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Securities
Commission

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

AND

IN THE MATTER OF 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

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

Hearing:	June 9, 10 and 11, 2014		
Decision:	September 11, 2014		
Panel:	James E. A. Turner Judith N. Robertson	- -	Vice Chair and Chair of the Panel Commissioner
Appearances:	David Hausman	-	For Douglas Michael Chornoboy and Frederick Earl Vance
	Victor Philip Alboini	-	For himself and Northern Securities Inc.
	Alexandra Clark Charles Corlett	-	For the Investment Industry Regulatory Organization of Canada
	Matthew Britton	-	For the Ontario Securities Commission

TABLE OF CONTENTS

I. Introduction 1

II. The Applicants 1

III. History of the Matter 2

1. The IIROC Decision 2
2. The OSC Decision 4
    (a) Count 1 4
    (b) Count 2 6
    (c) Count 3 7
    (d) Count 5(a) 8
    (e) Sanctions and Costs 8
3. The IIROC Motion and Alboini and NSI's Cross-Motion 9

IV. Sanctions and Costs Requested by IIROC Staff 12

V. Evidence Presented at the Sanctions and Costs Hearing 13

1. Affidavits 13
2. Witnesses 16

VI. Submissions of the Parties 17

1. IIROC Staff's Submissions 17
    (a) Count 1 17
    (b) Count 2 20
    (c) Count 5(a) 21
    (d) Costs 22
2. The Applicants' Submissions 23
    (a) Count 1 23
    (b) Count 2 25
    (c) Count 5(a) 25
    (d) Costs 26

VII. The Law on Sanctions 27

1. General Principles 27
2. IIROC Rules 29
3. Sanctions Guidelines 30
    (a) General Principles 30
    (b) Permanent Bans 31
    (c) Failure to Supervise 32
    (d) Record Keeping Violations 33
4. Relevant Prior Decisions 33
    (a) Decisions Relating to Count 1 34
    (b) Decisions Relating to Alboini's Role as UDP 34
    (c) Decisions relating to Count 2 35
    (d) Decisions relating to Count 5(a) 36

VIII. Appropriate Sanctions in this Matter 37

1. Relevant Sanctioning Factors 37
2. Count 1 – Sanctions Imposed on Alboini 44
3. Count 2 – Sanctions Imposed on Vance 51
4. Count 5(a) 53
   (a) Sanctions Imposed on Chornoboy 53
   (b) Sanctions Imposed on Alboini 53
   (c) Sanctions Imposed on NSI 54

IX. Costs 55

X. Decision on Sanctions and Costs 56

Schedule A – Sanctions and Costs Previously Requested and Imposed 58

Schedule B – Relevant IIROC Rules 59

Schedule C – Form of Order 62

REASONS AND DECISION ON SANCTIONS AND COSTS

I. INTRODUCTION

[1] This was a *de novo* sanctions and costs hearing before the Ontario Securities Commission (the "**Commission**") under sections 8(3) and 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") with respect to the Investment Industry Regulatory Organization of Canada ("**IIROC**") proceeding (the "**IIROC Proceeding**") relating to Northern Securities Inc. ("**NSI**"), Victor Philip Alboini ("**Alboini**"), Douglas Michael Chornoboy ("**Chornoboy**") and Frederick Earl Vance ("**Vance**") (collectively, the "**Applicants**").

[2] The hearing took place before the Commission on June 9, 10 and 11, 2014 (the "**Sanctions and Costs Hearing**"). Alboini represented himself and NSI, and separate legal counsel represented each of Chornoboy and Vance.

[3] During the hearing, we heard evidence relevant to sanctions and costs. Alboini and NSI called three witnesses and Alboini testified on his own behalf. In addition, Alboini and NSI tendered affidavit evidence.

[4] We received written submissions from IIROC staff ("**IIROC Staff**"), Alboini on behalf of himself and NSI, and Chornoboy. We heard oral submissions from IIROC Staff, Alboini on behalf of himself and NSI, and counsel for Chornoboy, respectively. Counsel for Vance made no submissions (see paragraph 125 of these reasons). Staff of the Commission ("**Commission Staff**"), while present during the Sanctions and Costs Hearing did not make any submissions.

[5] These are our reasons and decision on sanctions and costs.

II. THE APPLICANTS

[6] The following background facts were agreed to at the hearing (the "**IIROC Hearing**") before the IIROC panel (the "**IIROC Panel**") in this matter and are set out in paragraph 4 of the IIROC Panel's decision (*Re Northern Securities* (2012) IIROC 63 (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.

[7] In this hearing *de novo*, we are determining the appropriate sanctions and costs to be imposed on Alboini, NSI, Chornoboy and Vance based on the IIROC Decision as modified by our decision referred to in paragraph 14 and summarized in paragraphs 15 to 36 below.

III. HISTORY OF THE MATTER

1. The IIROC Decision

[8] 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 an oral decision on the merits on July 23, 2012 with reasons to follow.

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

[10] 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.

[11] In the IIROC Decision, the IIROC Panel found that IIROC Staff had proven the allegations contained in **Count 1, Count 2, Count 3** and **Count 5(a)** as alleged by IIROC Staff**.**

[12] 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 Member [*sic*].

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

[13] 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)

2. The OSC Decision

[14] Following the IIROC Decision, the Applicants brought an application (the "**Application**") under subsection 8(3) and section 21.7 of the Act for a hearing and review by the Commission of the IIROC Decision. The Application was heard over three days on February 14, 15, and 20, 2013 (the "**Application Hearing**"). The Commission issued its decision and reasons on December 19, 2013 (*Re Northern Securities Inc.* (2014), 37 O.S.C.B. 161 (the "**Commission Decision**").

[15] The Commission upheld the IIROC Panel's findings on Count 1, 2 and 5(a). It dismissed Count 3 and referred that Count back to IIROC to be re-heard before a different IIROC panel if IIROC decided to do so by notice to NSI, Alboini and Vance given by February 14, 2014. With respect to sanctions and costs, the Commission Decision set aside the sanctions and costs imposed in the IIROC Decision and determined that the Commission would hold a hearing *de novo* solely on the question of sanctions and costs. The Commission's findings are described below.

(a) Count 1

[16] With respect to Count 1, the Commission agreed with the IIROC Panel's conclusion that Alboini as UDP and RR at NSI engaged in a trading practice through the use of the average price accumulation account (the "**TA Account**") that allowed Jaguar to improperly obtain access to credit (when it was not creditworthy within the meaning of the industry) and in doing so risked the capital of both NSI and Penson, which constituted conduct unbecoming or detrimental to the public interest contrary to IIROC Rule 29.1. The Commission found that 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 (Commission Decision, *supra* at para. 254). The Commission agreed with the IIROC Panel that:

(a) access to credit for Jaguar was improper (Commission Decision, *supra* at paras. 227 to 229);

(b) Jaguar was not creditworthy by the standards of the investment industry at the time it purchased securities because it did not have the cash or marginable securities to pay

for the securities in the TA Account (Commission Decision, *supra* at paras. 230 to 233);

(c) Alboini had multiple roles and that those roles created potential conflicts of interest. 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 (Commission Decision, *supra* at paras. 234 to 235);

(d) The trading in the TA Account was improper because Jaguar was not creditworthy at the times of the trades and the ticketing out of securities was delayed until month-end resulting in a delay of payment for the securities (Commission Decision, *supra* at paras. 236 to 243);

(e) Alboini misled Penson and, as a result, Penson granted credit to Jaguar through the trading in the TA Account in circumstances in which it would not otherwise have done so (Commission Decision, *supra* at para. 248); and

(f) Alboini exposed Penson and NSI to out-of-the-ordinary credit risk. The Commission found that 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. 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 (Commission Decision, *supra* at paras. 249 to 253).

[17] The IIROC Panel's findings on Count 1 that were upheld by the Commission are summarized as follows:

(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 neither 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 …" (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 [*sic*] 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).

(Commission Decision, *supra* at para. 229)

[18] It is these findings that we must consider in determining appropriate sanctions to impose on Alboini in respect of Count 1.

(b) Count 2

[19] The Commission found that there was an adequate evidentiary foundation upon which the IIROC Panel could conclude that Vance, as NSI's CCO, failed to adequately supervise Alboini's trading activity involving Jaguar and other NSI clients, contrary to IIROC Dealer Member Rules ("**IIROC Rules**") 1300.1, 1300.2 and 2500. The Commission agreed with the IIROC Panel's finding that Vance's failure to adequately respond to the following red flags was sufficient to establish the allegations in Count 2:

(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; and

(c) Vance was aware that a "majority of the investors" in the Project Accounts were also NSI clients.

Further, Vance failed to make additional inquiries with respect to these matters (Commission Decision, *supra* at paras. 259 to 267). The Commission noted that the IIROC Decision found that "Vance's testimony made clear the fact that he took little initiative to ensure compliance within NSI" with IIROC Rules 1300.1, 1300.2 and 2500 (IIROC Decision, *supra* at para. 105(b) and Commission Decision, *supra* at para. 262).

[20] The Commission also noted that the IIROC Panel recognized the importance of Vance's role as CCO given the conflicting corporate relationships:

> 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 para. 105(d) and Commission Decision, *supra* at para. 263)

[21] It is these findings that we must consider in determining appropriate sanctions to impose on Vance in respect of Count 2.

(c) Count 3

[22] The central factual issue in respect of Count 3 was whether NSI, Alboini and Vance each repeatedly failed to ensure that deficiencies identified by IIROC in three business conduct compliance reviews and one trading conduct compliance review were corrected by NSI (Commission Decision, *supra* at para. 268).

[23] The Commission concluded that the IIROC Panel made an error in law because it applied a standard of review like that set out in *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190 ("***Dunsmuir***") in assessing IIROC Staff's allegations. The Commission held that 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. 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. The question was whether IIROC Staff had established on the balance of probabilities that repeated deficiencies had occurred and were not corrected. In the Commission's view, the IIROC Panel made an error in law in applying a *Dunsmuir*-like standard of review to the evidence before it (Commission Decision, *supra* at paras. 274 to 278 and 282).

[24] The Commission therefore set aside the IIROC Panel's decision with respect to Count 3. The Commission referred that matter back to IIROC for disposition indicating that IIROC was entitled to decide whether Count 3 shall be re-heard in a trial *de novo* before a different IIROC panel. Any such decision to re-hear Count 3 was to be made by IIROC, and communicated to NSI, Alboini and Vance, on or before February 14, 2014, or by such other date as was agreed to by those Applicants, failing which Count 3 was dismissed (Commission Decision, *supra* at para. 343).

[25] On February 13, 2014, IIROC notified Alboini by e-mail that it had decided not to proceed with a new hearing with respect to Count 3.

[26] Accordingly, Count 3 was dismissed and the conduct and the sanctions and costs relating to Count 3 are not at issue in this hearing.

(d) Count 5(a)

[27] The IIROC Panel found that NSI, Alboini as UDP and Chornoboy as CFO, from February 2008 to February 2009, filed or permitted to be filed inaccurate monthly financial reports ("**MFRs**") which failed to account for leasehold improvement costs, thereby misstating NSI's risk adjusted capital ("**RAC**") contrary to IDA By-law 17.2 and IIROC Rule 17.2.

[28] Chornoboy admitted the facts alleged in Count 5(a) and "that he erred in his accounting treatment" of the costs of the leasehold improvements (Commission Decision, *supra* at para. 284). As a result of this error, NSI was also held liable for the breach of IDA By-law 17.2 and IIROC Rule 17.2 (IIROC Decision, *supra* at para. 137).

[29] The Commission recognized that Alboini's role as UDP did not make him responsible or culpable for every error by a person under his supervision. However, 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 Commission agreed with the IIROC Panel's conclusion 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 Commission found that the IIROC Panel was entitled to conclude, as it did, that Alboini was culpable with respect to Count 5(a) (Commission Decision, *supra* at paras. 285 to 287).

[30] It is these findings that we must consider in determining appropriate sanctions to impose on Alboini, NSI and Chornoboy in respect of Count 5(a).

(e) Sanctions and Costs

[31] The IIROC Panel issued its brief decision on the merits on July 23, 2012. No reasons were provided to support the decision on the merits prior to the sanctions and costs hearing held on October 11 and 12, 2012. The Applicants strenuously objected to the sanctions and costs hearing taking place before the reasons for the IIROC Panel's findings were issued. The IIROC Panel dismissed that objection and proceeded with the sanctions and costs hearing without issuing reasons on the merits (Commission Decision, *supra* at paras. 288 to 294).

[32] The Commission found that it was procedurally unfair in the circumstances that no reasons on the merits were provided by the IIROC Panel to the Applicants prior to the sanctions and costs hearing.

[33] The Commission noted that there have been a number of proceedings in which IIROC panels bifurcated the merits hearing and the sanctions and costs hearing and 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 instances in which IIROC panels have not done so (Commission Decision, *supra* at paras. 295).

[34] The Commission considered whether proceeding on this basis was procedurally unfair to the Applicants. The Commission found that in this case, the matters at issue were complex and that 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. The Commission found that it would have been difficult for the Applicants to effectively address the issue of proportionality of sanctions without the reasons and detailed findings on the merits by the IIROC Panel. In the Commission's 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. The Applicants were entitled to a high level of procedural fairness which includes the right to be heard (Commission Decision, *supra* at paras. 297 and 298).

[35] The Commission also noted that the IIROC Panel imposed a longer suspension and UDP ban on Alboini than requested by IIROC Staff. The IIROC Panel imposed a permanent ban on Alboini as UDP on the basis that Alboini's conduct indicated a resistance to governance (Commission Decision, *supra* at paras. 300 to 303). (Schedule A to these reasons sets out the sanctions requested by IIROC Staff at the IIROC Hearing and the sanctions imposed by the IIROC Panel.) The Commission found that 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 (Commission Decision, *supra* at paras. 300 to 304).

[36] The Commission found that the conduct of the sanctions and costs hearing was procedurally unfair to the Applicants and set aside the IIROC Panel's sanctions and costs order. As a result, we are now conducting this *de novo* hearing solely on the question of the appropriate sanctions and costs to be imposed on the Applicants based on the findings of the IIROC Panel on Counts 1, 2 and 5(a).

