reasonable person informed of the circumstances. Accordingly, the IIROC Panel was not and could not be perceived to be biased against the Applicants.

[216] Commission Staff also submitted that the comments made by the IIROC Panel do not come close to the comments that were found to be biased by the Ontario Court of Appeal in

Shoppers Mortgage & Loan v. *Health First Wellington Square Ltd.* [1995] O.J. No. 1268 ("***Shoppers***") and *Sorger* v. *Bank of Nova Scotia* [1998] O.J. No. 2071. Commission Staff referred to the Ontario Court of Appeal's assessment of the comments made by the trial judge in *Shoppers:*

> It is unnecessary to enumerate and quote from the countless interventions by the trial judge, a ground of appeal which overlaps with the ground of appeal based on premature, anticipatory rulings on the admissibility of evidence indicating a prejudgment of the issues. Generally, the record is punctuated by statements of the trial judge to defence counsel such as:
>
> > You're wasting my time.
> >
> > You are scraping the bottom of the barrel.
> >
> > You're clutching at straws.
> >
> > You're fighting an uphill battle.
> >
> > You have got a pretty desperate case.
> >
> > Rather than attempting to weigh each intervention separately, one has to consider their cumulative effect.
>
> (*Shoppers, supra,* at para. 8)

Sanctions

Financial penalties imposed

[217] Commission Staff submitted that, in arguing that the financial penalties imposed by the IIROC Panel are unenforceable, the Applicants misconstrued the nature of the relationship between IIROC and its members. As voluntary members of IIROC, the Applicants entered into a contractual commitment to abide by IIROC's constitution, regulation, rules and by-laws.

[218] Further, Commission Staff submitted that *Birch* (the authority cited by the Applicants to support their position that the sanctions imposed by the IIROC Panel were "unconscionable") dealt with imposing financial sanctions on union members who crossed picket lines. That case has no application in this matter where we are dealing with a regulatory proceeding where members are expressly subject to regulatory obligations enforced through sanctions.

[219] Commission Staff submitted that the Application should be dismissed.

F. ANALYSIS

1. Introduction and Standard of Review

[220] The IIROC proceeding raised a large number of complex legal and factual issues that were required to be addressed by the IIROC Panel. It is clear from the IIROC Decision and the

IIROC Panel's reasons that the panel carefully considered and addressed the terms of the various Counts and the legal issues raised by them, and made appropriate findings of fact based on the evidence. The IIROC Panel's reasons are comprehensive and clearly set forth the IIROC Panel's analysis and rationale for its findings and conclusions. Subject to the specific matters we address in these reasons, we defer to the conclusions reached by the IIROC Panel, which fall squarely within the IIROC Panel's expertise and authority.

[221] We must give a high level of deference to decisions of an SRO, such as IIROC, in the areas of its expertise (see the decisions referred to in paragraphs 54 to 61 of these reasons). In reviewing the IIROC Decision, we must be guided by the grounds for intervention by the Commission set out in *Canada Malting* (see paragraph 49 and following of these reasons).

[222] We will examine each of the different Counts addressed in the IIROC Decision applying the *Canada Malting* principles.

2. Count 1 – Alboini Improperly Obtained Access to Credit for Jaguar

[223] The IIROC Panel concluded that Alboini as UDP and an RR at NSI engaged in a trading practice through the use of the TA Account that allowed Jaguar to improperly obtain access to credit (while it was not creditworthy within the meaning of the industry) and in doing so risked the capital of both NSI and Penson.

[224] The IIROC Panel properly noted that there are several elements to Count 1: whether the trading practice obtained access to credit for Jaguar and, if so, whether that trading was improper and whether it risked the capital of both NSI and Penson.

[225] The IIROC Panel found that Alboini's use of the TA Account was not in accordance with either NSI's policies and procedures or accepted industry practice. Specifically, the IIROC Panel found:

> The NSI manual states that the TA Account must be used for "accumulations … where clients do not wish small fills for large orders." The reasons for such an approach, which is in keeping with industry practice in the Panel's opinion, are to avoid putting one large order into the market which could influence upward the price the buyer might have to pay, to avoid the inconvenience and excessive paperwork which would be required for multiple small orders rather than a single ticket and to facilitate average price fills when an institutional order is to be prorated amongst the clients [*sic*] internal accounts. *By its own terms the TA Account was never intended as a source of financing to purchase shares in situations where funds were not available on a T+3 basis*. It was IIROC's position that the orders placed by Alboini in the TA Account on behalf of Jaguar were not "large orders" that were worked by the trade desk over an extended period of time, but rather were day orders that were filled seriatim and simply aggregated and assigned an average price for ticketing purposes usually at month end. The trade summary above shows that in some months during the relevant period, very few trades took place.

> The Panel agrees with IIROC's position that the orders in the TA Account were not large orders, but were day orders that were accumulated and assigned an average price for ticketing purposes. It is the Panel's conclusion that this trading activity in the TA Account was not in accordance with accepted industry practice regarding the use of client average price accumulation accounts, nor with NSI's manual and *was nothing more than Jaguar free-riding on Penson's capital. This was an improper use of the TA Account.*
>
> [emphasis added]
>
> (IIROC Decision, *supra,* at paras. 60 and 61)

[226] The IIROC Panel concluded that Alboini's use of the TA Account obtained access to credit for Jaguar that Jaguar would not otherwise have been able to obtain. The IIROC reasons state that:

> ... It is clear that Alboini's trading practice gained Jaguar access to credit and thus enabled it to purchase securities which it could not otherwise acquire.
>
> (IIROC Decision, *supra,* at para. 44)

Was the Access to Credit Improper?

[227] The IIROC Panel addressed whether gaining that access to credit for Jaguar was improper. The Panel set out four reasons why it considered that trading practice to be improper:

> (a) Jaguar was not creditworthy at the time of the purchases in the TA Account;
>
> (b) Alboini had a conflict of interest in making the purchases;
>
> (c) the trading was an inappropriate use of the TA Account; and
>
> (d) Alboini misled Penson as to Jaguar's creditworthiness.

There was a fifth ground that alleged that there was a transfer of money directly from a client account to a "pro account" without written authorization. The IIROC Panel concluded with respect to that issue that:

> … The Respondents took the position that this transfer was of no particular importance because the transaction was processed by Penson, not NSI, and that the transfers of client money into the Vulcan and Titan Project accounts was authorized by the client opportunity documents. The Panel has concluded that these transfers of client money to pro accounts, while inappropriate, were largely the result of sloppy documentation and procedures and are not a factor in determining whether Jaguar's access to credit was "improper". However, this incident again reflects negatively on the multiple roles that Alboini played with the parties involved.
>
> (IIROC Decision, *supra,* at para. 70)

[228] We agree with the IIROC Panel's statement that IIROC needed to be successful in establishing only one of the matters referred to in paragraph 227 above in order for the Panel to conclude that the access to credit obtained by Jaguar was improper (IIROC Decision, *supra*, at para. 45).

[229] The IIROC Panel made the following findings with respect to the issues identified in paragraph 227 above:

(a) "It is the Panel's conclusion that Jaguar was not creditworthy when it purchased the securities in the TA Account which were destined for the Jaguar Project Accounts and that Alboini should not have initiated the trades knowing that Jaguar was not creditworthy. This factor alone would be sufficient to establish that Alboini's gaining access to credit was improper …" (IIROC Decision, *supra*, at para. 51);

(b) "... Furthermore as UDP and CEO, Alboini owed a fiduciary obligation to NSI to protect the interests of NSI. In this case, Alboini let his interests in making money for Jaguar and himself take precedence over his obligations to NSI, rather than the other way around. This conflict is another factor leading the Panel to conclude that the access to credit was "improper"" (IIROC Decision, *supra*, at para. 53);

(c) "The Panel agrees with IIROC's position that the orders in the TA Account were not large orders, but were day orders that were accumulated and assigned an average price for ticketing purposes. It is the Panel's conclusion that this trading activity in the TA Account was not in accordance with accepted industry practice regarding the use of client average price accumulation accounts, nor with NSI's manual *and was nothing more than Jaguar free-riding on Penson's capital*. This was an improper use of the TA Account" (see paragraph 225 above and the IIROC Decision, *supra*, at para. 61); [emphasis added]

(d) "... a far more important factor was Alboini misleading Penson into thinking it could treat the Jaguar Main Account and the Jaguar Project Accounts as if they were one account" (IIROC Decision, *supra*, at para. 65). "... [i]t is the Panel's conclusion that Alboini's failure to correct Penson's misimpression about the propriety of treating the Jaguar accounts as one was improper and was a factor in getting Jaguar access to credit" (IIROC Decision, supra, at para. 69); and

(e) "Based on the Panel's conclusions regarding the issues relating to Jaguar's lack of creditworthiness, Alboini's conflict of interest, the inappropriate use of the TA Account and Alboini's misleading Penson regarding the treatment of Jaguar Main Account and the Jaguar Project Accounts as described above, the Panel's decision is that Jaguar's access to credit was "improper" for the purposes of Count 1" (IIROC Decision, *supra*, at para 71).

Whether Jaguar was creditworthy

[230] The IIROC Panel made the following finding with respect to Jaguar's creditworthiness:

> The account statements for the Jaguar Main Account and for the Jaguar Project Accounts as well as the spreadsheet summary of all trading in the accounts contained in Exhibit 7 clearly established that when Alboini arranged to purchase the securities for the various projects, *Jaguar did not have the cash or marginable securities to pay for the securities and that Alboini knew that was the case*. This is established by the cross-examination testimony of Alboini and Chornoboy and by the trade record documents referred to above. There were securities in the Jaguar Main Account, but these were not marginable and frequently were subject to certain restrictions and valuation issues which were relevant to the issue of the risk to the credit of NSI and Penson (discussed below). *Jaguar was not creditworthy by the standards of the investment industry at the time it purchased the securities.*
>
> Knowing the creditworthiness of a client before executing trades on its behalf and only executing trades for creditworthy clients *is a basic obligation of registered securities dealers* and in particular is an obligation of the client's RR. This was admitted by Alboini in his cross-examination …
>
> [emphasis added]
>
> (IIROC Decision, *supra,* at paras. 46 and 47)

[231] We find that it was within the Panel's expertise and authority to come to the conclusion referred to in paragraph 230 above based on the evidence before it. The IIROC Panel found that "Jaguar did not have the cash or marginable securities to pay for the securities and that Alboini knew that was the case" (see paragraph 230 above). As a result, Jaguar could not have made the purchases directly in reliance on its own creditworthiness and was able to make the purchases only through the TA Account. The question the IIROC Panel was addressing was whether Jaguar was creditworthy by industry standards. Whether a client is creditworthy is a basic requirement addressed in the IIROC Rules. A client's margin position is a basic element of assessing the creditworthiness of a client and managing the credit risk related to a client's trading. The IIROC Panel had ample evidence and was entitled to conclude, as it did, that Jaguar was not creditworthy by those standards.

[232] In reaching that conclusion, it appears to us that the IIROC Panel was addressing the appropriate industry standards in the circumstances and did not rely on the doctrine of judicial notice.

[233] Whether or not Alboini had guaranteed Jaguar's obligations and had other personal financial resources to address any deficiency does not affect the IIROC Panel's conclusion.

Alboini's Conflicts of Interest

[234] The IIROC Panel also concluded that there was a conflict of interest between Alboini's obligations as UDP, RR and CEO of NSI and his interests as CEO and a shareholder of Jaguar. Specifically, the IIROC Panel stated:

> … As CEO and a shareholder of Jaguar, Alboini saw opportunities for Jaguar to make money by purchasing the various securities that ultimately ended up in the Jaguar Project Accounts. If Jaguar were successful in these projects Alboini would benefit financially. As UDP, RR and CEO at NSI, it is Alboini's obligation not to take any action that would knowingly expose NSI's (or Penson's) credit to out-of-the-ordinary risks, or breach any IIROC rules or guidelines. In this case, it is the Panel's conclusion (as outlined in Paragraph 72 - 81 below), that Alboini's actions in the TA Account on behalf of Jaguar exposed NSI's credit to out-of-the-ordinary risks.
>
> IIROC Dealer Member Rule 38.5 provides that the UDP must "supervise the activities of the Dealer Member that are directed towards ensuring compliance with [IIROC] rules and applicable securities law requirements…" and must "promote compliance by the Dealer Member, and individuals acting on its behalf, with [IIROC] rules and applicable securities laws." *While IIROC was unable to point to any IIROC rule or securities law that specifically required the UDP or RR to ensure the creditworthiness of clients or not expose the credit of the Dealer Member to unnecessary risks, this was, and remains a basic and obvious obligation, well recognized by industry participants as illustrated by the know-your-client process.* Furthermore as UDP and CEO, Alboini owed a fiduciary obligation to NSI to protect the interests of NSI. In this case, Alboini let his interests in making money for Jaguar and himself take precedence over his obligations to NSI, rather than the other way around. This conflict is another factor leading the Panel to conclude that the access to credit was "improper".
>
> [emphasis added]
>
> (IIROC Decision, *supra*, at paras. 52 and 53)

[235] It is clear that the IIROC Panel found that Alboini had multiple roles and that those roles created potential conflicts of interest. Alboini's decisions to delay any "ticketing out" of securities in the TA Account (see paragraph 238 below) imposed carrying costs on NSI and exposed NSI to credit risk while also benefiting Alboini as a shareholder of Jaguar. It is not an adequate response to this concern to say that Alboini was in the best position to assess all of the risks to NSI, Penson and Jaguar and the competing financial interests involved. It is clear that Alboini had multiple roles that potentially created conflicts of interest. There does not appear to have been any evidence that Alboini appropriately addressed those conflicts. The IIROC Panel was entitled to conclude, as it did, that those conflicting interests made the trading in the TA Account improper.