3. The IIROC Motion and Alboini and NSI's Cross-Motion

[37] On April 21, 2014, IIROC Staff brought a motion to limit the scope of Alboini and NSI's proposed evidence at the Sanctions and Costs Hearing (the "**IIROC Motion**"), and on May 5, 2014, Alboini and NSI filed a cross-motion to dismiss the IIROC Proceeding (the "**Cross-Motion**"). On May 12, 2014, the Commission held a hearing to consider the motions.

[38] IIROC Staff objected to certain affidavits and witnesses that Alboini and NSI intended to introduce or call at the sanctions and costs hearing.

[39] Alboini and NSI wanted to rely on affidavits addressing the following topics:

(a) financial commitments relating to transactions which took place in the TA Account (the "**Financial Commitments Affidavits**");

(b) fees and the lack of conflicts of interest associated with imposing such fees (the "**NSI Fees Affidavit**");

(c) the financial impact of sanctions; and

(d) character evidence.

[40] IIROC Staff objected to the Financial Commitments Affidavits and NSI Fees Affidavit proposed to be tendered as evidence. IIROC Staff took the position that these affidavits dealt with evidence on the merits and admitting them would be tantamount to re-opening the merits and re-litigation of the findings on the merits.

[41] Alboini and NSI also wished to call four witnesses, which IIROC Staff objected to on the basis that their testimony also related to findings on the merits and were not relevant to the determination of sanctions. IIROC Staff also took the position that Alboini's "will say" statement dealt for the most part with evidence relating to the merits of Counts 1 and 5(a).

[42] The Commission gave oral reasons on May 12, 2014. The Commission stated that NSI and Alboini must have a full opportunity to address sanctions and costs. However, this does not permit the re-opening and re-litigation of the findings on the merits on Counts 1, 2 and 5(a). The appropriate forum for the Applicants to contest the findings in the Commission Decision is an appeal to the Divisional Court.

[43] The Commission held that the evidence tendered at the Sanctions and Costs Hearing must be relevant for the determination of appropriate sanctions and/or costs. The Commission found that the affidavits relating to the financial impact of proposed sanctions and character evidence are relevant to determining sanctions. However, the Commission found that the Financial Commitments Affidavits and NSI Fees Affidavit dealt solely with evidence relating to the merits of Count 1 and were therefore inadmissible.

[44] As noted above, the Commission found it appropriate to permit Alboini and NSI to call four witnesses to testify as to Alboini's good character. However, the Commission indicated that the witnesses would not be permitted to testify as to conduct relating to the findings on the merits on Counts 1, 2 and 5(a). Alboini was also instructed that his testimony should not touch on evidence relating to the merits findings made by the Commission in the Commission Decision. He was requested to focus on providing evidence as to relevant sanctioning factors.

[45] In response to the IIROC Motion, Alboini and NSI brought the Cross-Motion and took the position that the IIROC Proceeding should be stayed, or the matter sent back for a re-hearing before IIROC, because the IIROC Hearing was procedurally unfair. Specifically, Alboini and NSI stated that the IIROC Proceeding was unfair because:

(a) they did not have the reasons on the merits prior to the sanctions hearing and thus did not have a full opportunity to be heard on sanctions,

(b) the IIROC Panel was biased, and

(c) the IIROC Panel imposed sanctions higher than those requested by IIROC Staff.

[46] IIROC and OSC Staff took the position that pursuant to sections 8 and 21.7 of the Act, the Commission has the authority to conduct a hearing *de novo* and substitute its decision for that of the IIROC Panel. The hearing *de novo* on sanctions and costs would provide Alboini and NSI with a full opportunity to be heard. They also submitted that the Cross-Motion should be dismissed because it was both premature and inappropriate to grant that relief at the time as it amounted to an attempt to appeal the findings in the Commission Decision.

[47] The Commission gave oral reasons on May 12, 2014 and dismissed the Cross-Motion. The Commission found that any prejudice to Alboini and NSI of a procedurally unfair IIROC sanctions hearing would be remedied by holding a *de novo* sanctions and costs hearing before the Commission. At the *de novo* sanctions and costs hearing, Alboini and NSI would have the opportunity to be heard and they would have the benefit of the Commission's Decision which sets out its findings in this matter.

[48] The Commission also found that the submissions by Alboini and NSI relating to alleged bias and abusive conduct of the IIROC Panel were already addressed in the Commission Decision. The Commission found that the Sanctions and Costs Hearing was not the appropriate forum to argue and re-litigate the IIROC Decision and the Commission Decision. That should be addressed as part of any appeal, if any.

[49] The Commission concluded in its May 12, 2014 order that:

1. Alboini and NSI's Cross-Motion was dismissed;

2. the IIROC Motion was granted as follows:

   (a) The Financial Commitments Affidavits and NSI Fees Affidavit filed by Alboini and NSI were excluded from evidence at the Sanctions and Costs Hearing;

   (b) Witnesses W.R., J.K., and E.M. could testify at the Sanctions and Costs Hearing only as to the character of Alboini and their satisfaction in their dealings with Alboini and NSI;

   (c) Witness J.S. could testify at the Sanctions and Costs Hearing only as to the character of Alboini and his level of satisfaction in his dealings with Alboini and NSI in terms of transparency, fair dealing, integrity and honesty; and

   (d) Alboini's testimony at the Sanctions and Costs Hearing was limited to the matters described in the oral reasons of the Commission given at the motions hearing on May 12, 2014;

3. the other affidavits and materials previously tendered to the Commission by Alboini and NSI could be included in the evidence at the Sanctions and Costs Hearing.

IV. SANCTIONS AND COSTS REQUESTED BY IIROC STAFF

[50] IIROC Staff has requested that the following sanctions and costs orders be made against the Applicants in this Sanctions and Costs Hearing:

(a) sanctions against Alboini in relation to Count 1:

- (i) a fine of $500,000;
- (ii) a two-year suspension from registration in all capacities;
- (iii) a permanent suspension as UDP; and
- (iv) Alboini disgorge $244,985 in commissions;

(b) sanctions against Alboini in relation to Count 5(a), a fine of $35,000;

(c) costs against Alboini of $93,750;

(d) sanctions against NSI in relation to Count 5(a), a fine of $50,000 and costs of $15,000;

(e) sanctions against Vance in relation to Count 2:

- (i) a fine of $25,000;
- (ii) a three-month suspension from registration in any supervisory capacity; and
- (iii) costs of $25,000;

(f) sanctions against Chornoboy in relation to Count 5(a), a fine of $25,000 and costs of $15,000.

[51] IIROC Staff states that they are seeking to uphold the same sanctions and costs ordered by the IIROC Panel in the IIROC Decision. IIROC Staff says that the Commission should defer to the IIROC Panel's decision on sanctions and costs because the IIROC Panel (i) was in the best position to determine appropriate sanctions and costs as it heard and reviewed all the evidence before it during the IIROC Hearing; (ii) is intimately familiar with the Dealer Member Disciplinary Sanctions Guidelines (the "**Sanctions Guidelines**") and IIROC decisions on sanctions and costs; and (iii) is aware of appropriate sanctions and costs in light of industry expectations and standards.

[52] IIROC Staff also refers us to the decision in *Re Mills*, 2001 IDACD No. 7 ("***Re Mills***"), which emphasized industry expectations as a central guiding principle in ensuring general deterrence.

[53] We have set out in Schedule A to these reasons a chart showing the sanctions and costs requested by IIROC Staff at the IIROC Hearing and the sanctions and costs originally imposed by the IIROC Panel.

V. EVIDENCE PRESENTED AT THE SANCTIONS AND COSTS HEARING

[54] As determined on the IIROC Motion, Alboini's evidence was limited to evidence that was relevant in determining appropriate and proportionate sanctions and/or costs. The bulk of the evidence was contained in the affidavits submitted by Alboini and in the testimony of the witnesses at the Sanctions and Costs Hearing. We have summarized this evidence below.

1. Affidavits

[55] Alboini introduced the following affidavits:

(a) affidavit of J.B., sworn March 13, 2014;

(b) Alboini's Impact Affidavit, sworn March 12, 2014; and

(c) Alboini's Supplementary Impact Affidavit, sworn May 23, 2014.

[56] The Affidavit of J.B provided character evidence with respect to Alboini and evidence regarding J.B.'s experience investing with Alboini at NSI. J.B. was a corporate lawyer who had worked with Alboini in a professional context and then later engaged him as his investment advisor to allocate a small portion of assets in speculative investments. The affidavit of J.B. stated at paragraph 6 that Alboini and NSI "provided me with a careful analysis of the speculative investment opportunities and also brought a positive entrepreneurial zeal to these opportunities". In J.B.'s view, Alboini and NSI contributed to the health and vibrancy of the Canadian capital markets through their services and J.B. stated that overall his interactions with Alboini and NSI were "significantly positive".

[57] Alboini's Impact Affidavit addressed the consequences of the IIROC Decision on NSI and Alboini. That Affidavit lists the negative consequences of the IIROC Decision to NSI as follows:

(a) NSI's seriously damaged reputation;

(b) NSI's failure to secure a new carrying broker;

(c) NSI's distress sale of its retail business;

(d) widespread negative publicity;

(e) NSI's loss of all employees (with the transfer of the retail business and shutdown of the institutional business, NSI required a financial and operational restructuring; employees were reduced from 57 employees to 10 employees in January 2013 and further reduced to four employees in April 2013);

(f) NSI's capital deficiencies (as at December 4, 2012, IIROC determined that NSI had a RAC deficiency of $143,000);

(g) the IIROC decision did not permit NSI to carry out exempt market dealer functions;

(h) the trading halt in NFC shares (which the TSX Venture Exchange imposed on November 13, 2013 and was only lifted after the Commission granted a stay of the IIROC sanctions);

(i) NSI has been insolvent since January 1, 2013;

(j) NSI's suspension as an IIROC Dealer Member in March 2013;

(k) NSI's cessation of its business (as a result, NFC is carrying on a downsized mergers and acquisitions advisory business and small merchant banking business through Added Capital, a Division of NFC (a non-registrant));

(l) NSI's uncertain ability to revive its IIROC status;

(m) significant delay in receiving repayment of the comfort deposit; and

(n) the financial burden with substantial legal fees.

[58] According to Alboini's Impact Affidavit, NSI has debt of $9,847,408 including subordinated debt owing to NFC of $8,475,723. NSI's shareholders' deficit is $9,847,961. If the subordinated debt owing to NFC was converted to equity, the shareholders' deficit for NSI would be $1,372,238. Given its liabilities, negative shareholders' equity and inability to generate revenue, NSI is currently insolvent.

[59] The Alboini Impact Affidavit also states that the loss of contributing revenue from NSI has had an adverse financial impact on NFC, which is a public company with approximately 5,100 shareholders listed on the TSX Venture Exchange. For the fiscal year ended March 31, 2013, which covered the period of the IIROC Decision, NFC reported a loss of $6,049,332. As at March 31, 2013, NFC had total liabilities of $5,169,098 which included a provision of $450,000 representing the total financial penalty imposed on NSI in the IIROC Decision. NFC's total liabilities of $5,169,098 may be compared with its total liabilities of $2,958,131 as at March 31, 2012 before the IIROC Decision was released. NFC reduced its total liabilities by approximately $1,550,855 from $5,169,098 at March 31, 2013 to $3,618,243 at December 31, 2013 with a write-down of debt and a reversal of the $450,000 provision for the financial penalty of $450,000 imposed by the IIROC Decision. Despite the write-down, NFC continues to have substantial debt and NFC has a shareholders' equity deficiency of $3,509,015. Given its substantial debt and equity deficiency, NFC is currently insolvent. NFC has not been able to raise any capital. The insolvency of NFC represents a negative consequence to NSI as NFC has been the financing pipeline for NSI. NFC's revenue for the nine month period ended December 31, 2013 was $1,318,108 and its net income was $1,121,180. However, a substantial portion of the revenue is attributable to non-cash debt write-downs in the restructuring of NFC.

[60] Further, Alboini's Impact Affidavit lists the negative consequences of the IIROC Decision on Alboini as follows:

(a) substantial adverse reputational impact both professionally and personally due to widespread negative publicity on the IIROC sanctions imposed;

(b) loss of NSI source of income;

(c) adverse financial impact in his attempt to save NSI and restructure NFC;

(d) negative impact on Alboini's wife, daughter and son;

(e) highly unlikely that Alboini will work again in the securities industry;

(f) loss of colleagues at NSI and NFC who were friends and partners;

(g) the insolvency of NSI and substantial debt of NFC;

(h) loss of clients;

(i) loss of some friends;

(j) financing NSI to pay for substantial legal fees;

(k) material reduction in the value of Alboini's NFC shares; and

(l) since the suspension of NSI in March 2013, Alboini has been unable to work in the securities industry.

[61] Alboini asserts in the Alboini Impact Affidavit that the sanctions in the IIROC Decision were so harsh, and that the negative publicity so widespread and devastating, that his ability to work again in the securities industry is at a minimum highly unlikely or possibly permanently damaged and that there is no possible way that his reputation will be restored in any meaningful way to the status that he once enjoyed.

[62] The Alboini Impact Affidavit also sets out the negative consequences on NFC that arose out of the sanctions imposed in the IIROC Decision as follows:

(a) NFC was unsuccessful in carrying out two equity financings in 2013;

(b) the auditors of NFC resigned as a result of the restructuring carried out by NFC;

(c) two independent directors of NFC resigned;

(d) NFC was able [*sic*] to appoint two new independent directors and auditors;

(e) in order to meet its obligations to settle a debt with Alboini, NFC sold 4,000,000 Jaguar shares on April 26, 2013, 1,900,000 Jaguar shares on May 8, 2013 and 6,000,000 Jaguar shares on October 11, 2013;

(f) NFC settled Jaguar debt with two creditors by making a payment of $108,865 on June 20, 2013 and a payment of $108,000 on August 28, 2013. The payments were financed by Alboini's loans made to NFC in the total amount of approximately $217,000;

(g) NFC incurred a loss of $6,049,000 for the fiscal year ended March 31, 2013;

(h) NFC's debt increased from $2.6 million as at March 31, 2012 to $5.2 million as at March 31, 2013; and

(i) Alboini made substantial loans to, and equity investments in, NFC and made substantial equity investments in NFC, which funds were substantially invested in NSI.