Was the trading an inappropriate use of the TA Account?

[236] The IIROC Panel concluded that NSI's use of the TA Account was "nothing more than Jaguar free-riding on Penson's capital. This was an improper use of the TA Account" (see paragraph 225 of these reasons and IIROC Decision, *supra*, at para. 61). That was perhaps the IIROC Panel's most important finding.

[237] The IIROC Decision states that as early as July, 2008, the Jaguar Main Account was restricted by Penson because that account "… had been undermargined for twenty consecutive days …" (IIROC Decision, *supra*, at para. 35). By early August, however, the account was unrestricted. Between August and November, 2008, "… instead of buying the securities in the Jaguar Main Account or in the Jaguar Project Accounts, neither of which held sufficient funds to make the acquisitions, Alboini placed the orders in the NSI average price accumulation account…" held at Penson (IIROC Decision, *supra*, at para. 37).

[238] In their reasons, the IIROC Panel also addressed the issue of ticketing out. "Ticketing out" refers to the transfer of securities from an accumulation account to the client. When the securities are "ticketed out", the client pays for the securities. The IIROC Panel made the following statement with respect to ticketing out:

> The Panel agrees with the IIROC position. It is industry practice to ticket out when a trade has concluded and to collect funds at that point. If the account is being used for a true accumulation, payment might be delayed until the accumulation has been completed if the creditworthiness of the client is not in question, but it should never be delayed beyond completion of the accumulation. It is industry practice to get paid for an order on as timely a basis as possible. Indeed a member should not even take an order unless it has good reason to believe it will be paid for on a timely basis. Delaying the ticketing out until month end could only benefit Jaguar, could not be in the best interests of NSI (or Penson) and is an inappropriate use of the TA Account.
>
> (IIROC Decision, *supra*, at para. 63)

[239] When the IIROC Panel concluded that NSI's use of the TA Account was Jaguar "free riding" on Penson's capital, it meant that Alboini was making purchases through the TA Account on behalf of Jaguar that Jaguar would not otherwise have been able to make directly. Those purchases were made through the credit advanced by Penson as a result of the trading in the TA Account. Alboini knew that Jaguar did not have the cash or marginable securities to pay for the purchases in the TA Account. That exposed Penson to credit risk related to the trading by Penson in the TA Account and it exposed NSI to the same risks because the TA Account was an NSI account. The IIROC Decision states that "[u]ntil Jaguar actually paid for the securities, the regulatory capital of both was at risk …" (IIROC Decision, *supra*, at para. 75).

[240] The IIROC Panel noted that there was a gap in understanding between NSI and Penson with respect to how the TA Account was viewed:

> … The "gap" in understanding was that Penson viewed the TA account as a principal account of NSI (and therefore had no margin/capital responsibilities),

> whereas NSI viewed the TA account as a client account (and therefore the margin/capital responsibilities belonged to Penson). The end result was that neither Penson nor NSI provided margin/capital in respect of the TA account during the August-November 2008 period.
>
> (IIROC Decision, *supra*, at para. 40)

[241] The IIROC Panel did not, however, determine which of Penson or NSI should have allocated regulatory capital for the transactions in the TA Account. Further, the IIROC Panel concluded that it was not necessary to decide whether Alboini knew of and exploited the gap in understanding.

[242] We note that there is nothing improper in a Dealer Member providing credit to a client through trading in an accumulation account. The IIROC Panel found the trading in the TA Account to be improper because (i) Jaguar was not creditworthy at the time of the trades, and (ii) delaying ticketing out the securities in the TA Account until month-end was an inappropriate use of the TA Account and could only benefit Jaguar (because Jaguar was required to fund the purchases in the TA Account only when the securities were ticketed out) (see paragraph 238 above and IIROC Decision, *supra*, at para. 63).

[243] In our view, it was within the expertise and authority of the IIROC Panel to assess the use by Alboini of the TA Account and to come to the conclusion that use was improper for the reasons referred to in paragraph 242 above.

[244] We note that the IIROC Panel refused to allow NSI and Alboini to introduce expert evidence that would have included evidence as to the accepted practice in the industry related to the use of an accumulation account (see paragraph 69 of these reasons). The use of an accumulation account was clearly an important issue in this proceeding and one upon which we would likely have wanted to receive further evidence with respect to industry practice. The question on this Application is not, however, whether we would have permitted expert or other evidence on that issue. The question is whether the IIROC Panel was entitled to make the decision it did with respect to Alboini's use of the TA Account and whether that decision was procedurally unfair to the Applicants because they were not permitted to tender expert evidence on the point.

[245] The threshold for permitting expert evidence is a high one (see paragraph 69 of these reasons). The legal question is whether expert evidence was necessary to enable the IIROC Panel to appreciate the matters in issue and to make the decisions that it did. The IIROC Panel concluded that such evidence was not necessary (the Panel also questioned other aspects of the proposed expert evidence including the qualifications of the proposed expert). Ultimately, it was for the IIROC Panel to determine whether the use by Alboini of the TA Account was improper in the circumstances; that was not a matter for the opinion of an expert. We find that the IIROC Panel was entitled to conclude that expert evidence as to industry practice in the use of an accumulation account was not necessary in the circumstances. In our view, the IIROC Panel was also entitled to conclude that "[d]elaying the ticketing out [of the securities in the TA Account] until month end … is an inappropriate use of the TA Account" (see paragraph 238 above and IIROC Decision, *supra*, at para. 63).

[246] We note that the Applicants were able to make submissions to the IIROC Panel as to the appropriate use of an accumulation account and as to ticketing out securities from it.

[247] On balance, we do not find the IIROC Panel's decision to exclude the Applicants' proposed expert evidence to have been procedurally unfair to the Applicants.

Misleading Penson

[248] The IIROC Panel came to the conclusion that Penson was misled by Alboini "into thinking it could treat the Jaguar Main Account and the Jaguar Project Accounts as if they were one account" (IIROC Decision, *supra,* at para. 65). While the IIROC Panel concluded that Alboini misled Penson, no witness testified at the IIROC Hearing on behalf of Penson. We acknowledge that the evidence before the Panel on this issue was not the best evidence available in the circumstances (which would have been the testimony of a senior officer of Penson with knowledge of the facts who testified whether Penson was actually misled). We note, however, that there was evidence before the IIROC Panel upon which it could rely in coming to the conclusion that Alboini misled Penson, including the testimony of Alboini referred to in the IIROC reasons (see IIROC Decision, *supra,* at paras. 68 and 69). We do not know whether Penson took the position that it was misled by Alboini. We note, however, that the IIROC Panel concluded that Penson granted credit to Jaguar through the trading in the TA Account in circumstances in which it would not otherwise have done so. In our view, the IIROC Panel was entitled in these circumstances to conclude that Alboini misled Penson.

Risk to NSI and Penson

[249] The IIROC Panel found that the following factors contributed to exposing NSI and Penson to out-of-the-ordinary credit risk:

(a) the time the securities were held in the TA Account without being ticketed out to and paid for by Jaguar;

(b) the lack of creditworthiness of Jaguar;

(c) the fact that had NSI been required to put up margin for the purchases in the TA Account it would have exceeded the "required to margin amount" established by Penson (see paragraph 167 of these reasons);

(d) the speculative nature of the securities held by Jaguar in the Jaguar Main Account; and

(e) the speculative and illiquid nature of the securities being purchased for the Project Accounts through the TA Account.

(see IIROC Decision, *supra,* at paras. 77 to 80)

[250] There was evidence before the IIROC Panel that Jaguar's overall securities position was under-margined for all but eight days during the period from August 1, 2008 to November 28, 2008 (see paragraph 165 of these reasons). Further, at one point, the aggregate

unmargined liabilities of Jaguar in the TA Account and other Jaguar accounts at NSI was $2,964,012 which was more than the comfort deposit of approximately $1.7 million maintained by NSI with Penson. The unmargined liabilities exposed NSI to significant risk because NSI would have been deficient in its regulatory capital had it accounted for those liabilities (see paragraphs 166 and 167 of these reasons).

[251] In our view, the IIROC Panel was entitled to conclude that the "… access to credit created by Alboini's trading practice as described above, caused the capitals of both NSI and Penson to be put at greater risk than would have occurred had the TA Account not been used for the Jaguar Project Account purchases" (IIROC Decision, *supra*, at para. 81). The factors that created this risk are those set out in paragraph 249 above.

[252] We understand, however, that Jaguar's trading in the TA Account did not ultimately result in any financial loss to NSI or Penson and that both those parties derived financial benefits from the trading.

[253] The IIROC Panel also concluded that "Dealer Members owe a duty to each other to deal honestly and fairly in accordance with generally accepted industry standards (so long as those standards are not below their obligation to the public interest) so as not to expose other Dealer Members or their employees to unnecessary and unexpected risks" (IIROC Decision, *supra*, at para. 84). The Panel concluded that "Alboini's actions fell very far below the standards that would or should be acceptable to member firms" (IIROC Decision, *supra*, at para. 85). One factor in making that finding was the IIROC Panel's conclusion that "Alboini's failure to correct Penson's misimpression about the propriety of treating the Jaguar accounts as one was improper and was a factor in getting Jaguar access to credit" (IIROC Decision, *supra*, at para. 69; see paragraph 229(d) above).

Conclusions

[254] The IIROC Panel considered the evidence before it and made findings that the use by NSI and Alboini of the TA Account was improper in light of industry standards. We are satisfied that there was evidence before the IIROC Panel upon which it was entitled to come to the conclusions referred to in paragraph 229 of these reasons. The IIROC Panel has specialized knowledge and expertise with respect to conduct in the securities industry and is entitled to interpret and apply IIROC Rules. The IIROC Panel was entitled to apply that knowledge and expertise to interpret the evidence and submissions before it and to come to the conclusion that the trading in the TA Account was improper and caused out-of-the-ordinary risks to NSI's and Penson's capital.

[255] In our view, the IIROC Panel did not rely on judicial notice in reaching its conclusions on Count 1.

[256] Count 1 alleges that Alboini engaged "in business conduct unbecoming or detrimental to the public interest" (IIROC Rule 29.1). IIROC has particular knowledge and expertise in interpreting and applying that standard. The fact that there is no definition of what "unbecoming business conduct" may be does not prevent an IIROC panel from interpreting and applying that standard. In *Youden*, the absence of a definition of "misconduct" did not prevent an IDA panel

from addressing and applying that concept. *Youden* quotes the following passage from *Re Gareau*:

> …
>
> Finally, the courts have made clear that the absence of a definition of misconduct does [not] prevent a disciplinary tribunal from considering whether there has been misconduct in a particular case. In *Re Matthews and Board of Directors of Physiotherapy* (1987), 61 O.R. (2d) 475, the Ontario Court of Appeal stated:
>
> > The absence of such a definition requires the board to judge the appellant by the objective standards of his own profession. Although these standards are unwritten, they are nonetheless real and it is within the jurisdiction of the appellant's professional brethren who constitute the board to determine in the particular case if he has fallen below that standard.
>
> …
>
> (*Youden, supra,* at para. 76)

[257] Accordingly, the IIROC Panel was entitled to interpret and apply the concept of "unbecoming business conduct" and to determine whether Alboini's conduct fell within it. The IIROC Panel was entitled to conclude, as it did, that Alboini's conduct constituted conduct unbecoming or detrimental to the public interest contrary to IIROC Rule 29.1.

[258] Based on our conclusions in paragraphs 254 and 257 above, we find that the IIROC Panel did not make an error in principle or in law that would warrant our intervention in relation to Count 1. We therefore defer to the IIROC Panel's decision with respect to Count 1.

3. Count 2 – Vance Failed to Adequately Supervise Alboini's Trading

[259] IIROC Staff alleged that Vance, as NSI's Chief Compliance Officer, failed to adequately supervise Alboini's trading activity involving Jaguar and other NSI clients, contrary to IIROC Rules 1300.1, 1300.2 and 2500, because he did not make sufficient inquiries in response to the following five alleged red flags:

> (a) Alboini opened 10 new Project Accounts for Jaguar between August and November 2008;
>
> (b) the new client application forms (NCAFs) for the 10 new Project Accounts were incomplete, including the absence of any indication as to whether or not any third parties held a beneficial interest in the accounts;
>
> (c) transfers of funds were effected between NSI retail client accounts and pro accounts of Jaguar, without proper documentation to do so;
>
> (d) Vance was aware that a "majority of the investors" in the Project Accounts were also NSI clients; and

(e) over two million shares of a particular issuer were traded from a pro account into a retail client account on one day.

(IIROC Decision, *supra*, at para. 95)

[260] The IIROC Panel found that Vance failed to make sufficient inquiries regarding the matters referred to in clauses (a), (b) and (d) of paragraph 259 above, and thereby breached IIROC Rules 1300.1, 1300.2 and 2500 (IIROC Decision, *supra*, at para. 106). However, with respect to the matters referred to in clauses (c) and (e) of that paragraph, the IIROC Panel found that "Vance was never faced with [these] red flag[s]". Therefore, if those were the only red flags referred to in Count 2, the IIROC Panel "could not conclude that the allegation against Vance was established" [emphasis in original] (IIROC Decision, *supra*, at paras. 105(c) and 105(e)).

[261] The IIROC Panel provided specific reasons for its findings. The IIROC Panel had evidence before it of (i) missing NCAFs for the Project Accounts, (ii) Vance's approval for the opening of accounts with no RR signature, (iii) numerous missing NCAF support documents that Vance claimed "may be misfiled", (iv) two Project Accounts opened with no CCO or senior officer signatures, and (v) four other Project Accounts opened without compliance department approval (IIROC Decision, *supra*, at para. 105(b)). The IIROC Panel stated that it was not a sufficient excuse for Vance to say that he was unaware of missing third party information. The IIROC Panel also found that Vance should have made further inquiries regarding the incompleteness of the NCAFs and his failure to do so was a failure by Vance to properly supervise Alboini's trading activity, as alleged in Count 2 (IIROC Decision, *supra*, at para. 105).

[262] The IIROC Panel concluded that "Vance's testimony made clear the fact that he took little initiative to ensure compliance within NSI" with Rules 1300.1, 1300.2 and 2500 (IIROC Decision, *supra*, at para. 105(b)).

[263] With respect to this finding, the IIROC Panel also stated:

> Good business practice requires that a CCO be extra-careful to ensure proper disclosure documentation is on file and that NSI clients have been fully advised of the corporate relationships when they are investing with Jaguar, a firm in which the NSI UDP exercises control and has a personal financial interest. Vance's testimony demonstrated a lack of situational awareness and little interest in questioning *what should have been a major compliance concern at NSI*. This was a red flag which should have caused Vance to make more diligent inquiries into all the circumstances of the client investments in the Jaguar Projects to ensure that the clients were fully advised and knew what they were doing. Failure to do so was a failure on his part to properly supervise Alboini's trading activity, as alleged.
>
> [emphasis added]
>
> (IIROC Decision, *supra*, at paras. 105(d))

[264] The Applicants submitted that the opening of the 10 Project Accounts and the fact that a majority of the investors in those accounts were NSI clients were not red flags because there was nothing unusual about Alboini opening those accounts or that NSI clients had an interest in them.

While that may be the case, IIROC Rules specifically address the account opening process. The IIROC Panel found that Vance should have made more diligent inquiries related to the Project Accounts, particularly given Alboini's multiple roles and his potential conflicts of interest. In our view, it makes no difference that the account opening deficiencies referred to in paragraph 261 above were not directly related to Alboini's trading conduct alleged in Count 1. Those deficiencies did relate to the Project Accounts and should have led Vance to make further enquiries.

[265] Count 2 relates to the allegation that Vance, as CCO, failed to supervise Alboini's trading activity contrary to IIROC Rules 1300.1, 1300.2 and 2500. That Count does not expressly refer to IIROC Rule 38.7 which imposes obligations on a CCO. In this respect, the IIROC Panel stated that:

> … However, Respondents' counsel never made any objection to the applicability of Rules 1300.1, 1300.2 and 2500 to Vance's conduct even after the issue was raised by the Panel in the hearing. At all times, the hearing proceeded on the basis that Rules 1300.1, 1300.2 and 2500 applied to the conduct of Vance. Consequently, it is the decision of the Panel that the Respondents have suffered no procedural unfairness due to the absence of Rule 38.7 from the wording of Count 2 and have waived their right to object to the application of Rules 1300.1, 1300.2 and 2500 to Vance's conduct.
>
> (IIROC Decision, *supra*, at para. 98)

[266] We agree with the IIROC Panel's conclusion that there was no procedural unfairness to Vance in these circumstances. Vance knew throughout that it was his conduct as CCO in supervising Alboini's trading activity and the opening of the Project Accounts that was the subject of Count 2.

[267] Further, in our view, there was an adequate evidentiary foundation upon which the IIROC Panel could conclude that Vance failed to adequately supervise Alboini's trading. The IIROC Panel's finding that Vance's failure to adequately respond to the red flags referred to in paragraph 259 (a), (b) and (d) of these reasons, including the failure to make further inquiries, is sufficient to establish the allegation in Count 2. We find that the IIROC Panel did not make an error in principle or in law that would warrant our intervention in relation to Count 2. We therefore defer to the IIROC Panel's decision with respect to Count 2.

4. Count 3 – Repeated Failures to Remedy Deficiencies

[268] The central factual issue in respect of Count 3 is whether NSI, Alboini and Vance each repeatedly failed to ensure that deficiencies identified by IIROC in three business conduct compliance reviews (a "**BCC review**") and one trading conduct compliance review (a "**TCC review**") were corrected by NSI. The particulars of these deficiencies are set out in the IIROC Decision, which states:

> The NOH [notice of hearing] contains the following particulars in relation to Count 3:

i. Between 2004 and 2008, Staff of the IDA, RS [Market Regulation Services Inc.] and subsequently IIROC conducted three BCC reviews (formerly known as "sales compliance reviews") and one TCC review of NSI. Each of the deficiencies listed below (in paragraph 109.iv) was raised with NSI, including with Vance after his employment at NSI commenced in October 2006.

ii. Final reports for the above-mentioned compliance reviews were issued as follows:

> a. on March 22, 2005, the final 2004 Sales Compliance Review listing the below deficiencies was sent to NSI;
>
> b. on May 23, 2007, the final 2006 Sales Compliance Review listing the below deficiencies was sent to NSI;
>
> c. on April 30, 2009, the final 2007 Business Conduct Review listing the below deficiencies was sent to NSI; and
>
> d. on February 8, 2010, a letter was sent to NSI, making reference to a report issued in December 2008 that listed the below Trading Conduct Compliance deficiencies, of which several were repeats from previous trading conduct compliance reviews.

iii. IIROC gave NSI ample opportunity to address the outstanding deficiencies in the firm's daily business and supervision of its employees. Despite some efforts and repeated assurances by NSI that the deficiencies would be addressed, and notwithstanding a settlement reached with RS in May 2008 regarding trading conduct failings from 2003 to 2005, NSI, Alboini and Vance failed to address the deficiencies during the material time.

iv. NSI's conduct during the material time included the following:

> a. failing to maintain current and accurate information about and properly supervise employees' external securities accounts;
>
> b. failing to maintain adequate grey and restricted lists and failing to ensure proper procedures were created and followed regarding use of the lists;
>
> c. failing to maintain adequate physical barriers in its office space to contain corporate finance information;

d. failing to develop and maintain a firm-specific 90-day training program to complement the Canadian Securities Institute program; and

e. failing to adequately supervise trading conduct, including audit trail, order markers, grey lists and short sale markers.

v. As UDP, Alboini was ultimately responsible for NSI's conduct during the material time, including its deficiencies in the firm's daily business and supervision of its employees.

(IIROC Decision, *supra,* at para. 109)

[269] We note that two of the final reports referred to in paragraph 268 above were issued before the merger of the IDA and RS on June 1, 2008 to form IIROC.

[270] IIROC Staff had the onus of establishing that the alleged deficiencies occurred and that there were failures to remedy them. The IIROC Panel stated that:

The critical issue is, by what standard is the Panel to determine whether the deficiencies alleged by IIROC existed and, if so, whether they were corrected. The Panel has decided that the existence of a deficiency and whether it has been corrected must be determined by the regulator, IIROC, in accordance with applicable laws and its published rules, regulations, policies and bulletins and, in particular, its interpretation thereof. This is a complex industry with numerous members in a variety of circumstances; this requires that many of the applicable laws, rules and policies must be of general application, requiring flexibility and interpretation to fit differing circumstances. If a Member or registrant believes that IIROC is mistaken in this regard, their only option is to ignore IIROC's position and, as in this case, be open to IIROC taking disciplinary proceedings; otherwise they must comply with the IIROC position.

[emphasis added]

(IIROC Decision, *supra,* at para. 115)

[271] We note that evidence regarding all of the alleged deficiencies was presented to the IIROC Panel and that repeat deficiencies were acknowledged by Vance (IIROC Decision, *supra,* at paras. 111 and 112). However, the IIROC Decision discusses only the evidence regarding the deficiency of failing to maintain adequate physical barriers. The IIROC Decision states:

There is no need to outline the history of each of the deficiencies in these reasons, but the Panel notes for the record that the evidence at the hearing clearly establishes the legal basis for IIROC's deficiency findings and that NSI, Alboini and Vance failed to correct such deficiencies. However, the Panel will review the issue of physical barriers (referred to in paragraph 109 iv (c)) to illustrate our conclusions.

(IIROC Decision, *supra,* at para. 119)

[272] While we might have preferred the IIROC Panel to have specifically addressed in its reasons more than one of the alleged deficiencies, the IIROC Panel had evidence before it regarding all of the deficiencies and stated that there was evidence constituting a legal basis for IIROC's conclusions. In our view, there are no grounds for us to intervene in the IIROC Decision on Count 3 based on the failure of the IIROC Panel to address each of the separate deficiencies in its reasons.

[273] IIROC Staff submitted that the statement set out in paragraph 271 above means that the IIROC Panel made an independent finding that the deficiencies referred to occurred and were not corrected. We do not accept that submission. The Panel concluded that the evidence established "the legal basis for IIROC's deficiency findings …" That does not constitute an independent finding by the IIROC Panel that the deficiencies occurred and were not corrected. The IIROC Panel stated expressly the standard of review it was applying in deciding whether the deficiencies existed and whether they were corrected (see paragraphs 270 and 274 of these reasons and our conclusion in paragraph 278 below).

[274] In reaching its conclusion with respect to Count 3, the IIROC Panel was influenced by the standard of review set out in *Dunsmuir* in assessing IIROC Staff's allegations. The IIROC Decision states that:

> ... What are the limits on IIROC's ability to compel Members and registrants to follow its interpretations and directives? The case of *Dunsmuir* v. *New Brunswick* [2008] 1 S.C.R. 190, 2008 SCC 9 reestablished the principles for judicial review of tribunal decisions. Ours is not a case of judicial review and this Panel is not saying that it is applying *Dunsmuir*, but this Panel is influenced by the principles stated in *Dunsmuir* and *we have concluded that the ability of IIROC to compel Members and registrants to obey its interpretations and directives is subject to the condition that IIROC's interpretation may be overturned by an IIROC disciplinary hearing panel (or the OSC on appeal) if the panel (or the OSC) finds the interpretation to be arbitrary or unreasonable, contrary to law or beyond its jurisdiction.* It is this Panel's view that none of the deficiencies found, nor corrective instructions given by IIROC in this case were unreasonable, arbitrary, contrary to law or beyond its jurisdiction, and consequently the Respondents are compelled to obey IIROC's determination of the existence of deficiencies, its corrective instructions and its findings that the deficiencies had not been corrected.
>
> [emphasis added]
>
> (IIROC Decision, *supra*, at para. 117)

[275] The IIROC Panel was required to determine based on the evidence before it whether the allegations by IIROC Staff with respect to Count 3 were established. While IIROC Staff through its reviews may have come to conclusions about the alleged repeated deficiencies, the IIROC Panel should not have addressed that allegation as if it were sitting on a judicial review applying a *Dunsmuir*-like standard of review (see paragraph 274 above). While the IIROC Panel stated that it was not applying *Dunsmuir*, it also said that it was influenced by the principles in *Dunsmuir*.

[276] The question to be determined by the IIROC Panel was not whether IIROC Staff's position and interpretation of IIROC rules with respect to the deficiencies was unreasonable, arbitrary, contrary to law or beyond its jurisdiction. That constitutes a standard of judicial review. The question was whether IIROC Staff had established on the balance of probabilities that repeated deficiencies had occurred and were not corrected. In our view, the IIROC Panel made an error in law in concluding that it could overturn an IIROC Staff decision or interpretation only if the interpretation was "unreasonable, arbitrary, contrary to law or beyond its jurisdiction."

[277] This is an important point. IIROC Staff made an administrative, and not an adjudicative, decision when it decided that deficiencies had occurred and were not corrected. That administrative decision was being reviewed by the IIROC Panel as an independent adjudicator (in the same way this Commission reviews administrative decisions of Commission Staff). That review is an important element of the oversight role of an IIROC panel (or of a Commission panel). In our view, no deference was owed by the IIROC Panel to the decisions and interpretations of IIROC Staff (in the same way that no deference is owed by a panel of the Commission to decisions and interpretations made by Commission Staff).