[63] During the period from June 2012 to April 2013 Alboini and another director of NFC and two clients made substantial contributions of capital to NFC which in turn were substantially invested in NSI, all with a view to keeping NSI alive. In total NFC owed $450,000 to two clients, $500,000 to a director and $700,000 to Alboini. In addition, since June 2012, Alboini invested $300,000 in NFC equity and an NFC director invested $300,000 in equity. Despite the investments made in NSI, NSI was unable to maintain a positive RAC and NSI was suspended by an IIROC panel in March 2013, and remains suspended today. As of the date of the Alboini Impact Affidavit, NFC has approximately $3,618,243 in liabilities and has a market value of $220,000.

[64] Alboini also filed the Supplementary Impact Affidavit, which dealt with the closure by TD bank of all Alboini affiliated accounts in May of 2014 (including his accounts, his wife's accounts, NSI accounts, Jaguar accounts, and NFC accounts). The affidavit states that these accounts were closed as a result of the sanctions imposed by IIROC and adverse publicity from the IIROC Decision. The affidavit also states that NFC's $300,000 credit facility, which had a loan outstanding of $245,000, was affected and the bank has demanded payment of the loan by June 20, 2014.

2. Witnesses

[65] Alboini called three witnesses to testify at the Sanctions and Costs Hearing:

(a) E.M., a chairman of a securities brokerage firm, who dealt with Alboini and NSI in a professional capacity on various financings;

(b) J.S., who worked at Penson and later became the president and CEO of Penson from 2010 to 2013; and

(c) J.K., a chairman and/or chief executive in a number of mid-cap and small-cap resource companies.

[66] All three witnesses provided character evidence regarding Alboini and testified as to their experiences with Alboini.

[67] Specifically, E.M. testified that NSI was involved in small-cap transactions that most of the larger banks would not participate in and that NSI was competitive in this field. As well, E.M. testified that when on opposite sides of a transaction, Alboini and NSI were good adversaries and played by the rules. There was never any negative experience regarding NSI's or Alboini's ethics or fairness.

[68] J.S. testified about the professional types of conversations that he would have with Alboini relating to the services being provided by Penson to NSI, the NSI accounts that Alboini was directly involved in, and the contractual discussions between NSI and its carrying broker Penson. J.S. testified that conversations were of a productive nature, legitimate concerns would be raised and action plans made. J.S. also testified that Alboini was cooperative in discussions that dealt

with addressing margin issues. In addition, J.S. testified that Alboini was reasonable in contract negotiations, and although they might have had different positions, they managed to resolve the issues and come to a reasonable agreement. J.S also testified that Alboini was always transparent in discussions and that he never saw a situation where there was a lack of integrity or lack of honesty.

[69] J.K. testified about the financings in which NSI was engaged as the financial advisor, underwriter or agent, and/or broker. J.K explained that NSI was selected because the size of the financings was not something that the larger banks would have an interest in. According to J.K., NSI was instrumental in developing this area of business compared to the large banks. J.K. also testified that he was happy with Alboini and NSI's services and that is why they went back to them for other financings. Alboini and NSI had knowledge of the type of companies they were dealing with and the investors who would be interested in such investments. Overall, he was satisfied with the service and advice received from Alboini and NSI. They were constructive, helpful and knowledgeable. In addition, J.K. also testified that there were never any incidents where an issue of honesty or integrity arose. He also testified that he opened a personal account at NSI and that Alboini was his investment advisor and that he was satisfied with Alboini in this regard. Alboini explained investment opportunities in detail and provided all the information requested. Further, J.K. testified that he had no concerns with Alboini's honesty, integrity or ethics.

[70] Initially, Alboini was also proposing to call a fourth witness, W.S., to testify (who was also a former director of NFC). However, due to medical issues, this witness was unable to attend and provided a written statement instead. The statement set out that W.S. dealt with Alboini in various circumstances and W.S. was also a client of Alboini at NSI and was "generally satisfied with [Alboini's] performance as an investment advisor". The statement also commented on the unique business and investing opportunities that Alboini provided and that Alboini conducted himself honestly and always presented and explained opportunities and risks to his clients. He also stated that as a small firm, NSI suffered from the regulatory burden and compliance was very costly to such a small firm.

VI. SUBMISSIONS OF THE PARTIES

[71] The following is a summary of the key submissions made by each party.

1. IIROC Staff's Submissions

(a) Count 1

[72] Count 1 applies only to Alboini. IIROC Staff takes the position that the sanctions imposed by the IIROC Panel with respect to that Count are appropriate.

[73] IIROC Staff refers us to several IIROC decisions to provide an overview of similar sanctions imposed in similar circumstances. IIROC Staff focuses on decisions dealing with TA Accounts and the roles of UDPs (see *Re Connacher*, 2011 IIROC 28 ("***Re Connacher***"); *Re Cuthbertson*, 2012 IIROC 24; ("***Re Cuthbertson***"); *Re Pan*, 2012 IIROC 22 ("***Re Pan***"); and *Re Rowan* (2013), 33 O.S.C.B. 91 ("***Re Rowan***")).

[74] IIROC Staff relies on *Re Mills* to emphasize that industry expectation is a major factor in determining general deterrence. IIROC Staff also refers us to *Re Connacher* to establish that substantial character evidence is not sufficient to outweigh the breaches of IIROC Rules by a UDP.

[75] In their submissions, IIROC Staff took us through Alboini's conduct and submitted that it was serious misconduct that supported the imposition of the sanctions requested.

[76] While Alboini's conduct did not cause any harm to clients, IIROC Staff submits that Alboini's conduct did harm the reputation of the industry as a whole and the confidence in that industry.

[77] IIROC Staff submits that Alboini, as UDP and RR at NSI, exploited NSI to benefit the business of Jaguar in which Alboini had a financial interest. IIROC Staff submits that, through his actions, Alboini put the capital of NSI's carrying broker, Penson and NSI, at risk.

[78] IIROC Staff submits that there were several transactions in which Alboini intentionally exploited the opportunity for Jaguar to obtain free financing for purchases of securities that it would not have been able to obtain otherwise. First, in July 2008, Penson imposed a trading restriction on Jaguar's main account at NSI (the "**Main Account**") because it had been undermargined for twenty consecutive days. After the restriction was lifted, the Main Account held a negative position despite holding securities with a market value of almost $20 million because none of the securities were eligible for margin.

[79] Second, IIROC Staff submits that in August 2008, Penson had identified an undermargin problem with Alboini's attempt to make a purchase in the Main Account at NSI. To address the liquidity problem in the Main Account, Alboini sold shares of Telehop Communications Inc. from the Main Account to one of Alboini's NSI clients. This transaction was done in the form of an off-book put option in favor of the client, while the risk of the arrangement remained with Jaguar. Moreover, this transaction was not disclosed to Vance.

[80] Third, IIROC Staff submits that Alboini used the TA Account to finance further securities purchases on behalf of Jaguar. Alboini opened additional project accounts for each stock that Jaguar wanted to purchase (the "**Project Accounts**"). In some cases, Jaguar was the only investor, but in other accounts, there were outside investors.

[81] According to IIROC Staff, these transactions exploited the "gap" in understanding between NSI and Penson in regards to which party was required to hold regulatory capital to cover purchases in the TA Account. IIROC Staff suggests that Penson did not know the identity of the purchaser in the TA Account until the transaction was ticketed out, which Alboini did not do immediately (IIROC Staff indicates that for some transactions, the delay was up to a month).

[82] IIROC Staff further submits that as a result of Alboini's trading activity, both NSI and Penson's capital was at risk because the securities were not ticketed out of the TA Account on a timely basis. Therefore, IIROC Staff states that Jaguar was not creditworthy by industry standards and NSI would not have been able to meet the "required margin amount".

[83] Furthermore, IIROC Staff states that Alboini failed to fully appreciate his responsibilities as UDP which was to ensure compliance and promote a culture of compliance within NSI. IIROC

Staff points out that in the Commission Decision, the Commission recognized the findings made by the IIROC Panel relating to the responsibilities of Dealer Members and how Alboini's conduct fell short:

> 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).
>
> (Commission Decision, *supra* at para. 253)

[84] IIROC Staff submits that Alboini's conduct described above had a significant impact on the risk to the capital of both Penson and NSI. For example, IIROC Staff points out that during cross-examination at the IIROC Hearing, Chornoboy stated that NSI would have been in a negative RAC position if NSI had to put up the $1.113 million from the Vulcan transaction.

[85] IIROC Staff also submits that Jaguar was undermargined for the entire period between August 1, 2008 and November 28, 2008 except for eight days in August, 2008. During this period, IIROC Staff indicates that Alboini continued to place orders for shares on behalf of Jaguar and, by the end of November 2008, the Jaguar accounts had an overall undermargin position of $1,424,000. The magnitude of the undermargin amount and length of time the undermargin position continued is a relevant consideration that should be taken into account when imposing sanctions.

[86] In response to Alboini's submissions, IIROC Staff takes the position that Alboini's arguments relating to Count 1 appear to be re-litigating the merits of Count 1 and that the appropriate forum for that is the Divisional Court, not the Commission.

[87] With respect to Alboini's submissions regarding the impact of the IIROC Decision on him and NSI, IIROC Staff submits that Alboini's impact evidence was unsubstantiated. IIROC Staff submits that Alboini's evidence to demonstrate the impact of the IIROC Decision was tenuous and that it should not be taken at face value. Specifically, IIROC Staff submits that the evidence lacked salient facts and painted an incomplete picture of what transpired.

[88] With respect to Alboini's submissions relating to the unfairness of the sanctions and costs hearing before the IIROC Panel, IIROC Staff submits that Alboini failed to recognize that the initial sanctions under the IIROC Decision never came into effect, as they were initially stayed. Further, the Commission Decision overturned the sanctions and costs imposed and required a hearing *de novo* on sanctions and costs. Therefore, in IIROC Staff's submission, there is no material impact of the IIROC Decision.

(b) Count 2

[89] Count 2 applies solely to Vance. IIROC Staff takes the view that the sanctions imposed by the IIROC Panel in respect of Count 2 are appropriate. They were a fine of $25,000 and a three-month suspension from registration in any supervisory capacity.

[90] In considering sanctions for Vance, IIROC Staff refers us to the following IIROC decisions: *Re Benarroch,* 2011 IIROC 11 ("***Benarroch***"); *Re Murdoch,* 2012 IIROC 23 ("***Re Murdoch***") and *Re Stevenson* 2008 IIROC 24 ("***Re Stevenson***").

[91] IIROC Staff submits that the following relevant factors as set out in the Sanctions Guidelines apply to Vance's conduct:

(a) the extent of inadequacy of the procedures for supervision or the actual supervision of employees;

(b) the extent of employee misconduct;

(c) "red flag" warnings that should have been caught by a proper system of supervision and the failure to follow up or to conduct periodic review; and

(d) corrective measures taken since discovery of the problem.

[92] IIROC Staff points to several aggravating factors related to the seriousness of Vance's breaches of the IIROC Rules. First, Vance failed to make proper inquiries into the following trading activities by Alboini:

(a) ten new Jaguar Project Accounts were opened between August and November 2008;

(b) those ten new accounts had incomplete documentation and did not mention whether any third parties held a beneficial interest in the account; and

(c) Vance's knowledge that a majority of those investors in the Project Accounts were also NSI clients. Vance failed to make a reasonable effort to ensure that the clients' interests were properly protected by failing to inform them of the potential conflict of interest between Alboini, NSI and Jaguar.

[93] IIROC Staff submits that the failure to maintain properly completed new client account forms had a substantial impact because it is "the foundational supervisory document that all compliance personnel use to monitor trading".

[94] IIROC Staff says that Vance's testimony at the IIROC Hearing showed that he made little effort to ensure that NSI was in compliance with IIROC Rules 1300.1, 1300.2 and 2500. As a result, IIROC Staff submits that Vance failed as CCO to properly identify major compliance concerns at NSI.

[95] IIROC Staff acknowledges that Vance had a difficult task because he was effectively responsible for supervising his boss, Alboini. However, IIROC Staff emphasizes that this situation illustrates the importance of sending a message to IIROC Dealer Members and CCOs

that "they must take their obligations very seriously, no matter who in the organization may object".

[96] IIROC Staff suggests that there were several mitigating factors to consider as well: Vance did not have any prior disciplinary record, Vance was not involved in Alboini's trading practices, and Vance did not directly benefit from NSI's and Alboini's misconduct.

(c) Count 5(a)

[97] Count 5(a) applies to Chornoboy, NSI and Alboini and relates to inaccurate MFRs that failed to properly account for leasehold improvement costs thereby misstating NSI's RAC. IIROC Staff takes the position that the sanctions imposed by the IIROC Panel in respect of this Count are appropriate. They are a fine of $25,000 for Chornoboy, a fine of $50,000 for NSI and a fine of $25,000 for Alboini.

[98] In considering sanctions for Count 5(a), IIROC Staff refers us to several IIROC decisions: *Re Aquino* [2001] IDACD No. 10 ("***Re Aquino***"); *Re HSBC James Capel Inc.* [2000] IDACD No. 29 ("***Re HSBC***"); *Re Interactive Brokers Inc.* 2009 IIROC 30 ("***Re Interactive Brokers***"); and *Re Mills*, *supra*.

Chornoboy

[99] IIROC Staff submits that the breach committed in Count 5(a) is significant because it was in the period of time when the activities in Count 1 occurred. In IIROC's view, if NSI's RAC calculation included Jaguar's unfunded liabilities in the TA Account and other Jaguar accounts, NSI would have had a negative RAC in the period of August, September, and November 2008. Furthermore, if the leasehold improvements were accounted for properly, NSI would have been in "early warning" status on six occasions.