[278] When we read all of the portions of the IIROC Decision related to Count 3, we believe that it is clear that the IIROC Panel did not make independent findings that deficiencies had occurred and were not corrected. The IIROC Panel found instead that IIROC's position with respect to the occurrence and correction of the alleged deficiencies was not unreasonable, arbitrary, contrary to law or beyond its jurisdiction.

[279] The IIROC Panel also stated:

> In the case of *Re Questrade Inc.* [2009] I.I.R.O.C. No.49, IIROC found that a continual refusal to comply with IIROC rules was a breach of IIROC Rule 29.1. Questrade appealed to the OSC, (*Re Questrade Inc.* (2011), 34 OSCB 2595) arguing that its deliberate refusal to follow the IDA's interpretation of the rules was not a deliberate refusal to follow the rules themselves, that IDA's findings, guidance or interpretations do not have the effect of a rule and were not binding on Questrade per se. The OSC disagreed with Questrade and ruled that Questrade was required to follow the IDA interpretation. That case is very persuasive to the Panel in this case. It is this Panel's conclusion that, subject to the condition stated in paragraph 117 [referred to in paragraph 274 of these reasons], *Members and registrants ultimately must follow IIROC's interpretation of all applicable laws, published rules, policies and bulletins etc. and are not entitled to simply disagree with IIROC or follow their own interpretation. It is IIROC, not NSI, Alboini or Vance, which determines the existence of deficiencies in NSI practices and whether they have been corrected.*
>
> [emphasis added]
>
> (IIROC Decision, *supra,* at para. 116)

[280] In *Questrade,* however, the District Council made an independent finding that Questrade had failed to comply with IIROC Rules. The reasons of the Commission state that:

> The District Council found that Questrade failed to comply with the rules when it made no attempts to collect the required margin from its online FX trading clients. Dealing with an issue that falls squarely within IIROC's expertise, the District Council concluded that Spot FX contracts are not exempt from regulatory margin requirements. The IIROC District Council made no error in law and proceeded on no incorrect principle; the decision of the District Council falls squarely within its area of competence and expertise.
>
> (*Re Questrade Inc.* (2011), 34 OSCB 2595 at para. 25)

In this case, we have concluded that the IIROC Panel did not make independent findings that deficiencies had occurred and were not corrected (see paragraph 278 above).

[281] We would add that the conclusion in *Questrade* is undoubtedly correct that regulatory consequences flow from a refusal by a registrant to comply with a regulatory requirement. IIROC may well take the position that Dealer Members have an obligation to comply with the reasonable determinations or directions of IIROC Staff. In this case, the IIROC Panel expressed concerns regarding the Applicants' "… failure to obey legal and reasonable findings and directives from IIROC, the intentional substitution of their own view of what was required for that of IIROC and the failure to understand, or intentional disregard of, the relationship between the regulator, IIROC, and the Respondents as the regulated parties" (IIROC *Decision, supra*, at para. 133). However, those matters were not the allegations made by IIROC Staff in Count 3. The IIROC Panel recognized in its reasons that Count 3 required IIROC Staff to establish that there were deficiencies under IIROC Rules and repeated failures to correct them (see paragraph 270 above). The onus remained on IIROC Staff throughout to prove its allegations in Count 3. If an IIROC Dealer Member disagrees with an interpretation of IIROC Staff, that Dealer Member takes the risk that a proceeding will be brought against it to establish the breach and that the breach will be found to have occurred. The IIROC Panel was right when it stated that "… [i]f NSI, Alboini and Vance choose not to comply with IIROC's determination that there were deficiencies and that they have not been corrected, they are subject to disciplinary proceedings ..." (IIROC Decision, *supra*, at para. 129). However, the question before the IIROC Panel was whether Count 3 as alleged by IIROC Staff was established; not whether IIROC Staff's interpretation of IIROC Rules was unreasonable, arbitrary, contrary to law or beyond its jurisdiction. In our view, the IIROC Panel made no independent findings in that respect.

[282] We find that the IIROC Panel made an error in law when it came to the conclusions set out in paragraphs 270 and 274 of these reasons. Accordingly, we set aside the IIROC Panel's decision with respect to Count 3.

5. Count 5(a) – Filing of Inaccurate Monthly Financial Reports

[283] The particulars of Count 5(a) are as follows:

> The NOH stated the following particulars regarding Count 5(a):
>
> a) NSI found new premises for its Toronto office in 2007 and retained a contractor to make improvements. The contractor proceeded with its work and issued invoices to NSI from time to time in 2007 and early 2008. After deducting

an interim payment made by NSI, the final cost of the contractor's work was $521,515.55.

b) Chornoboy was responsible for reviewing the contractor's invoices and arranging for payment. Chornoboy failed to record the liabilities owing to the contractor on NSI's monthly financial reports and its annual financial statements. The invoices were properly liabilities of NSI, unless and until a different amount was agreed upon or ordered by a court, and they ought to have been recorded.

c) As a result of failing to properly record the liabilities to the contractor, NSI's Monthly Financial Reports filed with IIROC were inaccurate for the 13 months from February 2008 to February 2009. Importantly, by not recording the liabilities, NSI concealed six instances in which it was in early warning for the purpose of IIROC Dealer Member Rule 30.

d) As UDP, Alboini was ultimately responsible for the failures to properly record NSI's liabilities and for the breach of IIROC Dealer Member Rule 30.

(IIROC Decision, *supra*, at para. 136)

[284] Chornoboy admitted the facts alleged in Count 5(a) and "that he erred in his accounting treatment" of the costs of the leasehold improvements (IIROC Decision, *supra*, at para. 137). Accordingly, the issue for the IIROC Panel was whether Alboini as UDP had responsibility for Chornoboy's conduct referred to in Count 5(a).

[285] The IIROC Panel recognized that Alboini's role as UDP did not make him responsible or culpable for every error by a person under his supervision. The IIROC Panel stated that:

There are two factors which lead this Panel to conclude that Alboini should be held culpable under Count 5(a) as alleged. Firstly, the failure in reporting arose out of the leasehold improvements to the new premises of NSI (the move that was reported by Vance to IIROC when indicating that the physical barriers deficiency would be corrected and which is referred to in Count 3 above). *There can be no issue that Alboini was aware of the move and its cost, which involved payment of over $500,000 in settlement of the claim of the construction firm which did the leasehold improvements. This was simply too significant a number for Alboini not to be aware of it given the size of NSI and its very small executive team at NSI.* [emphasis added]

Secondly, in their closing argument, Respondents' counsel admitted that Alboini reviewed the Monthly Financial Reports (MFRs), but said he was unaware of the error. There is no direct evidence that he was aware of the error, but given the following factors:

- his involvement in the move to the new premises;
- the size of the settlement;

- the size of the error relative to the totals in the MFRs;
- the fact that he reviewed the MFRs with Chornoboy;
- this was a substantial error made by a senior member of the firm,

it is the Panel's conclusion that Alboini failed to supervise the activities of, and promote compliance by NSI and Chornoboy with IIROC rules regarding proper reporting in its MFRs as alleged.

(IIROC Decision, *supra*, at paras. 140 and 141)

[286] In the circumstances, it was not enough for Alboini to simply say that he was unaware of the error. The onus was on Alboini to establish that his reliance on Chornoboy was reasonable and that he took appropriate steps to ensure that the MFRs were accurate. The IIROC Panel concluded that Alboini was ultimately responsible for Chornoboy's error. Given the materiality of the amounts paid for the leasehold improvements, Alboini's knowledge of those amounts and his review of the MFRs, the IIROC Panel was entitled to conclude, as it did, that Alboini was culpable with respect to Count 5(a).

[287] In our view, the IIROC Panel made no error in principle or in law in making its findings with respect to Count 5(a) based on the evidence before it. In the circumstances, we defer to the IIROC Panel's decision as to Count 5(a).

6. Procedural Fairness Regarding the Sanctions and Costs Hearing

Decision of the IIROC Panel

[288] The IIROC Panel issued its decision on the merits on July 23, 2012. That decision was as follows:

> The Panel makes the following findings against NSI, Mr. Alboini, Mr. Vance, and Mr. Chornoboy
>
> **Count 1**: Between August and November 2008, Alboini, as Ultimate Designated Person and a Registered Representative at NSI, engaged in a trading practice which improperly obtained access to credit for his client, Jaguar Financial Corporation, and in doing so risked the capital of both NSI and its carrying broker, thereby engaging in business conduct unbecoming or detrimental to the public interest, contrary to IIROC Dealer Member Rule 29.1;
>
> **Count 2**: Between August and November 2008, Vance, as Chief Compliance Officer, failed to adequately supervise Alboini's trading activity involving Jaguar Financial Corporation and other NSI clients, contrary to IIROC Dealer Member Rules 1300.1, 1300.2 and 2500;
>
> **Count 3**: From 2006 to 2010, NSI, Alboini, as Ultimate Designated Person, and Vance, as Chief Compliance Officer, repeatedly failed to ensure that NSI

> corrected deficiencies found in three business conduct compliance reviews and one trading conduct review, thereby engaging in conduct unbecoming or detrimental to the public interest, contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.
>
> **Count 5(a):** NSI, Alboini, as Ultimate Designated Person, and Chornoboy, as Chief Financial Officer from February 2008 to February 2009, filed or permitted to be filed inaccurate Monthly Financial Reports which failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital, contrary to IDA By-law 17.2, and IIROC Dealer [*sic*].
>
> (IIROC Decision, *supra,* at para. 143)

[289] No reasons were provided supporting these findings prior to the sanctions and costs hearing held on October 11 and 12, 2012.

Applicants' Objection

[290] A chart showing the sanctions and costs requested by IIROC Staff and the sanctions and costs imposed on the Applicants is attached as Schedule B to these reasons. The sanctions and costs imposed on Alboini were those requested by IIROC Staff, except that (i) on Count 1, IIROC Staff requested a one-year suspension of Alboini in all categories, and the IIROC Panel imposed a two-year suspension in all categories and a permanent UDP ban, (ii) on Count 3, IIROC Staff requested a six-month suspension of Alboini as UDP and the IIROC Panel imposed a one-year suspension in all categories and a permanent UDP ban, and (iii) on Count 5(a), IIROC Staff requested a fine for Alboini of $35,000 and the IIROC Panel imposed a fine of $25,000. The sanctions and costs imposed on NSI, Vance and Chornoboy were those requested by IIROC Staff, except that for Vance (x) on Count 2, IIROC Staff requested a fine of $35,000 and the IIROC Panel imposed a fine of $25,000, and (y) on Count 3, IIROC Staff requested a fine of $50,000 and the IIROC Panel imposed a fine of $25,000. All of the costs orders requested by IIROC Staff were granted.

[291] Prior to the sanctions and costs hearing, the Applicants objected to that hearing proceeding before the reasons for the IIROC Panel's findings were issued. In this respect, the IIROC Panel made the following comment:

> After delivering its decision, the Panel indicated that full reasons for the decision would follow in due course and invited counsel to suggest dates for the penalty phase of the hearing. Respondents' counsel took the position that they could not properly address the matter of the appropriate penalties until they had seen the Panel's full reasons for the decision and that dates for the penalty phase should not be determined until after they had an opportunity to review the Panel's reasons. The Respondents' counsel did not cite any authority whatsoever for their position, no IIROC rules, no cases and no legal principles.
>
> (IIROC Decision, *supra,* at para. 144)

[292] At the sanctions and costs hearing, the Respondents again asserted that:

> It is fundamentally unfair to expect the respondents to be able to make meaningful submissions as to the appropriate sanctions and costs in the absence of reasons showing how and why the Hearing Panel arrived at its findings on the merits hearing.
>
> (IIROC Decision, *supra*, at para. 146)

[293] There was another relevant exchange at the IIROC sanctions and costs hearing with respect to this issue:

Mr. Walsh: [member of the IIROC Panel]	What you're asking for is reasons on a decision as to the merits. What we're supposed to be here today doing is having submissions on penalty.
Mr. Kaufman: [counsel to the Applicants]	That's what we're trying to do. We're trying to deal with the degree and significance of the misconduct which Mr. Douglas [counsel to IIROC] said is relevant. So we are dealing with that from a blameworthy perspective to try to show you why we don't think it's as blameworthy as Mr. Douglas says. But we're doing that in the context of not having the reasons on the facts, so we don't know what your reasons are. We know what Mr. Douglas' arguments are. So in the sense, we are trying to argue things without the facts from your reasons and trying to do the best we can. It is not procedurally fair, in my view. It isn't.
The Chairman [of the IIROC Panel]:	Let me answer that. The fact that the Respondents decided to change counsel after the full case was heard is not our problem and it's not Mr. Douglas' problem. You're stuck with the situation that was created by your client. He's the one who changed horses. Mr. Brush raised exactly the same issue. We told him he was wrong. And the fact that you weren't here to listen to the facts, that's not anybody's problem. Respondents and their counsel were here. They listened to the facts; they listened to the arguments; we made a decision. All you need to know now is what those facts are and what our decision was. The facts are there. We didn't ---
Mr. Kaufman:	I need to know your reason [*sic*].
The Chairman:	No, you don't. You just need to know the facts ---
Mr. Kaufman:	I fundamentally disagree.
The Chairman:	Well, I'm not the least bit surprised.

Mr. Kaufman: Right. It's a fundamental administrative law of principle [*sic*].

The Chairman: No, it's not.

Mr. Kaufman: It is.

(Transcript, IIROC Sanctions Hearing, October 11, 2012 at page 161, line 10 to page 162, line 25)

[294] The IIROC Panel dismissed the Applicants' objections and stated that:

> This Panel agrees with the IIROC position on these matters, and reiterates its conclusion that the Respondents did not require the reasons for its decision on the merits prior to dealing with sanctions issues.
>
> This Panel also noted that, despite their protestations to the contrary, the Respondents were able to present full, complete and meaningful submissions on the sanctions issues in this case.
>
> (IIROC Decision, *supra,* at paras. 150 and 151)

[295] We understand that there have been a number of proceedings in which IIROC panels have bifurcated the merits hearing and the sanctions and costs hearing and have provided reasons on the merits before the sanctions and costs hearing. However, there does not appear to be an IIROC policy in this respect and, according to IIROC Staff, there have also been many circumstances in which IIROC panels have not done so.

[296] This issue goes to the question of procedural fairness to the Applicants. The question is whether the Applicants were given a meaningful opportunity to address and make submissions on the question of sanctions and costs?

[297] In this case, the matters at issue were complex and there were many factual and legal issues in respect of which the IIROC Panel made findings contrary to the submissions of the Applicants. Further, one of the issues that the IIROC Panel was required to address at the sanctions and costs hearing was whether the sanctions and costs imposed were proportionate to the conduct and circumstances of the Applicants. It seems to us that it would have been difficult for the Applicants to effectively address the issue of proportionality without the reasons and detailed findings on the merits by the IIROC Panel. We note in this respect that the Applicants strenuously objected before the IIROC Panel that proceeding with the sanctions and costs hearing without the benefit of the reasons on the merits was unfair to them.

[298] In our view, in these circumstances, the IIROC Panel should have provided reasons on the merits prior to the sanctions and costs hearing in order to permit the Applicants to effectively make submissions. As noted in paragraph 71 of these reasons, the Applicants were entitled to a high level of procedural fairness which includes the right to be heard. In our view, the failure of the IIROC Panel to provide reasons on the merits before the sanctions and costs hearing was unfair to the Applicants in the circumstances. We note in this respect that the question is not whether in the IIROC Panel's view the Applicants were able to make effective submissions in the circumstances (see paragraph 294 of these reasons).

[299] We also note that the Commission's *Rules of Procedure* address this issue. Under the Commission's *Rules of Procedure*, a separate hearing must be held to determine sanctions and costs unless the parties otherwise agree (Commission's *Rules of Procedure*, section 17.3(1)). Those rules also require that a date for a sanctions hearing shall be set "[f]ollowing the issuance of the reasons for the decision on the merits …" (Commission *Rules of Procedure*, section 17.3(2)). Those rules do not, of course, apply to the IIROC Hearing. We would add that where a pending transaction is being challenged before the Commission, the Commission may well make a decision whether or not to cease trade that transaction before it issues detailed reasons on the merits.

More Severe Sanctions against Alboini

[300] This concern is heightened by the fact that the Panel imposed more severe suspensions on Alboini than were requested by IIROC Staff (see paragraph 290 above and Schedule B). With respect to Count 1, the IIROC Panel imposed on Alboini a two year suspension from registration in all capacities and a permanent UDP ban when IIROC Staff had requested a one year suspension from registration in all capacities. With respect to Count 3, the IIROC Panel imposed on Alboini a one-year suspension from registration in all capacities (to be served concurrently with the two year suspension in relation to Count 1) and a permanent UDP ban when IIROC Staff had requested a six-month suspension from serving as UDP. Those sanctions were in addition to a total fine of $625,000, disgorgement of commissions of $240,000 and costs of $125,000.

[301] It is clear, as a matter of law, that the IIROC Panel was not bound by the sanctions and costs proposals made by IIROC Staff and that it had the discretion to impose the sanctions and costs it considered appropriate and proportionate to the conduct involved. Having said that, IIROC Staff's requested sanctions and costs were a relevant consideration.

[302] IIROC's disciplinary sanctions guidelines discuss the circumstances in which a permanent ban should be imposed upon a Dealer Member. That guideline includes section 4.3 which states:

> A permanent ban from approval of an individual or the termination of membership or expulsion from the Corporation is a severe economic penalty and should generally be reserved for cases where:
>
> - the public itself has been abused;
> - where it is clear that a respondent's conduct is indicative of a resistance to governance;
> - the misconduct has an element of criminal or quasi-criminal activity; or
> - there is reason to believe that the respondent could not be trusted to act in an honest and fair manner in all their dealings with the public, their clients, and the securities industry as a whole.

In addition, "recommended sanctions" for breaches of IIROC Rule 29.1 include "in egregious cases" consideration of the imposition of a permanent prohibition.

[303] The IIROC Panel concluded that "… Alboini's conduct was quite intentional and amounted to a systematic attempt to improperly benefit Jaguar, in which he had a financial interest, at the risk and expense of NSI and Penson" and that conduct could be "characterized as manipulative and deceptive" … (IIROC Decision, *supra*, at para. 187). The IIROC Panel also concluded that Alboini's conduct was "deceitful and self-serving" and that he engaged in egregious conduct (IIROC Decision, *supra*, at para. 208). That conduct included the failure of the Applicants "to obey legal and reasonable findings and directives from IIROC" (IIROC Decision, *supra*, at para. 133).

[304] The IIROC Panel addressed at the sanctions and costs hearing whether Alboini's conduct indicated a "resistance to governance" and whether there was reason to believe that NSI and Alboini "… could not be trusted to act in an honest and fair manner in all of their dealings with the public, their clients and the securities industry as a whole" (IIROC Decision, *supra*, at para. 197). The IIROC Panel concluded that "this factor is relevant to Alboini". The IIROC Panel also concluded "… that there is sufficient evidence that Alboini could not be effectively controlled by anyone brought into, or currently in NSI, or by any restriction on him other than a suspension" (IIROC Decision, *supra*, at para. 206). *While there were findings made by the IIROC Panel that supported these conclusions (including those referred to in paragraph 303 above), Alboini would have been unaware of those findings until the reasons on the merits were issued (which was, of course, after the sanctions and costs hearing)*. Further, while being ungovernable is a relevant consideration when an IIROC panel is considering imposing a permanent ban pursuant to IIROC Sanctions Guidelines, it does not appear that Alboini was aware, prior to the sanctions and costs hearing, that a permanent ban was being considered by the IIROC Panel. IIROC Staff did not request such a ban. Accordingly, Alboini would not have known in advance of the sanctions and costs hearing that his resistance to governance or ungovernability would be an issue at that hearing and he would not have known what findings the IIROC Panel was relying on to support a permanent ban. That knowledge would have been important to Alboini in formulating his submissions on sanctions and costs. The result of these circumstances was that, to a significant extent, Alboini went into the sanctions and costs hearing on an uninformed basis.

Conclusions

[305] In our view, based on the conclusion in paragraph 298 above, and, in the case of Alboini, in light of the circumstances referred to in paragraphs 300 and 304 above, we find that the conduct of the sanctions and costs hearing was procedurally unfair to the Applicants. That constitutes an error in law within the meaning of *Canada Malting*. Accordingly, we set aside the IIROC Panel's sanctions and costs imposed on the Applicants.

[306] Given our conclusion in paragraph 305 above, we do not have to address the Applicants' submissions on (i) the proportionality of the sanctions and costs imposed by the IIROC Panel, or (ii) the costs awarded by the IIROC Panel, including the submissions in paragraph 148 of these reasons.

7. Reasonable Apprehension of Bias

[307] The Applicants allege that a reasonable apprehension of bias on the part of the IIROC Panel arose as a result of comments made by the members of the IIROC Panel during the sanctions and costs hearing.

[308] The parties do not disagree about the applicable test for determining whether a reasonable apprehension of bias on the part of the IIROC Panel arose in the circumstances. That test is substantially the same whether one applies *Newfoundland Telephone*, *R.D.S.* or *National Energy Board* (see paragraphs 72 and 73 of these reasons). What is disputed is whether the comments made by members of the IIROC Panel during the sanctions and costs hearing gave rise to a reasonable apprehension of bias.

[309] We note that there is a presumption that an IIROC panel will act fairly and impartially (see paragraph 76 of these reasons). Accordingly, the onus is on the Applicants to establish the contrary and the threshold for finding bias is a high one (see paragraph 75 of these reasons).

[310] The comments of the members of the IIROC Panel alleged by the Applicants to give rise to a reasonable apprehension of bias can be grouped into the following categories (i) comments about the public perception of IIROC in imposing sanctions, including allegedly disparaging comments made by Alboini and reported in the media with respect to a previous IIROC enforcement proceeding against NSI, (ii) comments about the costs of the IIROC proceeding that would be borne by other IIROC Dealer Members if those costs were not paid by the Applicants, and (iii) comments that were dismissive of the one-year ban from registration requested by IIROC Staff for Alboini.

Comments as to Public Perception of IIROC

[311] The comments about the public perception of IIROC in imposing appropriate sanctions arose during a discussion about the principle of general deterrence and industry expectations that appropriate penalties will be imposed by IIROC. The IIROC Panel questioned how it would be perceived by the public if IIROC imposed the lower penalties requested by Alboini's counsel.

[312] In our view, the reference to the public perception of appropriate sanctions would not generally raise a reasonable apprehension of bias in the mind of a reasonable person, fully informed of the circumstances. The Commission has held that general deterrence can be taken into account in determining appropriate sanctions (*Donnini (Re)* (2002), 25 O.S.C.B. 6225 at para. 178). The Supreme Court of Canada emphasized the important role of general deterrence in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***"). In *Cartaway*, the Supreme Court of Canada stated that deterrence is "…an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventive" (at para. 60). Further, the Supreme Court has noted that deterrence may be specific to the respondent or general to the public at large. The Supreme Court stated in *Cartaway* that:

> Deterrent penalties work on two levels. They may target society generally, including potential wrongdoers, in an effort to demonstrate the negative consequences of wrongdoing. They may also target the individual wrongdoer in

> an attempt to show the unprofitability of repeated wrongdoing. The first is general deterrence; the second is specific or individual deterrence: see C. C. Ruby, *Sentencing* (5th ed. 1999). In both cases deterrence is prospective in orientation and aims at preventing future conduct.
>
> (*Cartaway, supra,* at para. 52)

[313] The Commission has also addressed the relevance of industry expectations in imposing appropriate sanctions:

> Industry expectations and understandings are particularly relevant to general deterrence. If a penalty is less than industry understandings would lead its members to expect for the conduct under consideration, it may undermine the goals of the Association's disciplinary process; similarly, excessive penalties may reduce respect for the process and concomitantly diminish its deterrent effect. Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention, rather than punishment.
>
> (*Mills, supra,* at p. 3)

[314] Accordingly, the IIROC Panel was entitled to consider general deterrence and public and industry expectations in imposing sanctions in this matter.

[315] The IIROC Panel also referred to certain allegedly disparaging comments made by Alboini and reported in the media with respect to a previous IIROC enforcement proceeding against NSI. This included a comment by one of the members of the IIROC Panel that:

> … there was a public response from NSI basically -- how do I put it in nice words -- well, basically rubbing IIROC's nose into the fact that, 'You know what? You guys were all wrong. You were offside. It just goes to prove that we're not going to be bullied around and whatever.'
>
> (Transcript, February 15, 2013 at page 334, lines 13 to 24)

Alboini did not deny making the statements.

[316] It seems to us that if such comments are made in the media, the comments are in the public domain and the person making them should not generally be able to complain if the comments are raised later by another IIROC panel considering imposing sanctions on the same person. The comments made are not wholly irrelevant in considering the imposition of sanctions. They may have been relevant to the question of what sanctions would likely deter NSI and Alboini from similar conduct in the future.

[317] Having said that, those statements were not the subject matter of the IIROC proceeding and, based on the extensive reasons for sanctions and costs in the IIROC Decision, the IIROC Panel does not appear to have been influenced by them in imposing sanctions and costs.

Other Comments

[318] The IIROC Panel also made comments that, absent an award of costs against the Applicants, the costs of the IIROC proceeding would be borne by other IIROC Dealer Members. Those comments arose during a discussion of IIROC's ability to require a Dealer Member to pay IIROC's costs after a contested hearing. The authority of an IIROC panel to order a member to pay costs after a disciplinary proceeding is set out in IIROC Rule 20.49. It is obvious that if costs are not recovered by IIROC pursuant to a cost award, those costs will indirectly be paid by other IIROC Dealer Members. The Commission has recognized this result in similar circumstances. In *Re Costello*, the Commission stated that "… costs that are not recovered will come indirectly, through the Commission's cost recovery funding arrangements, from fees paid by other participants in the capital markets" (at para. 41). We find that it was not irrelevant or inappropriate for the IIROC Panel to identify this issue in the sanctions and costs hearing.