[100] IIROC Staff also acknowledges that Chornoboy immediately admitted the accounting error when it was presented to him by IIROC Staff and that the error appeared to be inadvertent.

NSI

[101] IIROC Staff submits that NSI's previous disciplinary history should be taken into account in considering Count 5(a). NSI and IDA Staff entered into a settlement agreement in 2001 in which NSI admitted that it maintained a RAC of less than zero. NSI was fined $10,000 and ordered to pay costs of $5,000 in that proceeding.

Alboini

[102] IIROC Staff submits that Alboini should be responsible for the accounting errors in the MFRs because of Alboini's involvement with the review of those documents and the amount of money involved with the leasehold improvements. In IIROC Staff's view, the significance of the leasehold improvement costs for a small firm was not a minor event and Alboini would have been aware of them.

(d) Costs

[103] IIROC Staff requests costs pursuant to IIROC Rule 20.49. IIROC Staff submitted to us the bill of costs that was introduced before the IIROC Panel as the basis for the costs requested.

[104] IIROC Staff also submits that we should defer to the findings in the IIROC Decision relating to costs because the IIROC Panel "was in the best position to consider the length of the hearing and the complexity and nature of the evidence and issues that were placed before it".

[105] Notwithstanding, IIROC Staff acknowledges that a portion of the costs incurred dealt with Count 3, and because Count 3 was dismissed, a reduction of the costs is warranted for the Applicants that were named in Count 3. Those reductions are discussed below.

Alboini

[106] With respect to Alboini, IIROC Staff submits that the original amount of costs ordered by the IIROC Panel ($125,000) should be discounted by 25% to reflect that one of the four counts in the allegations was dismissed (Count 3). The total costs requested by IIROC Staff against Alboini after the discount are $93,750.

Vance

[107] With respect to Vance, IIROC Staff submits that the original amount of costs ordered by the IIROC Panel ($50,000) should be discounted by 50% to reflect that one of the two counts against Vance (Count 3) was dismissed. The total costs requested by IIROC Staff against Vance after the discount are $25,000.

Chornoboy

[108] IIROC Staff submits that since Chornoboy was named only in Count 5(a) and the original costs imposed by IIROC ($15,000) relate only to that Count, the IIROC Panel's costs ordered against Chornoboy in the amount of $15,000 should be upheld.

NSI

[109] With respect to NSI, IIROC Staff submits that the original amount of costs ordered by the IIROC Panel ($150,000) should be discounted by a significant amount to reflect that one of the two counts against NSI (Count 3) was dismissed. The total costs requested by IIROC Staff after the discount are $15,000.

[110] At the Sanctions and Costs Hearing, IIROC Staff submitted that such a large discount was warranted because NSI is now named only in Count 5(a), which involved a relatively small portion of the evidence and IIROC Staff time and effort in this matter. Further, IIROC Staff relies on the fact that Chornoboy, who was also subject only to Count 5(a), was ordered by the IIROC Panel to pay $15,000 in costs, and that this amount is an appropriate "yardstick" for comparison to determine the amount of costs that NSI should bear. As a result, IIROC Staff submits that NSI should be ordered to pay $15,000 in costs.

2. The Applicants' Submissions

(a) Count 1

[111] Alboini and NSI take the position that no sanctions or costs should be ordered against them. They submit that the publicity of the IIROC Decision has already caused maximum possible damage. Alboini and NSI further submit that the sanctions and costs imposed under the IIROC Decision do not appropriately reflect the conduct and factors to be considered. For example, Alboini and NSI point out that: (i) there was no loss to clients, NSI, Penson or anyone else, and the clients, NSI and Penson all profited from the investments; (ii) Jaguar was making legitimate investments; (iii) there was no fraudulent, criminal or deceitful conduct in the client accumulations; (iv) there was a delayed payment for some of the trades that were made; (v) there is no IIROC Rule or guidance concerning the use and operation of a TA Account; and (vi) this was the first contested case involving the use of TA Accounts.

[112] These submissions are discussed below.

Financial Impact

[113] Alboini and NSI submit that they have already experienced significant negative financial impact as a result of the IIROC Decision and for this reason there should be no sanctions and costs imposed on Alboini and NSI. Alboini and NSI submit that they have suffered "maximum possible damage" from the IIROC Decision. Specifically, NSI is currently insolvent and suspended as an IIROC Dealer Member as of March 18, 2013 (*Re Northern Securities,* 2013 IIROC 14 (the "***IIROC Suspension Order***")).

[114] In Alboini and NSI's view, the IIROC Decision was a significant factor affecting whether NSI could secure a carrying broker. As a result of being unable to secure another carrying broker, Alboini and NSI submit that NSI was required "to sell its retail business at a distress sale price of $80,000 for the transfer of 30 investment advisors and $185 million in assets under administration, well below a normalized value of 2% of the $185 million in assets under administration or $3.7 million".

[115] Alboini and NSI submit that there were further financial consequences from the IIROC Decision. First, NSI had a negative shareholders' equity of $3.5 million as of December 31, 2013. Second, Alboini submits that as result of the IIROC Decision, Toronto-Dominion Bank issued a notice to terminate the client accounts of Alboini, his wife, NFC, and Jaguar. In addition, Toronto-Dominion Bank has retained legal counsel to recover loans from NFC, NSI and Alboini.

[116] Alboini submits that he has incurred significant debt ($900,000) in an effort to maintain NSI. Further, Alboini submits that he is owed $600,000 by NFC and that the value of Alboini's equity investments has declined since NSI's insolvency and suspension.

Reputational Impact

[117] Alboini submits that even though the IIROC sanctions and costs were set aside by the Commission and a *de novo* sanctions and costs hearing has taken place, the sanctions and costs ordered by the IIROC Panel are still in the minds of many market participants. In addition, since

the IIROC Decision is on IIROC's website, the original IIROC sanctions remain in the public eye and Alboini and NSI will face the damaging impact of the publicized IIROC sanctions for some time.

[118] Alboini submits that he has personally suffered reputational damage from the IIROC Decision. Alboini has not been employed by NSI since March 2013 and Alboini does not believe that he can work in the securities industry again. Alboini has suffered loss of employees, partners, friends and clients, and Alboini is facing ongoing review by the TSX Venture Exchange regarding his status as a director and officer of NFC and Jaguar.

Alboini's Role as UDP

[119] Alboini submits that as UDP, he has always strived to operate NSI with integrity and with the interest of the client as a priority. In Alboini's view, he promoted a culture of compliance to NSI staff, intervened in compliance matters with regulatory bodies and reviewed daily trades to ensure compliance.

Alboini's Clean Disciplinary Record

[120] Alboini maintains that he has a clean disciplinary record. There are, however, three settlements entered into by NSI with IIROC and its predecessor (the IDA) imposing sanctions on NSI (see paragraph 239 of these reasons). Alboini submits that he signed the 2008 settlement agreement on behalf of NSI, not because it dealt with him as an individual.

Client Satisfaction and Treatment

[121] Alboini and NSI submit that they always conducted themselves in a professional manner with clients. Furthermore, Alboini and NSI submit that a relevant mitigating factor is that the conduct did not result in any client losses.

IIROC Panel's Motives

[122] Alboini and NSI submit that the IIROC Panel's expressed fear of public statements by NSI and Alboini demonstrated that the IIROC Panel had an improper motive in considering sanctions and costs and as such they were biased when imposing sanctions.

IIROC Panel's Conclusion on Resistance to Governance

[123] Alboini submits that findings relating to Alboini's resistance to governance are irrelevant to Count 1 sanctioning considerations. In Alboini's view, the IIROC Panel considered Alboini's resistance to governance as a contributing factor in imposing a permanent suspension. Alboini submits that these findings were based exclusively on the IIROC Panel's conclusions on Count 3. Therefore, since Count 3 was dismissed by the Commission Decision, the factor of resistance to governance should not be considered in relation to Count 1.

No Specific Violation of a Rule or Guidance on the Use of Accumulation Accounts

[124] Alboini and NSI submit that since there was no specific violation of an IIROC Rule or guidance on the use of accumulation accounts, it is a relevant mitigating factor that there was no intentional breach of any existing rules in this regard.

(b) Count 2

[125] Vance was not present at the Sanctions and Costs Hearing. His counsel informed us that, due to illness, Vance could not participate and could not provide instructions to counsel regarding the Sanctions and Costs Hearing. As a result, on June 10, 2014, counsel for Vance requested an adjournment on behalf of Vance (see paragraph 242 of these reasons). Vance did not make any submissions at the Sanctions and Costs Hearing with respect to sanctions and costs.

(c) Count 5(a)

Chornoboy

[126] Counsel for Chornoboy submits that based on the principle of proportionality, a reprimand is the only proper sanction for Chornoboy.

[127] Chornoboy submits that the financial sanctions requested by IIROC would have a disproportionate impact as compared with the same sanctions against a member firm or individual having more substantial resources. In addition, IIROC decisions regarding inadvertent RAC deficiencies show that RAC deficiencies are resolved mostly by settlement, with insignificant financial sanctions and such sanctions are usually imposed on the issuer and not the individual CFO.

[128] Counsel for Chornoboy referred us to several decisions to support this position: *Re Mills*, *supra; Re Graham* [2005] IDACD No. 21 ("***Re Graham***"); *Re Trilon Securities Corp* [2003] IDACD No. 12 ("***Re Trilon***"); *Re Research Capital Corp* [2004] LNBCSC 108 ("***Re Research Capital***"); *Re Credifinance Securities Ltd* [2006] IDACD No. 30 ("***Re Credifinance***"); and *Re Dornford* (1998), 21 O.S.C.B. 7499 ("***Re Dornford***").

[129] Chornoboy submits that a sanction beyond a reprimand would not serve a specific deterrent purpose because the error was inadvertent and was not due to a failure to understand or appreciate the IIROC Rules and applicable securities law. Moreover, Counsel for Chornoboy submits that Chornoboy is no longer in the industry and, as a result, he will not be in a position to repeat such an error going forward. Accordingly, specific deterrence is not necessary.

[130] Furthermore, Chornoboy submits that sanctions other than a reprimand would not serve a general deterrence purpose. The error in Count 5(a) was a question of accrual accounting, which only had a consequential impact on NSI's RAC calculation. Accordingly, "a message doesn't need to be sent to the rest of the industry to accrue expenses properly. Any bookkeeper should have known how to do that."

[131] With respect to mitigating factors, counsel for Chornoboy emphasizes that Chornoboy did not obtain any financial benefit as a result of his error, the error did not relate to NSI's

trading activities or customers, there was no harm to investors, the error was inadvertent, Chornoboy did not receive any direct financial benefit as a result of the error, and he readily acknowledged the error once it was brought to his attention by IIROC Staff. Chornoboy also admitted to his error at the IIROC Hearing. Prior to this incident, Chornoboy had a clean disciplinary record.

[132] Chornoboy submits that he has already paid a substantial price for his error. For example, an offer of employment to work in Kelowna, British Columbia was withdrawn due to the IIROC Decision despite Chornoboy having already incurred expenses to relocate.

Alboini and NSI

[133] In relation to Count 5(a), Alboini and NSI submit that they should not be held responsible for Chornoboy's unintentional error. Moreover, Alboini submits that he relied on Chornoboy's expertise and the independent audit by an external auditor of NSI's financial statements. In addition, Alboini and NSI emphasized that Chornoboy admitted the conduct relating to Count 5(a) and that in light of these admissions, they should not also be held responsible for this conduct.

(d) Costs

[134] The Applicants' submissions regarding costs are summarized below.

Alboini and NSI

[135] Alboini, on behalf of himself and NSI, submits that there should be no costs imposed on him or NSI because of the various negative consequences they have already suffered as a result of the impact of the IIROC Decision (discussed above in paragraphs 111 to 118 of these reasons).

Chornoboy

[136] Chornoboy submits that the impact of a costs order and of any other financial sanctions should be considered as a whole. Chornoboy refers us to *Re Credifinance* which indicates that costs should be ordered with caution, and costs should not have "the effect of inhibiting a Member, or an approved person [*sic*], from advancing a defence which it thinks is meritorious." (*Re Credifinance, supra* at para. 56).

[137] Chornoboy also points out that he admitted his error from the beginning. Therefore, this Count and the investigation related to Count 5(a) represented only a small portion of the total IIROC Staff time related to this matter. Accordingly, a costs order of $15,000 would not be proportionate and would be punitive and excessive in the circumstances.

Vance

[138] Vance's counsel did not make any submissions regarding costs.

VII. THE LAW ON SANCTIONS

1. General Principles

[139] This is a hearing *de novo* on sanctions and costs pursuant to subsection 8(3) of the Act. That section provides that "the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper". The Commission Decision dismissed the IIROC Panel's decision on sanctions and costs. We are now holding a hearing *de novo* in which we will make a determination of the appropriate sanctions and costs.

[140] In imposing sanctions and costs, we have considered the Sanctions Guidelines and IIROC's previous decisions on sanctions and costs. In particular, we have considered the general principles, and key considerations when determining sanctions, set out in the Sanctions Guidelines. The principles reflected in the Sanctions Guidelines and IIROC decisions are substantially similar to the sanctioning factors considered by the Commission in its decisions. We have also considered the sanctions imposed under the IIROC Decision.

[141] Both IIROC and the Commission recognize that "[i]n imposing sanctions, the Commission's objective is not to punish past conduct. Rather, the Commission must act in a protective and preventative manner to restrain future conduct that may be harmful to investors or the capital markets" (*Re Sabourin* (2010), 33 O.S.C.B. 5299 at para. 53 ("***Re Sabourin***"), relying on *Re Mithras Management* (1990), 12 O.S.C.B. 1600 ("***Re Mithras***"). In *Re Mills*, a hearing Panel of the Investment Dealers Association ("**IDA**", now IIROC) also emphasized that the objective of sanctions is to determine sanctions "appropriate to the conduct and the respondent before it, reflecting that its primary purpose is prevention, rather than punishment" (*Re Mills, supra* at para. 6).

[142] The sanctions imposed must be proportionate to the nature of each Applicant's conduct (*Re M.C.J.C. Holdings*, (2002), 25 O.S.C.B. 1133 at 1134 ("***Re M.C.J.C.***")) and take into consideration the circumstances in which a contravention of IIROC Rules was committed and any aggravating and mitigating factors.