[319] The Applicants also submitted that the comments by the IIROC Panel dismissing the IIROC Staff request for a one-year suspension of Alboini gave rise to an appearance of bias. In our view, the IIROC Panel was not required to impose sanctions consistent with IIROC Staff's recommendations. Subject to our conclusion in paragraph 305 above with respect to procedural fairness, the Panel was entitled to impose the full range of sanctions available under IIROC Rules and to express its views on the appropriateness of the sanctions requested by IIROC Staff.

Conclusions

[320] In our view, all of the comments made by the members of the IIROC Panel (referred to in paragraph 310 above) were acceptable exchanges between members of a hearing panel and legal counsel in discussing issues related to the imposition of sanctions and costs. We would not want to discourage members of a panel from raising issues and questions that may concern them in imposing sanctions and which legal counsel would want an opportunity to address. Further, it would be unrealistic to expect a hearing panel never to comment on matters that may be peripheral or extraneous to the relevant considerations. In our view, the comments made by members of the IIROC Panel do not rise to the level of the comments in *Shoppers* (see paragraph 216 of these reasons).

[321] We find that the comments made by the members of the IIROC Panel referred to in paragraph 310 above, either individually or when considered together, would not lead an informed, reasonable person with knowledge of all the circumstances to reasonably perceive that the IIROC Panel was biased against the Applicants or had prejudged the matter of sanctions and costs. Accordingly, those comments do not give rise to a reasonable apprehension of bias on the part of the IIROC Panel.

[322] We note that the appropriate time for raising issues related to bias is at the hearing when the issue first arises. The Federal Court of Appeal has stated that:

> Parties are not normally able to complain of a breach of the duty of procedural fairness by an administrative tribunal if they did not raise it at the earliest reasonable moment. A party cannot wait until it has lost before crying foul.

(*Kozak* v. *Canada (Minister of Citizenship and Immigration)*, [2006] 4 F.C.R. 377 at para. 66)

[323] A motion that included an allegation of bias on the part of the IIROC Panel was brought by the Applicants before the IIROC Panel on May 18, 2012 during the IIROC Hearing (see paragraph 325 below). In addition, the Applicants expressed concerns to the IIROC Panel with respect to bias in connection with (i) the motion related to the proposed introduction of the Applicants' expert evidence (see paragraph 69 of these reasons), and (ii) comments made at the sanctions and costs hearing. On balance, we believe that was sufficient in this case to satisfy the obligation referred to in paragraph 322 above.

8. Other Submissions Made by the Applicants

[324] We will address briefly certain of the other submissions made by the Applicants.

The Risk Trend Report

[325] The Applicants objected to the references by certain witnesses during the IIROC Hearing to IIROC's confidential NSI RTR and brought a motion during the IIROC Hearing to stay the IIROC proceeding on the grounds of procedural unfairness, reasonable apprehension of bias and/or abuse of process (see *Re Northern Securities* (2012) IIROC 33 (the "**IIROC Motion Decision**") and the Applicants' submissions commencing at paragraph 137 of these reasons).

[326] The NSI RTR was not introduced in evidence at the IIROC Hearing.

[327] The IIROC Panel made the following statement with respect to the confidentiality of the NSI RTR:

> … the use of the report is restricted as follows: …
>
> Neither the Dealer member [*sic*] nor IIROC, nor any person acting on behalf of either of them, shall assert, use or rely on the Report or any of its contents in any legal or regulatory proceeding (including proceedings by IIROC in respect of the Dealer Member or any of its Approved Persons) provided that nothing shall prevent:
>
> > IIROC from instituting or maintaining any such proceeding or other regulatory action as a result of its authorized investigations and reviews of its Dealer Members which may be based on facts or information which are the same or similar to information contained in the report or received by IIROC otherwise than in connection with the preparation or delivery of the Report; or …"
>
> The Panel ruled that Exhibit 14 prohibited any reference to the NSI RTR and its contents, which were confidential and should not have been revealed by Ms Jensen. Regarding the witness who was testifying, Ms Sainsbury could ask questions about, and the witness could testify regarding facts upon which the report was based but could not refer to the RTR itself or its contents. *It is to be noted that the NSI RTR which Ms Jensen apparently referred to, was not in evidence (and in fact never went into evidence).*

[emphasis added]

(IIROC Motion Decision, *supra*, at paras. 8 and 9)

[328] An applicant must meet a high standard of proof to establish that a stay should be granted on the grounds alleged by the Applicants. The IIROC Motion Decision states in this respect that:

> In our case, the admission of the reference to the high risk rating in the RTR (which is merely IIROC's rating of NSI, and does not establish as a fact that NSI is high risk), in the context of the large volume of evidence to be considered, particularly where it can and will be ignored, does not in any way "compromise the very fairness of the process", "amount to a gross or shocking abuse of the process", or "offend society's sense of justice". This breach of confidentiality should be treated as an evidentiary matter and will be ignored by this panel. Granting a stay of proceedings is not warranted.
>
> (IIROC Motion Decision, *supra*, at para. 26)

[329] The IIROC Panel concluded that:

> It is the decision of this Panel that the evidence of Ms Jensen, that NSI was rated as a high risk firm, contained in an RTR (and any such evidence in Mr. Latka's testimony) does not give rise to a stay of proceedings on any of the grounds invoked by the Respondents, procedural unfairness, reasonable apprehension of bias and/or abuse of process. Rather it is to be treated as an evidentiary matter. If the Panel had known about its confidentiality prior to it being referenced in Ms Jensen's testimony, it would have been ruled inadmissible; since its confidential nature was disclosed after going into evidence it will be given no weight by the Panel. Similarly, any such reference in Mr. Latka's testimony will be ignored by this Panel.
>
> (IIROC Motion Decision, *supra*, at para. 40)

[330] The NSI RTR was not used or relied on by IIROC in the IIROC proceeding. The IIROC Hearing had nothing to do with whether NSI was a high risk Dealer Member. No such allegation was made by IIROC Staff and the IIROC Panel did not make any such finding. Further, any such finding would have been irrelevant to the findings of the IIROC Panel or its decision on sanctions and costs. A high risk rating does not mean that a firm has or will breach IIROC Rules or commit some other misconduct. Accordingly, in our view, the question is whether the references to NSI's high risk rating were so prejudicial to the Applicants as to render the IIROC Hearing procedurally unfair to them or constitute an abuse of process.

[331] It is well recognized in the case law that a judge or adjudicator can exclude prejudicial information they have heard. In *Philip* v. *Philip*, [2005] O.J. No. 3367 ("***Philip***"), the Court stated:

> Even if there was widespread knowledge of this matter, which I do not believe there is, trial judges are all the time aware of evidence about a matter that they must erase from their minds in deciding a case. In both civil and criminal matters

> trial judges sometimes hear on a *voir dire* evidence that they subsequently rule to be inadmissible at the trial that they are hearing in a judge alone trial. For example, a judge may rule a confession or a statement, that would otherwise be incriminating against an accused person, inadmissible at the trial proper. In a judge alone trial, the judge must completely put from his or her mind such a confession ruled inadmissible because of a Charter breach, when deciding whether the Crown has established beyond a reasonable doubt that the accused person committed a crime.
>
> As another example, potential jurors are often asked if they know something about a matter because there has been widespread publicity about it. Jurors will often admit that they have read about a matter in a newspaper. They are then asked whether they could put aside that information and decide the matter solely on the evidence heard at a trial. Jurors have to do that just as do trial judges.
>
> (*Philip, supra,* at paras. 9 and 10)

[332] The Commission has adopted this principle. In *Re Gaudet* (1990), 13 O.S.C.B. 1405, the Commission commented that its Commissioners are able to disregard information that is not in evidence before them:

> The same considerations are true for commissioners of the Ontario Securities Commission who through reading the financial press and in other ways will often be aware of allegations and of other proceedings but, like judges, should be able to approach a hearing in an objective manner. Moreover, commissioners should be fully aware that they are to hear and determine a matter based on the evidence placed before them. Even jurors are considered far less vulnerable to prejudice today than in the past. As a five-member Ontario Court of Appeal stated in *R.* v. *Hubbert* (1975) 11 O.R. (2d) 464 (upheld by the Supreme Court of Canada) at p. 477: "In this era of rapid dissemination of news by the various media, it would be naive to think that in the case of a crime involving considerable notoriety, it would be possible to select 12 jurors who had not heard anything about the case. Prior information about a case, and even the holding of a tentative opinion about it, does not make partial a juror sworn to render a true verdict according to the evidence."
>
> (*Re Gaudet, supra,* at page 6)

[333] The references in the evidence to the NSI RTR were far less prejudicial than a judge hearing and having to disregard a confession (as in *Philip*). The IIROC Panel stated that it would ignore the NSI RTR and there is nothing to suggest that the IIROC Panel did not do so. We agree with the IIROC Panel's legal analysis and conclusions set forth in its Motion Decision. In our view, there are no valid grounds for us to conclude that the references to the NSI RTR significantly prejudiced the Applicants or rendered the IIROC Hearing procedurally unfair or an abuse of process. Applying *Canada Malting*, there are no grounds for us to intervene in the IIROC Decision on this basis.

Limitation Act does not apply

[334] To become an IIROC Dealer Member, a firm enters into a standard form agreement with IIROC. That agreement obligates the Dealer Member to comply with IIROC Rules. While the basis of that relationship is contractual, the relationship is established within a regulatory context which includes the reliance by the Commission on IIROC's regulatory role and the terms and conditions imposed by the Commission on IIROC in the Recognition Order (see the discussion commencing at paragraph 40 of these reasons). In our view, the sanctions and costs imposed by IIROC on Dealer Members where there is a breach of IIROC Rules is not a contractual penalty subject to the *Limitations Act*. Those sanctions and costs are imposed as a result of breaches of regulatory requirements reflected in the IIROC Rules approved by the Commission. Further, a Dealer Member expressly agrees to comply with IIROC Rules and that regulatory framework.

IIROC Proceeding Not an Arbitration

[335] Further, a hearing before an IIROC panel does not constitute an arbitration for purposes of the *Arbitration Act*. Under that Act, an arbitration agreement "means an agreement by which two or more persons agree to submit to arbitration a dispute that has or may arise between them." In our view, the agreement by which a Dealer Member agrees to comply with IIROC Rules is not an agreement to submit a dispute to arbitration. An arbitration addresses the contractual rights and obligations between parties to an agreement. An IIROC hearing is regulatory in nature and involves considerations beyond the mere contractual rights and obligations of the parties or any private dispute between them.

IIROC Rule 38.7

[336] IIROC Rule 38.7 sets out the obligations of a CCO. That Rule provides that a Chief Compliance Officer must, among other obligations, "establish and maintain policies and procedures for assessing compliance with the Rules and applicable securities laws by the Dealer Member and individuals acting on its behalf" (IIROC Rule 38.7(h) (i)) and must "… monitor and assess compliance by the Dealer Member, and individuals acting on its behalf, with the Rules and applicable securities laws…" (IIROC Rule 38.7(h) (ii)).

[337] The IIROC Decision made the following comments regarding IIROC Rule 38.7:

> Count 2 contains allegations that Vance, as Chief Compliance Officer (CCO), failed to adequately supervise Alboini's trading activity, contrary to IIROC Rules 1300.1, 1300.2 and 2500. The Panel noted that these rules address primarily the conduct of a dealer member and not specifically that of a CCO, although there are some references to certain obligations of supervisors. The conduct of a CCO is dealt with in IIROC Rule 38.7 which is not referred to in Count 2. However, Respondents' counsel never made any objection to the applicability of Rules 1300.1, 1300.2 and 2500 to Vance's conduct even after the issue was raised by the Panel in the hearing. At all times, the hearing proceeded on the basis that Rules 1300.1, 1300.2 and 2500 applied to the conduct of Vance. Consequently, it is the decision of the Panel that the Respondents have suffered no procedural unfairness due to the absence of Rule 38.7 from the wording of Count 2 and have waived their right to object to the application of Rules 1300.1, 1300.2 and 2500 to Vance's conduct.

(IIROC Decision, *supra,* at para. 98)

[338] IIROC Rules 1300.1, 13002 and 2500 refer primarily to obligations of a "Dealer Member", although there are some references to the obligations of a "Supervisor". We note, however, that IIROC Rule 29.1 provides that:

> … For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and *each of the foregoing individuals shall comply with all rules required to be complied with by the Dealer Member*.
>
> [emphasis added]

[339] As CCO of NSI, Vance was required to comply with IIROC Rule 38.7. Further, pursuant to IIROC Rule 29.1, he was obligated to comply with all Rules that applied to NSI as a Dealer Member.