[143] Deterrence, both specific and general, is an important consideration to be taken into account by IIROC and Commission panels. Specific deterrence involves deterring the Applicants from committing the same type of misconduct again, while general deterrence involves deterring other Dealer Members and Approved Persons from committing similar violations of the IIROC Rules. The Supreme Court of Canada addressed the important role of deterrence in *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Re Cartaway***"):

> 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.
>
> (*Re Cartaway*, *supra* at para. 52)

[144] The IDA has also discussed the importance of deterrence:

> In our view, taking into account general deterrence, in the case before us, would not be for the purpose of punishing Dornford, as argued by Mr. Douglas, but rather for a prophylactic purpose, the future protection of the marketplace not only from actions by Mr. Dornford but also from breaches of trust by others. Although Mithras speaks of deterring future improper conduct of a respondent, it does note that the Commission is "here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient." It seems to us that Warnes does not in any way indicate that general deterrence can be taken into account for punitive purposes, but rather, in the securities law context, that it can be taken into account in determining what is necessary to restrain conduct by others that is likely to be prejudicial to the public interest in having capital markets that are fair and efficient.
>
> (*Re Dornford*, *supra* at page 12)

[145] Further in *Re Mills, supra*, the IDA noted that general deterrence can be achieved if a sanction strikes an appropriate balance by addressing the specific misconduct, but is also in line with industry expectations:

> 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.
>
> (*Re Mills, supra* at para. 6)

[146] With respect to general deterrence, the Commission stated in *Re Mithras*:

> … the role of this Commission is to protect the public interest by removing from the capital markets -- wholly or partially, permanently or temporarily, as the circumstances may warrant -- those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
>
> (*Re Mithras*, *supra* at 1610 and 1611)

[147] Deterrence, industry expectations, and relevant sanctioning factors and decisions are discussed below.

2. IIROC Rules

[148] IIROC Rules 20.33 and 20.34 set out the sanctions that an IIROC Panel may impose on Approved Persons and Dealer Members for a breach of IIROC Rules. For instance, a hearing panel may impose on an Approved Person one or more of the following:

(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 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.

In addition, Rule 20.49 gives an IIROC panel the authority to order costs. (Each of these IIROC Rules is set out in Schedule B to these reasons.)

[149] The Commission has recognized that disgorgement is permitted pursuant to IIROC Rule 20.33 and that the purpose of that Rule is to permit disgorgement of any amount accruing to the benefit of a person as a result of a contravention of the rules (*Re Dennis* (2012), 35 O.S.C.B. 7374 ("***Re Dennis***")). The Commission has held that a purposive approach should be taken to interpreting the word "profit" to achieve the overriding goal of investor protection (*Re Dennis*, *supra* at para. 43). The Commission stated in *Re Dennis*:

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

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

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

(*Re Dennis, supra* at paras. 44 and 45)

[150] Further, the Sanctions Guidelines address disgorgement as a component of sanctions:

> **4.1.3 Disgorgement**
>
> At present, Dealer Member Rules specifically restrict the levy of a fine to a maximum of $1,000,000 per contravention for Approved Persons and $5,000,000 for Dealer Members. As well, a Hearing Panel may require a respondent to pay an amount equal to three times the profit made or the loss avoided by the respondent as a result of the commission of the contravention in question, including any commissions earned, or other benefits obtained from the impugned transactions. However, disgorgement is a sanction – it is not restitution.

(Sanctions Guidelines, *supra* at page 13)

3. Sanctions Guidelines

(a) General Principles

[151] As discussed above, IIROC Rules 20.33 and 20.34 authorize the imposition of sanctions. The imposition of sanctions is a matter for the discretion of the panel to be determined in light of all the circumstances in each case. The Sanctions Guidelines were established by IIROC to assist with determining appropriate sanctions to be imposed as part of a settlement agreement or at the end of a disciplinary proceeding. It is important to note that the Sanctions Guidelines are neither exhaustive nor determinative (see paragraph 156 below).

[152] The Sanctions Guidelines set out general principles that should be considered when imposing sanctions; those purposes include:

> 1. protection of the investing public;
> 2. protection of IIROC's membership;
> 3. protection of the integrity of IIROC's process;
> 4. protection of the integrity of the securities markets; and
> 5. prevention of a repetition of conduct of the type under consideration.

(Sanctions Guidelines, *supra* at page 8)

[153] The Sanctions Guidelines also provide that those who threaten the integrity of the capital markets must recognize that they will be held accountable through enforcement action by regulators. The Sanctions Guidelines emphasize that "[s]anctions should be based on the circumstances of the particular misconduct by a respondent with an aim at general deterrence" (Sanctions Guidelines, *supra* at page 8). The Sanctions Guidelines also state that, "[s]ince sanctions should be tailored to address the misconduct involved in a particular case, a penalty must be proportionate to the gravity of the misconduct and the relative degree of responsibility of a respondent" (Sanctions Guidelines, *supra* at page 9).

[154] The Sanctions Guidelines also set out a non-exhaustive list of factors to be considered when determining sanctions:

(a) harm to clients, employer and/or the securities market;
(b) blameworthiness;
(c) degree of participation;
(d) extent to which the respondent was enriched by the misconduct;
(e) prior disciplinary record;
(f) acceptance of responsibilities, acknowledgement of misconduct and remorse;
(g) credit for cooperation;
(h) voluntary rehabilitative efforts;
(i) reliance on the expertise of others
(j) planning and organization (pre-meditation);
(k) multiple incidents of misconduct over an extended period of time;
(l) vulnerability of victim;
(m) failure to cooperative with the investigation;
(n) significant economic loss to the client and/or dealer member firm.

(Sanctions Guidelines, *supra* at pages 9 to 12)

[155] These factors are similar to the sanctions factors generally considered by the Commission in imposing sanctions (see *Re M.C.J.C. supra* at 1136 and *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746).

[156] In addition to the factors referred to above, the Sanctions Guidelines provide additional factors that relate to the breach of a specific IIROC Rule. They also suggest minimum sanctions as a baseline for specific offences, while recognizing that the Sanctions Guidelines should not fetter the discretion of a panel and a panel may impose different sanctions appropriate and proportionate to the specific circumstances of each case.

(b) Permanent Bans

[157] The Sanctions Guidelines recognize that in some circumstances the severity of the misconduct will merit a permanent ban. The Sanctions Guidelines specify the circumstances when such a ban would be appropriate:

4.3 Permanent Bar from Approval or Expulsion/Termination of Membership

A permanent ban from approval of an individual or the termination or membership [*sic*] 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.

Hearing Panel [*sic*] may consider imposing a fine and requiring disgorgement even when a registrant is permanently barred in egregious cases involving significant harm to clients and/or to the integrity of the securities industry as a whole.

(Sanctions Guidelines – General Principles – Section 4.3, *supra* at page 13)

(c) Failure to Supervise

[158] Sanctions Guideline 4.3 sets out factors to consider and recommended sanctions where the misconduct at issue involves the failure to supervise and breaches of IIROC Rules 1300.2 and 2500, among others (which is alleged in Count 2). Additional factors to consider include:

1. Extent of inadequacy in the procedures for supervision or the actual supervision of employee(s);
2. Extent of employee(s) misconduct;
3. Amount of losses or compensation for which the Dealer Member is liable as a result of the employee(s) misconduct;
4. "Red flag" warnings that should have been caught by a proper system of supervision/failure to follow-up or to conduct periodic reviews; and
5. Corrective measures taken since the discovery of the problem.

(Sanctions Guidelines – Internal Control Offences – Section 4.3, *supra* at page 40)

[159] Recommended sanctions include:

(a) for a Dealer Member:

- Fine: minimum of $50,000;
- Consider condition the Dealer Member demonstrate that its procedures and practices meet the Corporation standards; additional monthly fine until the Corporation is satisfied; and
- Suspension or expulsion of dealer member in egregious cases.

(b) for a designated person/supervisor:

- Fine: minimum of $25,000;
- re-write of PDO;
- period of suspension or permanent bar from director/officer/supervisory and or compliance responsibilities; and
- permanent ban from approval in all capacities in egregious cases.

(Sanctions Guidelines, *supra* at page 40)

(d) Record Keeping Violations

[160] Sanctions Guideline 4.5 sets out factors to consider and recommended sanctions where the misconduct at issue involves the failure to keep and maintain at all times current books and records necessary to record business transactions properly (breaches of IIROC Rules 17.2 and 200) (which is alleged in Count 5(a)). Additional factors to consider include:

1. nature of the inaccurate or missing information;
2. the materiality of the inaccurate or missing information;
3. the extent of any loss to client(s) or the Dealer Member firm;
4. whether there was an intentional disregard for Corporation requirements or if the failure to keep proper records was due to carelessness or inadvertence.

(Sanctions Guidelines, *supra* at page 42)

[161] Recommended sanctions include:

For a Dealer Member firm:

1. minimum fine of $25,000;
2. suspension until such time as the record keeping violations have been corrected.

For senior managers:

1. minimum fine of $10,000;
2. re-write of PDO;
3. period of suspension from director/officer/supervisory and/or compliance responsibilities;
4. permanent ban from approval in all registered capacities in the most egregious of cases.

(Sanctions Guidelines, *supra* at page 42)

4. Relevant Prior Decisions

[162] The following is a summary of the relevant decisions that the parties referred to during the Sanctions and Costs Hearing.

(a) Decisions Relating to Count 1

[163] With respect to Count 1, we were referred to *Re Connacher, supra, Re Pan, supra, Re Cuthbertson, supra* and *Re Benarroch, supra*. All of these decisions dealt with misconduct relating to trading and breaches of IIROC Rule 29.1, although the severity of the misconduct varied. For our purposes, it is helpful to examine the conduct and sanctions imposed in each of these cases to determine where Alboini's conduct falls on the spectrum of misconduct.

[164] In *Re Connacher*, the respondent (Connacher) was the head trader and RR who caused a loss of $33 million to Evergreen by conducting trades in the average price inventory account at his discretion. In addition, the respondent borrowed $345,000 from clients and never repaid them (*Re Connacher*, *supra* at para. 36). Connacher failed to recognize the risk to which he exposed the firm and/or carrying broker as a result of his trading activity (*Re Connacher, supra* at para. 18). Connacher was fined and required to disgorge commissions. The IIROC panel did not specify the individual amounts for the fine and for disgorgement, but the total was $500,000. A permanent suspension from registration in any capacity was also imposed on the basis that the breach was considered as "tantamount to fraud" (*Re Connacher*, *supra* at para. 36). *Re Connacher* is an example of misconduct falling on the most egregious side of the spectrum.

[165] A permanent suspension from registration and a fine of $150,000 have also been imposed where the conduct was "egregious" and where the respondent made "continuous efforts to deceive his employer" (*Re Pan*, *supra* at para. 48). In *Re Pan*, the respondent was an RR who made "unsolicited and aggressive active short-term trades" using the margin of a major client account (*Re Pan*, *supra* at para. 16). Several aggravating factors in *Re Pan* contributed to the sanctions imposed: there was a cumulative client account loss of approximately $3,000,000; Pan made a total of nine personal advances ($761,000) to the client and lied to compliance staff about the source of funds on several occasions; and Pan failed to comply with his "gatekeeper function" which was to "protect the integrity of the capital markets" (*Re Pan*, *supra* at para. 26).

[166] In *Re Cuthbertson*, *supra,* a settlement agreement was approved imposing an 18-month suspension and a $35,000 fine in circumstances where the trader and RR conducted seven unauthorized trades over a period of four months, which resulted in a loss of $418,000 to the dealer member. The settlement agreement referred to several mitigating factors including: the respondent's age; the respondent did not "devise a plan to take advantage of his clients for his personal gain" (*Re Cuthbertson*, *supra* at para. 10) and the fact that the respondent had agreed to a voluntary payment plan to compensate the Dealer Member for client losses (the payments totaled $154,041.83) (*Re Cuthbertson*, *supra* at para. 12).

[167] In circumstances in which an RR personally engaged in suspicious transactions for personal gain, a two-year suspension from registration and a fine of $50,000 have also been imposed (*Re Benarroch*, *supra* at para. 4).

(b) Decisions Relating to Alboini's Role as UDP

[168] Each Dealer Member must designate a director, partner or officer who is responsible for the opening of new accounts and the supervision of account activity (the Ultimate Designated Person or UDP). The UDP "is responsible for establishing and maintaining procedures for account supervision and shall 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" (Sanctions Guidelines, *supra* at page 40). *A UDP has the responsibility of ensuring and promoting a culture of compliance within a Dealer Member.* A UDP is "responsible for the firm's overall compliance with regulatory requirements as well as overseeing the development and implementation of its compliance practices and procedures" (*Re Rowan*, *supra* at para. 186). Accordingly, the UDP role is critically important within a Dealer Member and any breach of IIROC Rule 29.1 is fundamentally inconsistent with that role.

[169] In *Re Rowan, supra*, the following sanctions were imposed on a UDP: an administrative penalty of $250,000, a reprimand, resignation from any position that he held as a director or officer of a registrant, a 45-day ban from becoming or acting as a director and officer of a registrant and a condition that the UDP not be approved to act in any supervisory role for a period of 45 days. In *Re Rowan*, the UDP failed to "supervise trading by Rowan and to address the issues arising from Rowan's dual role as a director of Biovail and as a registered representative trading in Biovail securities …". That conduct was held to have been "serious misconduct" (*Re Rowan*, *supra* at para. 191). The Commission stated as follows:

> Although Carmichael's violations of the Act were not as significant as those of Rowan, we nevertheless find that Carmichael as Chairman, CEO and acknowledged UDP of Watt Carmichael had an important leadership role in the brokerage firm and was responsible to ensure that the firm and its employees operated in compliance with Ontario securities law by adopting appropriate policies, procedures and practices. Carmichael, in light of his role and long-standing career in the industry, should not have abdicated his responsibilities. In particular, Carmichael's failure to supervise trading by Rowan and to address the issues arising from Rowan's dual role as a director of Biovail and as a registered representative trading in Biovail securities amounted to serious misconduct.
>
> (*Re Rowan, supra* at para. 191)

[170] In *Re Benarroch, supra,* a UDP permitted and facilitated suspicious transactions in client accounts without making diligent inquiries to ensure the legitimacy of the transactions. *Re Benarroch* also emphasized the significance of the UDP's gatekeeper function. In that decision, the UDP was suspended for 15 years from any registration with IIROC and fined $250,000. The IIROC panel considered aggravating factors such as the fact that the UDP permitted and facilitated suspicious transactions; the UDP personally participated in and benefited from the transactions; there were multiple incidents over a number of years; the conduct was intentional and the UDP's experience in the industry. However, the IIROC panel noted as a mitigating factor that there was no harm to clients.