[340] While IIROC Rules 38.7 and 29.1 were not referred to expressly in Count 2, it is clear that Count related to Vance's role as CCO in supervising Alboini's trading activity and the IIROC Hearing proceeded on that basis. In our view, the IIROC Hearing was not procedurally unfair to Vance for that reason. There are no grounds for us to intervene in the decision of the IIROC Panel referred to in paragraph 337 above pursuant to *Canada Malting*.

Deficiencies that occurred prior to the formation of IIROC

[341] The Applicants also submitted that the IIROC Panel's finding on Count 3 was affected by the merger of the IDA and RS that formed IIROC on June 1, 2008. The Applicants submitted that it is not possible to have repeat deficiencies for purposes of IIROC Rule 29.1 that reach back to conduct that occurred before the merger of the IDA and RS because, at that time, a different regulatory regime applied. Given our conclusion in paragraph 305 of these reasons, we do not need to address that issue.

Financial Sanctions

[342] The IIROC Rules provide that an IIROC hearing panel can impose, among other sanctions, a fine for the failure to comply with the provisions of any IIROC Rule (IIROC Rule 20.33). In our view, that includes a contravention of IIROC Rule 29.1.

9. Conclusions

[343] Based on the finding in paragraph 282 of these reasons, we have set aside the IIROC Panel's decision on Count 3. We refer that matter back to IIROC for disposition. IIROC shall be entitled to decide whether Count 3 shall be re-heard in a trial *de novo* before a different IIROC panel. Given the nature of Count 3, the practical challenges in rehearing it and the level of sanctions imposed by the IIROC Panel in respect of it, we might have simply dismissed Count 3. However, we have concluded, on balance, that IIROC should have the option to decide whether

Count 3 should be re-heard if IIROC considers that to be important from a regulatory perspective. Any such decision to re-hear Count 3 shall be made by IIROC, and communicated to NSI, Alboini and Vance, on or before February 14, 2014, or by such other date as may be agreed to by those Applicants, failing which Count 3 shall be dismissed.

[344] Based on the finding in paragraph 305 of these reasons, we have set aside the sanctions and costs imposed by the IIROC Panel on the Applicants. We will hold a hearing *de novo* solely on the question of the appropriate sanctions and costs to be imposed on the Applicants based on the findings of the IIROC Panel (including the findings referred to in paragraph 303 of these reasons), other than its finding with respect to Count 3. The parties shall be entitled to make submissions solely on appropriate sanctions and costs in the circumstances. The parties will be entitled to submit further evidence related to sanctions and costs. In this respect, the Applicants may introduce new evidence of the nature referred to in clauses (a) to (d) of paragraph 14 of these reasons. The submission of all such evidence is subject to our discretion to exclude it. For greater certainty, we will proceed with the sanctions and costs hearing regardless of whether IIROC decides to have Count 3 re-heard in a trial *de novo* before a different IIROC panel.

[345] The parties should contact the Office of the Secretary within 30 days to set a date for the sanctions and costs hearing and for a pre-hearing conference. The parties may apply to us for direction related to any matter arising from this decision.

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

"James E. A. Turner"	*"Judith N. Robertson"*
James E. A. Turner	Judith N. Robertson

SCHEDULE A

RELEVANT PROVISIONS OF IIROC MEMBER RULES AND IDA BY-LAWS

IIROC Rule 20 - CORPORATE HEARING PROCESSES

20.33 Approved Persons

(1) Upon conclusion of a disciplinary hearing, a Hearing Panel may impose the penalties set out at 20.33(2) if, in the opinion of the Hearing Panel, the Approved Person:

(a) failed to comply with or carry out the provisions of any federal or provincial statute, regulation, ruling or policy relating to trading or advising in respect of securities or commodities;

(b) failed to comply with the provisions of any Rule or Ruling of the Corporation; or

(c) failed to carry out an agreement or undertaking with the Corporation.

(2) Pursuant to subsection (1), a Hearing Panel may impose any one or more of the following penalties upon the Approved Person:

(a) a reprimand;

(b) a fine not exceeding the greater of:

(i) $1,000,000 per contravention; and

(ii) an amount equal to three times the profit made or loss avoided by such Approved Person by reason of the contravention;

(c) suspension of approval for any period of time and upon any conditions or terms;

(d) terms and conditions of continued approval;

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

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

(g) revocation of approval;

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

(i) any other fit remedy or penalty.

20.34 Dealer Members

(1) Upon conclusion of a disciplinary hearing, a Hearing Panel may impose the penalties set out at Rule 20.33(2) if, in the opinion of the Hearing Panel, the Dealer Member:

(a) failed to comply with or carry out the provisions of any federal or provincial statute, regulation, ruling or policy relating to trading or advising in respect of securities or commodities;

(b) failed to comply with the provisions of any Rule or Ruling of the Corporation;

(c) failed to carry out an agreement or undertaking with the Corporation; or

(d) failed to meet liabilities to another Dealer Member or to the public.

(2) Pursuant to subsection (1), a Hearing Panel may impose any one or more of the following penalties upon the Dealer Member:

(a) a reprimand;

(b) a fine not exceeding the greater of:

(i) $5,000,000 per contravention; and

(ii) an amount equal to three times the profit made or loss avoided by the Dealer Member by reason of the contravention;

(c) suspension of the rights and privileges of the Dealer Member (and such suspension may include a direction to the Dealer Member to cease dealing with the public) for any period of time and upon any conditions or terms;

(d) terms and conditions of continued Membership;

(e) termination of the rights and privileges of Membership;

(f) expulsion of the Dealer Member from membership in the Corporation; or

(g) any other fit remedy or penalty.

20.49 Assessment of Costs

(1) In addition to imposing any of the penalties set out in Rule 20.33, Rule 20.34 or Rule 20.45, the Hearing Panel may assess and order any Corporation Staff investigation and prosecution costs determined to be appropriate and reasonable in the circumstances.

(2) Costs shall not be assessed where the Hearing Panel has not made a finding against the Respondent based on any of the grounds set out at Rule 20.33(1) or Rule 20.34(1) or where an expedited decision is quashed upon review pursuant to Rule 20.48(1).

IIROC Rule 29 - BUSINESS CONDUCT

Rule 29.1 of the IIROC Dealer Member Rules states:

> 29.1. Dealer Members and each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member (i) shall observe high standards of ethics and conduct in the transaction of the business, (ii) shall not engage in any business conduct or practice which is unbecoming or detrimental to the public interest, and (iii) shall be of such character and business repute and have such experience and training as is consistent with the standards described in clauses (i) and (ii) or as may be prescribed by the Board.
>
> For the purposes of disciplinary proceedings pursuant to the Rules, each Dealer Member shall be responsible for all acts and omissions of each partner, Director, Officer, Supervisor, Registered Representative, Investment Representative and employee of a Dealer Member; and each of the foregoing individuals shall comply with all rules required to be complied with by the Dealer Member.

IIROC Rule 38 - COMPLIANCE AND SUPERVISION

38.5 Ultimate Designated Person

(a) A Dealer Member must designate an individual who is approved under the Corporation's rules in the category of Ultimate Designated Person and who shall be responsible to the Corporation for the conduct of the firm and the supervision of its employees and to perform the functions described in paragraph (c).

(b) A Dealer Member must not designate an individual to act as the firm's Ultimate Designated Person unless the individual is:

(i) the chief executive officer or sole proprietor of the Dealer Member;

(ii) an Officer in charge of a division of the Dealer Member, if the activity that requires the firm to register under provincial or territorial securities laws occurs only within the division, or

(iii) an individual acting in a capacity similar to that of an Officer described in paragraph (a) or (b).

(c) The Ultimate Designated Person must

(i) supervise the activities of the Dealer Member that are directed towards ensuring compliance with the Corporation's Dealer Member rules and applicable securities law requirements by the firm and each individual acting on the Dealer Member's behalf, and

(ii) promote compliance by the Dealer Member, and individuals acting on its behalf, with the Corporation's Dealer Member rules and applicable securities laws.

38.7 Chief Compliance Officer

(a) Every Dealer Member must designate an individual who is approved under the Corporation's rules in the category of Chief Compliance Officer to perform the functions described in paragraph (h).

(b) A Dealer Member must not designate an individual to act as the firm's Chief Compliance Officer unless the individual is one of the:

(i) an Officer or partner of the Dealer Member;

(ii) the sole proprietor of the Dealer Member.

(c) A Dealer Member may appoint the Ultimate Designated Person to act as the Chief Compliance Officer.

(d) Where a Dealer Member is organized into two or more separate business units or divisions, a Dealer Member may, with the approval of the Corporation, designate a Chief Compliance Officer for each separate business unit or division.

(e) The Chief Compliance Officer must have the qualifications required under Rules, Part I, section A.2B.

(f) Notwithstanding subsection (a), a Dealer Member may, with the Corporation's approval, designate an Officer as Acting Chief Compliance Officer if the Chief Compliance Officer terminates his or her employment with the Dealer Member and the Dealer Member is unable to immediately designate another qualified person as Chief Compliance Officer provided that, within 90 days of the termination of the previous Chief Compliance Officer:

(i) the Acting Chief Compliance Officer meets the requirement of subsection (e) and is designated by the Corporation as Chief Compliance Officer; or

(ii) another qualified person is designated Chief Compliance Officer by the Dealer Member and is approved by the Corporation.

(g) The Corporation may grant to a Dealer Member an exemption from subsection (e) where it is satisfied that the nature of the Dealer Member's business is such that the qualification is not relevant to the Dealer Member and that to do so would not be prejudicial to the interests of the Dealer Member, its clients, the public or the Corporation. In granting such an exemption, it may impose such terms and conditions as it considers necessary.

(h) The Chief Compliance Officer of a Dealer Member must do all of the following:

(i) establish and maintain policies and procedures for assessing compliance with the Rules and applicable securities laws by the Dealer Member and individuals acting on its behalf;

(ii) monitor and assess compliance by the Dealer Member, and individuals acting on its behalf, with the Rules and applicable securities laws;

(iii) report to the Ultimate Designated Person as soon as possible if the Chief Compliance Officer becomes aware of any circumstances indicating that the firm, or any individual acting on its behalf, may be in non-compliance with the Rules or applicable securities laws and

(A) the non-compliance creates a reasonable risk of harm to a client;

(B) the non-compliance creates a reasonable risk of harm to the capital markets; or

(C) the non-compliance is part of a pattern of non-compliance;

(iv) submit an annual report to the firm's board of directors, or individuals acting in a similar capacity for the firm, for the purposes of assessing compliance by the firm, and individuals acting on its behalf, with the Corporation's Dealer Member Rules and applicable securities laws.

(i) The Chief Compliance Officer must have access to the Ultimate Designated Person and the board of directors (or equivalent) at such times as the Chief Compliance Officer may consider necessary or advisable in view of his or her responsibilities.

IIROC Rule 100 - MARGIN REQUIREMENTS

100.15 – ACCOUNT GUARANTEES

The margin required in respect of the account of a customer of a Dealer Member which is guaranteed in accordance with this Rule 100.15 may be reduced to the extent that there is excess margin in the accounts of the guarantor held by the Dealer Member calculated on an aggregated or consolidated basis and provided the Dealer Member has received the written consent of the customer to provide the guarantor with the customer's account statement, at least quarterly. Where the customer objects to provide such written consent, the Dealer Member shall notify the guarantor in writing of the customer's objection.

In calculating margin reductions for guaranteed accounts, the following rules shall apply:

(a) Guarantees in respect of customers' accounts by shareholders, registered representatives or employees of the Dealer Member shall not be accepted, unless paragraph (b) is applicable and has been complied with, or in the case of guarantees by shareholders, there is public ownership of the securities held by the shareholder and the shareholder is not an employee, registered representative, partner, director or officer of the Dealer Member or the holder of a significant equity interest in respect of the Dealer Member or its holding company within the meaning of Rule 5.4;

(b) Guarantees in respect of customers' accounts by partners, directors or officers of the Dealer Member shall only be accepted on the following basis:

(i) The self-regulatory organization having prime audit jurisdiction in Canada over the Dealer Member shall expressly approve the guarantee in writing by providing separate written approval and the release of the guarantee shall only be effective upon receipt of the express approval of the self-regulatory organization given in the same manner;

(ii) The guarantor shall not be permitted to transfer cash, securities, contracts or any other property from the accounts of the guarantor in respect of which the margin reduction is based without the prior written approval of the self-regulatory organization referred to in clause (b)(i);

(iii) The provisions of Form 1, Schedule 4, shall apply to the customer's account regardless of the guarantee and, if the account has been restricted and subsequently fully

margined, no trading shall occur in the account until the guarantee is released in accordance with clause (b)(i) above;

(c) Guarantees in respect of accounts of partners, directors, officers, shareholders, registered representatives or employees by customers of the Dealer Member shall not be accepted;

(d) Paragraphs (a), (b) and (c) do not apply to guarantees by any of the persons referred to therein in respect of accounts of members of the immediate families of such persons nor to guarantees in respect of the accounts of any of the persons referred to therein by members of their immediate families;

(e) In determining the margin deficiency of the account of any client, a guarantee in respect of the account may be accepted for margin purposes unless and until in connection with the annual audit, the confirmation requirements shall not have been satisfied in accordance with Rule 300.2(a)(vi). If the audit confirmation requirements for an account have not been satisfied, the margin reduction shall not be allowed until a confirmation is received or a new guarantee agreement is signed by the customer;

(f) A general guarantee in respect of the accounts of a customer, and a guarantee or guarantees from one or more customers in respect of more than one account, will not be accepted unless supported by proper documentation sufficient to establish the identity and liability of each guarantor and the accounts and customers in respect of which each guarantee is given;

(g) A guarantee in respect of an account of a customer shall only be accepted for margin if it directly guarantees the customer's obligations under such account, and a guarantee in respect of an account of a customer who in turn, directly or indirectly, provides a guarantee in respect of another account shall not be accepted for margin purposes in the latter account;

(h) No guarantee shall be accepted unless it is by enforceable written agreement, binding upon the guarantor, its successors and assigns and personal legal representatives and containing the following minimum terms:

(i) The prompt payment on demand of all present and future liabilities of the customer to the Dealer Member in respect of the identified accounts shall be unconditionally guaranteed on an absolute and continuing basis with the guarantor being jointly and severally liable for the obligations of the customer;

(ii) The guarantee may only be terminated upon written notice to the Dealer Member, provided that such termination shall not affect the guarantee of any obligations incurred prior thereto;

(iii) The Dealer Member shall not be bound to demand from or to proceed or exhaust its remedies against the customer or any other person, or any security held to secure payment of the obligations, before making demand or proceeding under the guarantee;

(iv) The liability of the guarantor shall not be released, discharged, reduced, limited or otherwise affected by (A) any right of set-off, counterclaim, appropriation, application or other demand or right the customer or guarantor may have, (B) any irregularity, defect or informality in any obligation, document or transaction relating to the customer or its accounts, (C) any acts done, omitted, suffered or permitted by the Dealer Member in connection with the customer, its accounts, the guaranteed obligations or any other

guarantees or security held in respect thereof including any renewals, extensions, waivers, releases, amendments, compromises or indulgences agreed to by the Dealer Member and including the provision of information by the Dealer Member to the guarantor as permitted in clause (i) of this Rule 100.15, or (D) the death, incapacity, bankruptcy or other fundamental change of or affecting the customer; provided that in the event the guarantor shall be released for any reason from the guarantee it shall remain liable as principal debtor in respect of the guaranteed obligations;

(v) The guarantor waives in favour of the Dealer Member any notices as to the terms and conditions applicable to the customer's accounts or agreements or dealings between the Dealer Member and the customer, or relating in any way to the status or condition or transactions or changes in the customers' accounts, agrees that the accounts as settled or stated between the Dealer Member and the customer shall be conclusive as to the amounts owing, and waives any rights of subrogation until all guaranteed obligations are paid in full;

(vi) All securities, monies, commodity futures contracts and options, foreign exchange contracts and other property held or carried by the Dealer Member for the guarantor shall be pledged or a security interest granted therein to secure the payment of the guaranteed obligations, with the full ability of the Dealer Member to deal with such assets at any time, before or after demand under the guarantee, to satisfy such payment;

(i) The guarantor shall receive from the Dealer Member, at least quarterly, the customer's account statement or statements, in respect of the accounts to which the guarantee relates, provided the guarantor does not object in writing to receiving such information. The Dealer Member shall disclose to the guarantor in writing that the suitability of transactions in the customer's account will not be reviewed in relation to the guarantor.

IIROC Rule 1300- SUPERVISION OF ACCOUNTS

1300.1.

Identity and Creditworthiness

(a) Each Dealer Member shall use due diligence to learn and remain informed of the essential facts relative to every customer and to every order or account accepted.

(b) When opening an initial account for a corporation or similar entity, the Dealer Member shall:

(i) ascertain the identity of any individual who is the beneficial owner of, or exercises direct or indirect control or direction over, more than 10% of the corporation or similar entity, including the name, address, citizenship, occupation and employer of each such beneficial owner, and whether any such beneficial owner is an insider or controlling shareholder of a publicly traded corporation or similar entity; and

(ii) as soon as is practicable after opening the account, and in any case no later than six months after the opening of the account, verify the identity of each individual identified in (i) using such methods as enable the Dealer Member to form a reasonable belief that it knows the true identity of each individual and that are in compliance with any applicable legislation and regulations of the Government of Canada or any province.

(c) Subsection (b) does not apply to:

(i) a corporation or similar entity that is or is an affiliate of a bank, trust or loan company, credit union, caisse populaire, insurance company, mutual fund, mutual fund management company, pension fund, securities dealer or broker, investment manager or similar financial institution subject to a satisfactory regulatory regime in the country in which it is located

(ii) a corporation or similar entity whose securities are publicly traded or an affiliate thereof.

(d) The Corporation may, at its discretion, direct Dealer Members that the exemption in subsection (c) does not apply to some or all types of financial institutions located in a particular country.

(e) When opening an initial account for a trust, a Dealer Member shall:

(i) ascertain the identity of the settlor of the trust and, as far as is reasonable, of any known beneficiaries of more than 10% of the trust, including the name, address, citizenship, occupation and employer of each such settlor and beneficiary and whether any is an insider or controlling shareholder of a publicly traded corporation or similar entity.

(ii) as soon as is practicable after opening the account, and in any case no later than six months after the opening of the account, verify the identity of each individual identified in (i) using such methods as enable the Dealer Member to form a reasonable belief that it knows the true identity of each individual and that are in compliance with any applicable legislation and regulations of the Government of Canada or any province.

(f) Subsection (e) does not apply to a testamentary trust or a trust whose units are publicly traded.

(g) If a Dealer Member, on inquiry, is unable to obtain the information required under subsections (b)(i) and (e)(i), the Dealer Member shall not open the account.

(h) If a Dealer Member is unable to verify the identities of individuals as required under subsections (b)(ii) and (e)(ii) within six months of opening the account, the Dealer Member shall restrict the account to liquidating trades and transfers, payments or deliveries out of funds or securities only until such time as the verification is completed.

(i) No Dealer Member shall open or maintain an account for a shell bank.

(j) For the purposes of section (i) a shell bank is a bank that does not have a physical presence in any country.

(k) Subsection (i) does not apply to a bank which is an affiliate of a bank, loan or trust company, credit union, other depository institution that maintains a physical presence in Canada or a foreign country in which the affiliated bank, loan or trust company, credit union, other depository institution is subject to supervision by a banking or similar regulatory authority.

(l) Any Dealer Member having an account for a corporation, similar entity or trust other than those exempt under subsections (c) and (f) and which does not have the information regarding the account required in subsections (b)(i) and (e)(i) at the date of implementation

of those subsections shall obtain the information within one year from date of implementation of subsections (b) and (e).

(m) If the Dealer Member does not or cannot obtain the information required under subsection (l) the Dealer Member shall restrict the account to liquidating trades and transfers, payments or deliveries out of funds or securities until such time as the required information has been obtained.

(n) Dealer Members must maintain records of all information obtained and verification procedures conducted under this Rule 1300.1 in a form accessible to the Corporation for a period of five years after the closing of the account to which they relate.

Business Conduct

(o) Each Dealer Member shall use due diligence to ensure that the acceptance of any order for any account is within the bounds of good business practice.

Suitability determination required when accepting order

(p) Subject to Rules 1300.1(t) and 1300.1(u), each Dealer Member shall use due diligence to ensure that the acceptance of any order from a client is suitable for such client based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level. If the order received from a client is not suitable, the client must, at a minimum, be advised against proceeding with the order.

Suitability determination required when recommendation provided

(q) Each Dealer Member, when recommending to a client the purchase, sale, exchange or holding of any security, shall use due diligence to ensure that the recommendation is suitable for such client based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or accounts' current investment portfolio composition and risk level.

Suitability determination required for account positions held when certain events occur

(r) Each Dealer Member shall, subject to Rules 1300.1(t) and 1300.1(u), use due diligence to ensure that the positions held in a client's account or accounts are suitable for such client based on factors including the client's current financial situation, investment knowledge, investment objectives and time horizon, risk tolerance and the account or account(s)' current investment portfolio composition and risk level whenever one or more of the following trigger events occurs:

(i) Securities are received into the client's account by way of deposit or transfer; or

(ii) There is a change in the registered representative or portfolio manager responsible for the account; or

(iii) There has been a material change to the client's life circumstances or objectives that has resulted in revisions to the client's "know your client" information as maintained by the Dealer Member.

Suitability of investments in client accounts

(s) To comply with the requirements under Rules 1300.1(p), 1300.1(q) and 1300.1(r), the Dealer Member must use due diligence to ensure that:

(i) The suitability of all positions in the client's account is reviewed whenever a suitability determination is required; and

(ii) The client receives appropriate advice in response to the suitability review that has been conducted.

Suitability determination not required

(t) Each Dealer Member that has applied for and received approval from the Corporation pursuant to Rule 1300.1(v), is not required to comply with Rules 1300.1(p), 1300.1(r) and 1300.1(s), when accepting orders from a client where no recommendation is provided, to make a determination that the order is suitable for such client.

(u) Each Dealer Member that executes a trade on the instructions of another Dealer Member, portfolio manager, investment counsel, limited market dealer, bank, trust company or insurer, pursuant to Section I.3 of Rule 2700 is not required to comply with Rule 1300.1(p).

Corporation approval

(v) The Corporation, in its discretion, shall only grant such approval where the Corporation is satisfied that the Dealer Member will comply with the policies and procedures outlined in Rule 3200. The application for approval shall be accompanied by a copy of the policies and procedures of the Dealer Member. Following such approval, any material changes in the policies and procedures of the Dealer Member shall promptly be submitted to the Corporation.

1300.2.

(a) A Dealer Member must designate a Supervisor to be responsible for the opening of new accounts and for establishing and maintaining procedures acceptable to the Corporation for account supervision to ensure that the handling of client business is within the bounds of ethical conduct, consistent with just and equitable principles of trade and not detrimental to the interests of the securities industry. As part of this supervision each new account must be opened pursuant to a new account form which includes the applicable information required by Form No. 2 for Retail Customer accounts, Institutional Customer accounts and for accounts exempt from suitability reviews.

(b) Where a Dealer Member conducts more than one of retail business, institutional business and suitability-exempt business under Rules 1300.1(t) and 3200.B, the Dealer Member may designate separate Supervisors for each type of business.

(c) The Supervisor designated under this section or another Supervisor assigned the responsibility for doing so in the policies and procedures of the Dealer Member must approve and record the approval of the opening of an account prior to or promptly after the completion of any transaction.

IIROC Rule 2500 - MINIMUM STANDARDS FOR RETAIL CUSTOMER ACCOUNT SUPERVISION

Section II of Rule 2500 states:

> To comply with the "Know-Your-Client" rule each Dealer Member must establish procedures to maintain accurate and complete information on each client. The first step towards compliance with this rule is completing proper documentation when opening new accounts. Accurate completion of the documentation when opening a new account allows both the Registered Representative and the supervisory staff to conduct the necessary review to ensure that recommendations made for any account are appropriate for the client and in keeping with his investment objectives. Maintaining accurate and current documentation will allow the Registered Representative and the supervisory staff to ensure that all recommendations made for any account are appropriate for the client and in keeping with the client's investment objectives.
>
> […]
>
> 1. A Dealer Member must complete an account application for each new customer that conforms to the account information requirements of this Rule.
>
> […]
>
> 4. A Dealer Member must maintain a complete set of documentation regarding each account. The Registered Representative(s) handling an account must maintain a copy of the account application. […]

Section III of Rule 2500 states:

> **B. Supervision of Account Activity**
>
> A Dealer Member must have systems and procedures to supervise trading activity in retail accounts. The supervision must provide reasonable assurance that the Dealer Member is meeting its regulatory obligations, including those to clients such as suitability and gatekeeper obligations such as preventing market abuses. […]

SCHEDULE B

SANCTIONS AND COSTS IMPOSED BY THE IIROC PANEL

	Sanctions and Costs Requested by IIROC Staff	Sanctions and Costs Imposed by the IIROC Panel
ALBOINI		
Count 1	$500,000	$500,000
	One year suspension from registration in all capacities	Two year suspension from registration in all capacities Permanent ban as UDP
	Disgorge commissions	Disgorge commissions
Count 2	N/A	N/A
Count 3	$100,000	$100,000
	Six months suspension from serving as UDP of NSI (to be served concurrently with other suspensions)	One year suspension from registration in all capacities (to be served concurrently with other suspensions) Permanent ban as UDP
Count 5(a)	$35,000	$25,000
Costs	$125,000	$125,000
NSI		
Count 3	$250,000	$250,000
Count 5(a)	$50,000	$50,000
Costs	$150,000	$150,000
VANCE		
Count 2	$35,000 Three months suspension from registration in any supervisory capacity	$25,000 Three months suspension from registration in any supervisory capacity
Count 3	$50,000	$25,000
Costs	$50,000	$50,000
CHORNOBOY		
Count 5(a)	$25,000	$25,00
Costs	$15,000	$15,000