(c) Decisions relating to Count 2

[171] With respect to Count 2, we were referred to *Re Murdoch, supra, Re Stevenson, supra,* and *Re Benarroch, supra*. All of these cases dealt with supervisory obligations.

[172] In *Re Murdoch*, a branch manager breached IDA Regulation 1300.2 by failing to adequately supervise a RR. The IIROC panel took into consideration factors including the failure to recognize red flags regarding client accounts; the respondent's knowledge and experience in

the industry; and the need to "send a message to others that more is required and serious consequences will result from failure to exercise individual responsibilities for the supervision of others and to take independent steps where red flags occur" (*Re Murdoch*, *supra* at para. 25). The branch manager received a twelve-month suspension from acting in any supervisory capacity and a fine of $50,000.

[173] In *Re Stevenson*, the respondent failed to exercise his gatekeeper duty with respect to 20 offshore corporations with the same designated beneficiary. Mitigating factors for imposing sanctions were the lack of client harm; the respondent's clean disciplinary record; the act "was a result of bad judgment" and was not fraudulent (*Re Stevenson*, *supra* at para. 17); the respondent fully cooperated during the investigation; and the requirements on the respondent to attend certification classes after the suspension period (*Re Stevenson*, *supra* at para. 17). The branch manager received a fine of $50,000, a 12-month suspension from approval as sales manager, officer (including revocation of the Senior Vice-President designation) and director, branch manager, co-branch manager or officer or any other management, compliance or supervisory function and various restrictions on the respondent's registration after the suspension (*Re Stevenson*, *supra* at para. 3).

[174] In *Re Benarroch*, *supra,* the CCO and Alternate Designated Person failed to supervise the transactions of the CEO, UDP, Director and Chairman and of an RR (*Re Benarroch*, *supra* at page 3). The CCO was suspended for five years from any registration with IIROC in a supervisory role, suspended from any registration with IIROC for one year, and fined $50,000. Aggravating factors included the fact that the CCO should have raised questions about the propriety of transactions; transactions between accounts were approved with no apparent justifications; and the CCO failed to make diligent inquiries (*Re Benarroch*, *supra* at page 30).

(d) Decisions relating to Count 5(a)

[175] With respect to Count 5(a), we were referred to the decisions in *Re Aquino, supra, Re HSBC, supra, Re Interactive Brokers, supra,* and *Re Trilon, supra*. Those decisions all dealt with issues relating to keeping books and records and/or negative RAC, constituting breaches of IIROC Rule 17.2 or former IDA By-Law 17.2 and IIROC Rule 17.1 or former IDA By-law 17.1, respectively. All of these matters were settlements, where sanctions were imposed on the dealer member firm for the misconduct at issue. Only in *Re Aquino* were sanctions imposed on the individual officer responsible for the compliance failures.

[176] Where Dealer Members have failed to keep proper records (under IIROC Rule 17.2), fines have been ordered against the corporate respondents. In *Re HSBC*, the respondent HSBC was fined $60,000 for failing to maintain a RAC greater than zero as required under IDA By-law 17.1 and in violation of IDA By-law 17.2. HSBC reported a RAC deficiency of $21,289,000 and $82,340,000 on two separate occasions. In these circumstances, the settlement considered mitigating factors such as the fact that no client funds were put at risk and the respondent incurred significant expenses to rectify the issues.

[177] A fine of $40,000 was imposed on the corporate respondent in *Re Interactive Brokers, supra,* for breaching IDA By-Law 17.2 between 2002 and 2009. The settlement agreement considered several mitigating factors such as the fact that the respondent had no prior disciplinary record; the breach was technical; no client was put at risk and no clients suffered

prejudice; the breach was not intentional; the respondent cooperated fully during the investigation and there was never any negative RAC as a result of the breach.

[178] Similarly, the corporate respondent in *Re Trilon, supra,* was fined $50,000 for having a RAC deficiency of $51,809,000 and $3,406,000 on separate occasions. A mitigating factor in *Re Trilon* was that the miscalculation was inadvertent.

[179] In circumstances where sanctions have been imposed on an individual respondent, the sanctions have been smaller. For example, in *Re Aquino* a fine of $10,000 was imposed and the individual was required to re-write the Partners, Directors and Senior Officers Exam. In that case, the respondent suspected the firm's bookkeeper of fraud and immediately took corrective measures to reconcile the bank balances. There was no client loss resulting from the conduct in question.

VIII. APPROPRIATE SANCTIONS IN THIS MATTER

1. Relevant Sanctioning Factors

[180] The following are the relevant sanctioning factors that we considered in imposing sanctions in this matter.

(a) Proportionality

[181] Sanctions must be proportionate to the conduct and the particular circumstances of the respondent (*Re M.C.J.C, supra*). The Commission has taken proportionality into account in connection with IIROC matters. In *Re Magna Partners* (2011), 34 O.S.C.B. 8697 ("***Re Magna Partners***"), IIROC Staff originally requested a global fine of $160,000 at the IIROC hearing and the IIROC panel ordered a fine of $100,000. On review, the Commission reduced the fine to $30,000 and ordered costs of $10,000 (the IIROC panel ordered the same costs). The Commission referred to *Re Kasman* (2009), 32 O.S.C.B. 5729 ("***Re Kasman***") where the Commission concluded that:

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

[182] In considering proportionality, the size of the registrant is also relevant. A fine that may be negligible for a larger Dealer Member may put a smaller Dealer Member out of business. This was recognized in *Re Magna Partners, supra*:

> In this case, we believe that the Decision lacked proportionality in that the IIROC Hearing Panel did not appear to appropriately take into account the small size of the registrant and its limited regulatory capital. During the hearing before the IIROC Hearing Panel, IIROC acknowledged that the Applicant was a small firm,

> with a risk adjusted capital of $293,000 as of August 31, 2010. The Applicant had been in early warning since June 8, 2010. In our view, a penalty of $100,000 is not proportionate to the size of the firm and its regulatory capital. A penalty of that size would be considered a minor deterrence to a large member of the industry, but could cause the failure of a much smaller member firm such as the Applicant. We are not suggesting that the amount of a firm's risk adjusted capital should be a determining factor in imposing sanctions. We are simply saying that, in these circumstances, it should be a very significant factor. Further, in imposing sanctions, the IIROC Hearing Panel did not have the benefit of considering the *Beacon* Decision. The fine imposed in that decision seems to us to be very relevant to the Applicant's circumstances.
>
> (*Re Magna Partners, supra* at para. 58)

[183] In considering the appropriate sanctions, we must consider the impact of those sanctions on the Applicants. NSI is a relatively small registrant and it is apparent that Alboini has been the driving force behind it. It appears that the Applicants have experienced significant negative financial consequences as a result of these lengthy proceedings. While we do not accept Alboini's submission that the IIROC Decision was the cause of all of the negative consequences referred to in paragraphs 57 to 64 of these reasons, it seems to us that the IIROC Proceeding and the IIROC Decision have already had significant negative effects on NSI and Alboini to the point of putting in doubt the continued viability of NSI.

[184] While that does not mean that substantial sanctions should not be imposed on Alboini and NSI, it is a relevant consideration.

(b) The Role of Each of the Individual Applicants

[185] Another important consideration is the role that each of the individual Applicants had with NSI and the level of their responsibility.

[186] Alboini was the directing mind and UDP of NSI. As discussed above, prior decisions have recognized that UDPs play a very important role in a firm's compliance practices and procedures (see paragraph 168 above). In the Commission Decision, we found that in his role as UDP, Alboini fell short of the standards that are expected of a UDP. Specifically, we noted that:

> 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" ...
>
> (Commission Decision, *supra* at para. 253)

[187] In addition, we acknowledged the IIROC Panel's finding that:

> ... 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".
>
> (Commission Decision, *supra* at para. 229 citing IIROC Decision*, supra* at para. 53)

[188] With respect to the role played by a CCO (which is a consideration in the case of Vance), the IIROC Panel 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.
>
> (IIROC Decision*, supra* at para. 105(d))

[189] With respect to the role played by CFOs (which is a consideration in the case of Chornoboy), the Commission has acknowledged the important role a CFO plays (see, for instance, *Re Rex Diamond Corp.* (2009), 32 O.S.CB. 6467).

[190] Overall, the UDP, CCO and CFO positions all carry with them a high level of responsibility. That responsibility was not met in this case.

(c) Deterrence

[191] In addition to imposing sanctions that are proportionate to each of the Applicants' conduct, it is also important that we impose sanctions that will provide general deterrence to others in the industry from engaging in similar misconduct. In some circumstances, general deterrence may require significant sanctions even if specific deterrence does not (see the discussion of disgorgement in paragraphs 210 and 211 of these reasons).

(d) Seriousness of the Misconduct

[192] With respect to Count 1, the IIROC Panel found that Alboini engaged in the following serious misconduct:

(a) he improperly obtained access to credit for Jaguar (Commission Decision, *supra* at paras. 223 to 226) at a time when Jaguar was not creditworthy (Commission Decision, *supra* at paras. 227 to 233);

(b) 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 (Commission Decision, *supra* at paras. 234 to 235);

(c) the trading in the TA Account was inappropriate and permitted Jaguar to free-ride on Penson's capital (Commission Decision, *supra* at paras. 236 to 243);

(d) Penson was misled by Alboini (Commission Decision, *supra* at para. 248); and

(e) the trading exposed NSI and Penson to out-of-the-ordinary credit risk (Commission Decision, *supra* at paras. 249 to 253).

[193] Alboini submits that mitigating factors on Count 1 included that there were no investor losses as a result of his conduct and that there was no breach of a specific IIROC rule; rather, the finding of the IIROC Panel was that Alboini's conduct was "unbecoming".

[194] While there were no investor losses, it is important to note that this matter did involve conduct that exposed Penson and NSI to serious risks, as found in the IIROC Decision and the Commission Decision. Further, Alboini profited from his misconduct through receiving commissions of $244,985.

(e) No Express IIROC Rule Breached

[195] As noted above, Alboini argues that there are no express IIROC Rules relating to the use of a TA Account. Rather, Count 1 is framed on the basis that Alboini's conduct was "unbecoming". One of IIROC's roles is to establish appropriate standards of conduct in the securities industry and not every action or activity can be expressly addressed in specific IIROC Rules. A general category of "unbecoming business conduct" is necessary and appropriate.

[196] The IIROC Panel concluded that "[i]t is the Panel's view 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).

[197] We concluded in the Commission Decision that:

> 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)

(Commission Decision, *supra* at para. 256)

[198] Accordingly, the IIROC Panel was entitled to interpret and apply the concept of "unbecoming business conduct" and to determine that 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.

(f) Vance's Misconduct

[199] With respect to Count 2, we found that Vance engaged in serious misconduct by failing to make sufficient inquiries in response to the following 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; and

(c) Vance was aware that a "majority of the investors" in the Project Accounts were also NSI clients.

(Commission Decision, *supra* at paras. 260 and 267)

(g) Conduct Involved in Count 5(a)

[200] With respect to Count 5(a), the IIROC Panel found that Alboini, NSI and Chornoboy engaged in the following misconduct:

(a) NSI leased new premises in Toronto 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 failed to record the liabilities owing to the contractor on NSI's MFRs and in its annual financial statements;

(c) As a result of failing to properly record the liabilities to the contractor, NSI's MFRs filed with IIROC were inaccurate for the 13 months from February 2008 to February 2009. By not recording the liabilities, NSI concealed six instances in which it was in "early warning" for purposes of IIROC Rule 30;

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

We note that the IIROC Panel concluded that this error by Chornoboy was inadvertent and that he admitted the error at the IIROC Hearing (Commission Decision, *supra* at paras. 283, 284 and 287).

(h) Impact of the IIROC Decision

[201] We heard evidence and strong submissions from Alboini as to the negative impact of the IIROC Decision on Alboini and NSI.

[202] First, we note that the Commission granted a stay of the IIROC Decision on November 19, 2012 and thus the original sanctions and costs order never came into effect. Further, the Commission Decision overturned the sanctions and costs imposed by the IIROC Panel and ordered a hearing *de novo* on sanctions and costs.

[203] IIROC is a regulatory body and 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)" (Commission Decision, *supra* at para. 43). In addition, under the Commission's Recognition Order, IIROC has the responsibility to establish, administer and enforce rules related to the proper business conduct of IIROC members (Commission Decision, *supra* at paras. 44 and 45). All IIROC members must comply with IIROC's by-laws, rules, regulations, policies, procedures, interpretations and practices.

[204] It does appear to us that the IIROC Decision has had a significant negative impact on Alboini's reputation and on his and NSI's financial circumstances. There will, however, always be negative consequences to a registrant from an IIROC sanctions order and those consequences are recognized as a consideration in imposing sanctions. That consideration cannot, however, outweigh the other sanctioning considerations discussed in these reasons.

[205] In his submissions regarding the impact of the IIROC Decision, Alboini blamed IIROC for two matters:

(a) NSI was unable to secure a new carrying broker; and

(b) TD bank closed all NSI accounts, Jaguar accounts, and NFC accounts as well as individual accounts of Alboini and his wife.

[206] With respect to the ability to secure a new carrying broker, we note that Penson did not stop acting as NSI's carrying broker due to the IIROC Decision. On September 28, 2012, Penson sent a letter to NSI informing NSI that Penson was terminating the Uniform Type 2 Introducer/Carrier Broker Agreement with NSI and the termination would be effective on December 31, 2012. We note that the IIROC Decision was issued on November 10, 2012 about a month and a half later. The reason Penson terminated the agreement was because its parent company in the United States had declared bankruptcy. While IIROC expressed concerns for NSI clients as a result of NSI losing its carrying broker, it was NSI's responsibility to obtain a new carrying broker, not IIROC's.

[207] With respect to the closure of the TD bank accounts, there was evidence at the Sanctions and Costs Hearing that TD's decision was influenced by the findings of the Financial Transactions and Reports Analysis Centre of Canada ("**FINTRAC**") (whose mandate is to facilitate the detection, prevention and deterrence of money laundering and the financing of terrorist activities, while ensuring the protection of personal information) related to compliance issues set out in a Notice of Violation with respect to NSI dated April 22, 2013. This was confirmed by an e-mail from TD dated May 23, 2014 which stated:

> We have discretion under our account agreements to close accounts upon notice. We periodically review accounts and close them when they do not align with our risk management culture. In this instance, our decision was based on a review of Northern Securities and related parties. Of particular concern were the FINTRAC findings against Northern Securities. In any decision to end the relationship, we take a holistic approach which includes related parties and personal accounts.
>
> (Exhibit 12, Tab 5)

[208] We note that the FINTRAC investigation commenced prior to the release of the IIROC Decision and that the date of FINTRAC's examination was November 2, 2012 (which examined conduct from January 1, 2012 to June 30, 2012). Further, in respect of the TD account closures, we are not able to conclude that TD's decision regarding them was due to the IIROC Decision.

[209] Accordingly, the IIROC Decision was not the cause of NSI losing its carrying broker and there were a number of factors that prevented NSI from finding a new one. The IIROC Decision does not appear to have been the cause of TD's closure of the Alboini and related bank accounts. In any event, these issues are not significant mitigating circumstances in imposing sanctions in this matter.

(i) Disgorgement

[210] The disgorgement remedy is designed to (i) ensure that Dealer Members and Approved Persons do not profit or benefit from breaches of IIROC Rules; and (ii) satisfy the goals of specific and general deterrence.

[211] Specific deterrence is achieved as disgorgement requires a wrongdoer to disgorge the profit or benefit obtained from the misconduct. General deterrence is achieved because

disgorgement orders send a message that wrongdoers cannot profit or benefit from breaches of IIROC Rules.

2. Count 1 – Sanctions Imposed on Alboini

Fines

[212] The Sanctions Guidelines state that "[i]t is generally accepted that monetary fines serve to express general condemnation of specific conduct. Fines will generally increase in relation to the relative severity of specific misconduct. …"

[213] IIROC Staff requests a fine for Alboini on Count 1 of $500,000. We note that fines of that magnitude have been imposed in the past in egregious cases tantamount to fraud. (In *Re Connacher, supra,* a $500,000 penalty was imposed but we do not know how much of that amount was fine and how much was disgorgement.) However, fraud was not alleged in this matter and there was no direct financial harm or loss to investors. The IIROC Panel did, however, find serious harm from the conduct (see paragraph 192 of these reasons).

[214] In *Re Rowan*, the Commission ordered a fine of $250,000 against a UDP. In that case, the Commission recognized the important gate-keeping and leadership role that a UDP plays. Significant sanctions are necessary in this matter to ensure that Alboini and all UDPs take their role and responsibilities seriously. (*Re Rowan, supra* at paras. 186 and 191)

[215] The fine that we impose on Alboini in the circumstances is $250,000. That is a substantial amount that is slightly in excess of the commissions we have ordered disgorged below. Imposing that fine, in addition to disgorgement, is necessary as a matter of general deterrence. There may be significant financial benefits that can be obtained as a result of a contravention of IIROC Rules. As a general principle, no registrant should be able to profit from the breach of IIROC Rules. It is not sufficient deterrence simply to pay to IIROC an amount equal to the profit obtained from the misconduct. IIROC Dealer Members and Approved Persons must recognize that there will be a substantial cost to misconduct. A substantial fine, in addition to disgorgement, is appropriate in these circumstances.

Disgorgement

[216] It was an agreed fact that Alboini earned $244,985 in commissions from the trading in the TA Account during the period of time covered by Count 1. We find that it is appropriate to order that Alboini disgorge all commissions he earned as a result of his conduct involved in Count 1. The Commission has accepted the principle that a person should not profit from their breach of securities laws. The same principle applies to the breach of IIROC Rules. There would be no deterrence if wrongdoers can profit from their misconduct.

Registration Suspensions

[217] We find that it is appropriate to order that Alboini be suspended for (i) one year from registration in all capacities; and (ii) two years from approval by, or registration with, IIROC as a UDP anywhere in the industry.

[218] In the circumstances, we believe that a general suspension from registration should be imposed and that a one-year suspension is appropriate. That is a very significant sanction and is proportionate to Alboini's conduct in this matter.

[219] A number of factors influenced our decision that two years would be the appropriate length for a ban of Alboini as UDP. First, we note that the IIROC Decision imposed a permanent UDP ban and, at the Sanctions and Costs Hearing, IIROC Staff requested a permanent UDP ban. The Sanctions Guidelines recognize that a permanent ban is the most serious of all penalties and should be imposed in cases where one of the following factors are present:

(a) the public has been abused;

(b) it is clear that a respondent's conduct is indicative of a resistance to governance;

(c) the misconduct has an element of criminal or quasi-criminal activity; or

(d) 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.

(Sanctions Guidelines¸ *supra* at page 13)

[220] The factors referred to in paragraphs (a) and (c) above do not apply in this case.

[221] With respect to whether Alboini's conduct was indicative of a resistance to governance, Alboini submits that ungovernability related more to the conduct related to Count 3, which has been dismissed. We note that IIROC Staff did not make specific submissions at the Sanctions and Costs Hearing on the issue of ungovernability and did not tender any evidence to show that Alboini was ungovernable. However, the IIROC Decision did apply ungovernability to Count 1. The IIROC Decision stated:

> This Guideline provides that a permanent ban from approval of an individual may be considered where it is clear that a respondent's conduct *is indicative of a resistance to governance 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. The Panel has decided that this factor is applicable to Alboini in respect of Count 1. [Emphasis added]
>
> (IIROC Decision, *supra* at para. 197)

[222] Based on the evidence and submissions made to us, we are not persuaded that a permanent UDP ban is appropriate.

[223] Further, with respect to whether Alboini can be trusted to act in an honest and fair manner in all his dealings with the public, clients, and the members of the securities industry as a whole, we note that there was character evidence on this topic at the Sanctions and Costs Hearing. The witnesses indicated that all of their interactions with Alboini were professional and their experiences were positive. All acknowledged that Alboini and NSI provided services in a

small to mid-cap niche market which larger institutions don't serve. There was no suggestion by these witnesses that Alboini could not be trusted to act in an honest and fair manner.

[224] Taking into account all these considerations, we find that a two-year UDP suspension is appropriate and will send a strong message that the UDP role is important and that UDPs must take that role and their responsibilities very seriously (see paragraph 168 of these reasons for a description of the UDP role).

[225] During the Sanctions and Costs Hearing, Alboini made submissions about the negative impact of any suspension and the hardship that he would face if we imposed any suspension. We note, however, that Alboini confirmed that he can continue to carry on some of his business activities even though he is not registered. In his testimony, Alboini indicated that he is currently working in the securities industry through Added Capital, a division of NFC that was set up to focus on mergers and acquisitions advice and merchant banking. Those activities do not require registration.

[226] All registrants must understand that participation in the capital markets is a privilege, not a right, and if misconduct occurs while registered, that privilege may be suspended to emphasize the importance of compliance with applicable rules.

Reprimand

[227] We find that it is also appropriate to reprimand Alboini. The reprimand is intended to convey strong censure of his misconduct and to emphasize the importance of complying with IIROC Rules. A reprimand is particularly relevant to the misconduct of a registrant.

Alboini's Admissions

[228] Alboini made a number of admissions during the course of the Sanctions and Costs Hearing. Specifically, Alboini made the following admissions with respect to Count 1:

(a) "There were several mistakes made in hindsight. It was the first time that Jaguar carried out more than one investment at a time. This caused a problem with the structure of our investments. We always set up a "project" investment. This was done for administrative ease and to minimize legal fees and other costs which would otherwise apply in setting up a corporation or limited partnership. Each equity investor would own his pro rata share of the target company shares acquired by Jaguar on behalf of the investors. They would be entitled to their pro rata share of 70% of the net gain on the investment. This applied in the Virtek investment."

(b) "However in hindsight I should have made sure that he had all the investor or lender agreements as soon as they were signed by my clients. Penson did receive the investor or lender agreements at the time my client funds were transferred from their accounts to the appropriate Jaguar project accounts. It should have been done earlier."

(c) "I accept responsibility for that mistake. They were aware in general terms of the outside investor participation but we should have given Penson copies of the Investor and Lender agreements."

(d) "It is clear that I wore too many hats which caused concern to IIROC in these proceedings. I should have put in place independent responsibility for decision-making in the hands of Doug Chornoboy, Fred Vance and [our general counsel] because as UDP I was conflicted. In fact I believe they exercised their responsibilities well during this period. All of us would do the right thing. However I should have made it abundantly clear that they were the final authority on any conflict of interest matters."

These admissions (made in Alboini's factum) show that Alboini understands and is conscious of the seriousness of his misconduct in this matter.

Other Issues Raised by Alboini at the Sanctions and Costs Hearing

[229] During the course of his submissions, Alboini raised a number of issues relating to Count 1 which were previously addressed in the Commission Decision. In our view, those submissions were an attempt to reopen findings on the merits and were tantamount to an appeal of the Commission Decision. The appropriate forum for those submissions is an appeal to the Divisional Court, if Alboini and NSI wish to file one. We have summarized those submissions below and have referred to where they are addressed in the Commission Decision.

[230] First, Alboini takes the position that he did not mislead Penson. We note however that the Commission Decision upheld this finding of the IIROC Panel. Specifically, we stated:

> 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.
>
> (Commission Decision, *supra* at para. 248)

[231] Further, we note that misleading Penson was not the only ground for the IIROC Panel's finding on Count 1. The elements of Count 1 include: 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 (Commission Decision, *supra* at para. 224). Even if Penson was not misled, it was found in both the IIROC Decision and Commission Decision that (i) Alboini

improperly obtained access to credit for Jaguar; (ii) that access to credit was improper; (iii) Jaguar was not creditworthy at the time; and (iv) this exposed NSI and Penson to out-of-the-ordinary credit risk.

[232] Alboini also challenges the fact that the IIROC Panel did not take into account the equity value of the client accounts at issue when assessing creditworthiness. However, the issue was whether there were adequate *marginable* securities in the accounts at the time. The IIROC Panel found that the accounts held securities that were not marginable. The IIROC Decision stated:

> 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. ... Jaguar was not creditworthy by the standards of the investment industry at the time it purchased the securities.
>
> (IIROC Decision, *supra* at para. 46)

[233] Alboini also submits that the IIROC Panel ignored investor commitments of funds when assessing creditworthiness. Those commitments do not affect marginability. It is not sufficient for Alboini to say that he believed that his clients would comply with their financial commitments. The fact of the matter is that by not having sufficient marginable client securities, the capital of NSI and Penson was put at risk.

[234] Alboini also submits that the IIROC Panel erred in not allowing him to present expert evidence at the IIROC Hearing. This issue was addressed in the Commission Decision where we found that there was no procedural unfairness arising from the IIROC Panel's decision not to admit the expert evidence (Commission Decision, *supra* at para. 247). We stated that:

> 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).
>
> (Commission Decision, *supra* at para. 245)

[235] Alboini raised again the issue of the alleged prejudice arising from the confidential risk trend report ("**RTR**") that indicated that NSI was a high-risk firm. This issue was also addressed in the Commission Decision:

> 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. …
>
> (Commission Decision, *supra* at para. 330)
>
> 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.
>
> (Commission Decision, *supra* at para. 333)

[236] Alboini also alleges that the IIROC Panel was influenced by the public statements about IIROC made by Alboini in a news release dated September 23, 2005, and that the IIROC Panel did not issue separate merits reasons because it was afraid that NFC and/or NSI would issue another news release criticizing IIROC. The Commission Decision addressed Alboini's bias motion. That motion alleged that, among other things, comments of the members of the IIROC Panel gave rise to a reasonable apprehension of bias because they related to the public perception of IIROC in imposing sanctions, including allegedly disparaging comments made by Alboini reported in the media. The Commission Decision found that there was no bias and stated 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.
>
> (Commission Decision, *supra* at para. 317)
>
> We find that the comments made by the members of the IIROC Panel […] 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.

(Commission Decision, *supra* at para. 321)

[237] Alboini also submits that the fact that the IIROC Panel released its reasons on the merits and sanctions together was prejudicial. This issue was also dealt with in the Commission Decision. While the Commission acknowledged that in some circumstances reasons on the merits and sanctions may be issued together, in complex cases, separate reasons on the merits are preferable before a sanctions hearing. We determined that a hearing *de novo* on sanctions and costs was appropriate to provide the Applicants with the opportunity to make submissions on sanctions with full knowledge of the merits findings. Specifically, we found that:

> 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.
>
> 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).
>
> (Commission Decision, *supra* at paras. 297 and 298)

[238] Alboini also submits that he encouraged a culture of compliance at NSI and that he took matters of compliance with the IIROC Rules very seriously. During the Sanctions and Costs Hearing, Alboini provided us with examples of compliance e-mails and memos that were sent to his employees with the objective of ensuring that everyone at NSI followed the rules. Whether he did so does not change the findings of the IIROC Panel in the IIROC Decision.

[239] Alboini also emphasizes that he had a clean compliance and disciplinary record. That appears to us to be the case. However, we note that NSI has had compliance issues in the past and has entered into settlements with IIROC or its predecessor (*Re Northern Securities* [2001] IDACD No 31 ("**2001 Settlement**"), *Re Northern Securities* (2008), 31 O.S.C.B. 5856, and *Re Northern Securities,* 2013 IIROC 14). Alboini as UDP and the directing mind of NSI must take some responsibility for those compliance deficiencies.

Conclusions with respect to Count 1

[240] The IIROC Panel concluded that Alboini's conduct was unbecoming and breached IIROC Rule 29.1.

[241] After considering all the relevant factors discussed in these reasons, we find that it is appropriate to impose the following sanctions on Alboini in respect of Count 1:

(a) Alboini shall pay a fine of $250,000 to IIROC, such fine to be paid within 30 days of the date of the order;

(b) Alboini shall disgorge to IIROC commissions of $244,985, such amount to be paid within 30 days of the date of the order;

(c) Alboini shall be suspended for one year from approval by, or registration with, IIROC in all categories anywhere in the industry, commencing 14 days after the date of the order;

(d) Alboini shall be suspended for two years from approval by, or registration with, IIROC as a UDP anywhere in the industry, commencing 14 days after the date of the order; and

(e) Alboini shall be reprimanded.

3. Count 2 – Sanctions Imposed on Vance

[242] We did not receive any submissions on sanctions and costs from Vance because he was unable for medical reasons to provide instructions to his counsel. Counsel for Vance requested an adjournment at the Sanctions and Costs Hearing on June 10, 2014. Rule 9.2 of the Commission's *Rules of Procedure* (2014), 37 O.S.C.B. 4168 provides guidance as to the factors to be considered when considering an adjournment request. The following factors were relevant in this case:

(a) the adjournment was not on consent; IIROC Staff objected;

(b) granting an adjournment would create delay in this matter;

(c) the dates for the Sanctions and Costs Hearing were set down by order on January 27, 2014;

(d) the adjournment was requested at the last possible moment on June 10, 2014;

(e) adjourning at such a late stage would create delay and extra costs to the parties and the Commission; and

(f) we have very limited information as to Vance's medical condition and when that condition will be resolved, if it can be.

[243] Based on these considerations, we have decided not to permit Vance an adjournment and to proceed with our decision on sanctions. However, we are specifically granting to Vance the

right, exercisable within 60 days of these reasons, to bring an application under section 144 of the Act for a revocation or variation of our decision, if he wishes to do so (without prejudice to any other right Vance may have under that section or otherwise).

[244] Relevant decisions have emphasized the crucial "gatekeeper" function of the CCO, and the importance of the supervisory role of the CCO in a Dealer Member firm (see *Re Murdoch*, *supra, Re Stevenson, supra* and *Re Benarroch*, *supra*).

[245] We find that Vance's failure to properly supervise Alboini and inquire into the ten new Jaguar accounts, and into Alboini's trading activities, constituted serious misconduct. Further, those new account openings were approved without completed new client forms which would have indicated the existence of any third party beneficial interest in the accounts.

[246] There are, however, several mitigating factors that we considered: (i) Vance did not participate in Alboini's trading activities relating to Count 1; (ii) there was no direct loss or harm to investors; (iii) Vance did not receive any direct financial benefit from his misconduct; and (iv) Vance has a clean disciplinary record.

[247] The decisions dealing with similar misconduct provides guidance on the range of appropriate sanctions in respect of Vance's misconduct. For example, a suspension from any supervisory capacity has ranged from twelve months (*Re Murdoch, supra* and *Re Stevenson, supra*) to five years (*Re Benarroch, supra*). Fines have been imposed in the range of $50,000 (*Re Murdoch, supra; Re Stevenson, supra* and *Re Benarroch, supra*). We note that a minimum fine of $25,000 is suggested in the Sanctions Guidelines for a designated person or supervisor. However, Vance's misconduct was not as severe as the conduct in the decisions referred to us by the parties in their submissions. In particular, in *Re Benarroch,* the CCO's conduct was found to be "intentional, ongoing over a long period of time and systematic" (*Re Benarroch*, *supra* at para. 5). In that case, the CCO failed to properly inquire into suspicious transactions made by the RRs from which they directly benefitted. The CCO in *Re Stevenson* accepted personal loans from a representative who was under his supervision, thereby raising a significant conflict of interest in his supervisory role. The IIROC panel in *Re Stevenson* found the CCO's conduct to have "besmirch(ed) the reputation of the firm where they work, and, ultimately, the entire securities industry" (*Re Stevenson, supra* at para. 16). Finally, in *Re Murdoch*, a branch manager failed to properly inquire into and detect unauthorized trades over a three-year period in a client account which incurred significant losses. The branch manager also failed to detect glaring red flags such as the increase in volume and risk in trading activity in the client account, and the large amount of commissions generated through the trades. The conduct was found to be especially troubling because the client was vulnerable and was seventy-five years of age.

Conclusion

[248] Based on the foregoing considerations, we find that it is appropriate to impose the following sanctions on Vance with respect to Count 2:

(a) Vance shall be suspended for three months from approval by, or registration with, IIROC in any supervisory capacity, including acting as Chief Compliance Officer, anywhere in the industry commencing 14 days after the date of the order; and

(b) Vance is reprimanded for his conduct in this matter.

We find that these sanctions will provide sufficient specific and general deterrence and, in the circumstances, we do not need to impose a fine on Vance.

4. Count 5(a)

[249] As set out in paragraph 200 of these reasons, the IIROC Panel concluded that Chornoboy, Alboini and NSI breached IDA By-Law 17.2 and IIROC Rule 17.2 by filing or permitting to be filed inaccurate MFRs which failed to properly account for leasehold improvement costs, thereby misstating NSI's RAC.

[250] We note that breaches of IDA By-Law 17.2 and IIROC Rule 17.2 typically involve sanctions imposed on corporate respondents and not on individuals (see for example: *Re HSBC, supra, Re Interactive Brokers, supra* and *Re Trilon, supra,* where sanctions were imposed only on the corporate respondents (see paragraphs 175 to 179 of these reasons)). In the rare circumstance where an individual was sanctioned for such conduct, the fine was $10,000 (see *Re Aquino, supra*). We note that the Sanctions Guidelines suggest a minimum fine of $10,000 for a CFO (Sanctions Guidelines, *supra* at page 38).

(a) Sanctions Imposed on Chornoboy

[251] In considering appropriate sanctions for Chornoboy on Count 5(a), we have taken into account the following mitigating factors: (i) the error was inadvertent and was admitted by Chornoboy when it was brought to his attention; (ii) there was no direct loss or harm to investors; (iii) Chornoboy did not receive any direct financial benefit from the error; (iv) Chornoboy has a clean disciplinary record; and (v) Chornoboy cooperated fully with IIROC Staff to rectify the error once it was brought to his attention.

[252] We also note that, if the appropriate accounting had been applied, it would have put NSI in "early warning" status and would not have given rise to a RAC deficiency. We note that the decisions we were referred to involved RAC deficiencies of a material amount (see, for example, *Re Trilon, supra,* where there was a RAC deficiency of $51,809,000 over a period of 10 months).

[253] Finally, we recognize the fact that Chornoboy has already suffered significant negative consequences as a result of his error. Counsel for Chornoboy submits that, among other things, Chornoboy has not been able to secure consistent work in the securities industry since his employment with NSI ended.

[254] In our view, a fine is not necessary in these circumstances.

[255] For the reasons discussed above, we find that a reprimand is the appropriate sanction for Chornoboy.

(b) Sanctions Imposed on Alboini

[256] Alboini submits that he should not be subject to any sanctions with respect to Count 5(a) as the error that was committed was inadvertent and Alboini was entitled to rely on his CFO, Chornoboy, with respect to the appropriate accounting treatment. With respect to reliance on Chornoboy, the Commission Decision stated that:

> 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).
>
> (Commission Decision, *supra* at para. 286)

[257] We do not find it necessary, however, to impose a fine on Alboini with respect to Count 5(a). That is consistent with our decision on Count 5(a) with respect to Chornoboy. Further, as noted above, fines in respect of such matters are generally imposed on a corporate respondent and not individuals. There are no aggravating factors that support the imposition of a fine on Alboini in respect of Count 5(a).

[258] For the reasons referred to above, we find that a reprimand is the appropriate sanction for Alboini in relation to Count 5(a).

(c) Sanctions Imposed on NSI

[259] As discussed above, prior decisions generally sanctioned corporate respondents for breaches of IDA By-law 17.2 and IIROC Rule 17.2. We note that a fine of $60,000 was ordered in *Re HSBC, supra,* a fine of $40,000 was ordered in *Re Interactive Brokers, supra* and a fine of $50,000 was ordered in *Re Trilon, supra*.

[260] We have considered the same mitigating factors referred to in paragraphs 251 and 252 above. Count 5(a) was the only allegation against NSI.

[261] We note that NSI does have a prior disciplinary record and has entered into three settlement agreements referred to in paragraph 239 of these reasons. The 2001 Settlement and the settlement referred to in paragraph 262 below dealt with NSI's failure to maintain a RAC level greater than zero. We find that repeat misconduct does merit the imposition of higher sanctions in order to achieve specific and general deterrence. We find that a fine of $50,000 should be imposed on NSI in the circumstances. We note that is the same amount as the fine imposed in *Re Trilon, supra*.

[262] We also take into account NSI's current circumstances. NSI appears to be currently insolvent and was suspended as an IIROC Dealer Member as of March 19, 2013 (*IIROC Suspension Order, supra*). That order was issued on consent as a result of a settlement agreement between NSI and IIROC because during the period from November 21, 2012 to January 25, 2013 NSI: (i) had RAC in an amount less than zero on 38 days, and (ii) failed to have adequate controls because it did not have a CFO.

[263] Accordingly, we find that a $50,000 fine and a reprimand are appropriate sanctions against NSI on Count 5(a).

IX. COSTS

[264] IIROC has authority to order costs under IIROC Rule 20.49.

[265] The Applicants submit that costs should not be awarded against them. IIROC Staff requests that we impose the same costs as imposed by the IIROC Panel, subject to the reduction referred to in paragraph 270 below. IIROC Staff submits that the IIROC Panel was in the best position to assess those costs. To support that request, IIROC Staff tendered the same bill of costs that was before the IIROC Panel.

[266] IIROC Staff costs were billed at their usual rates of $150 per hour for enforcement counsel and $106 per hour for investigators. IIROC Staff's investigation costs were $337,927 and prosecution costs were $274,553 for total costs of $612,480. We note that IIROC Staff did not claim costs for outside counsel that acted during the course of this proceeding. Those costs exceeded $575,000.

[267] At the IIROC Hearing, IIROC Staff reduced the overall costs sought to $340,000 and sought costs in the amount of $150,000 from NSI, $125,000 from Alboini, $50,000 from Vance and $15,000 from Chornoboy.

[268] At the Sanctions and Costs Hearing, IIROC Staff further reduced their costs request to account for the fact that Count 3 was dismissed. Count 3 represented a large part of the investigation and prosecution costs. As a result, IIROC Staff submits that the following amounts of costs should be ordered:

(a) $93,750 against Alboini,

(b) $25,000 against Vance,

(c) $15,000 against Chornoboy, and

(d) $15,000 against NSI.

[269] IIROC Staff notes that the IIROC Panel ordered costs globally against each of the Applicants and did not specify the amount of costs that related to each Count.

[270] IIROC Staff submits that Alboini's costs should be reduced by one-quarter as there were a total of four allegations in this matter and only one allegation (Count 3) was dismissed. However, this approach ignores the fact that while there were four allegations, Alboini was named only in three of the allegations (Counts 1, 3 and 5(a)). Further, Count 3 would have involved very significant investigation and hearing time relative to Count 5(a). We conclude in the circumstances that it is appropriate to order costs against Alboini in respect of Count 1 and that those costs shall be $62,500. We determine those costs to be appropriate and reasonable in the circumstances.

[271] We find that costs should not be ordered against Alboini and Chornoboy with respect to Count 5(a). Because Chornoboy readily admitted his error, there were substantial cost savings at both the investigation and the IIROC Hearing stage.

[272] We find that it is not necessary to order costs against Vance in respect of Count 2. That Count arose substantially from Alboini's conduct related to Count 1. In our view, substantially more time, resources and costs would have been expended on Count 1 as opposed to Count 2.

[273] We order costs of $10,000 against NSI in respect of Count 5(a). We determine those costs to be appropriate and reasonable in the circumstances.

X. DECISION ON SANCTIONS AND COSTS

[274] Accordingly, we will issue an order, substantially in the form of Schedule C to these reasons, imposing the following sanctions and costs:

1. The following sanctions and costs are imposed on Alboini:

    (a) Alboini shall pay a fine of $250,000 to IIROC, such fine to be paid within 30 days of the date of the order;

    (b) Alboini shall disgorge to IIROC commissions of $244,985, the amount to be paid within 30 days of the date of the order;

    (c) Alboini shall be suspended for one year from approval by, or registration with, IIROC in all categories anywhere in the industry, commencing 14 days after the date of the order;

    (d) Alboini shall be suspended for two years from approval by, or registration with, IIROC as a UDP anywhere in the industry, commencing 14 days after the date of the order;

    (e) Alboini is reprimanded; and

    (f) Alboini shall pay to IIROC costs in the amount of $62,500, such costs to be paid within 30 days of the date of the order.

2. The following sanctions and costs are imposed on NSI:

    (a) NSI shall pay a fine of $50,000 to IIROC, such fine to be paid within 30 days of the date of the order;

    (b) NSI is reprimanded; and

    (c) NSI shall pay to IIROC costs of $10,000.

3. The following sanctions are imposed on Vance:

    (a) Vance shall be suspended for three months from approval by, or registration with IIROC in any supervisory capacity, including acting as Chief Compliance Officer, anywhere in the industry, commencing 14 days after the date of the order; and

    (b) Vance is reprimanded;

4. Chornoboy is reprimanded.

[275] We have concluded that these sanctions are proportionate to the conduct of each Applicant and are in the public interest.

Dated at Toronto this 11th day of September, 2014.

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

SCHEDULE A

SANCTIONS AND COSTS PREVIOUSLY REQUESTED AND IMPOSED

	Sanctions and Costs Requested by IIROC Staff at the IIROC Hearing	**Sanctions and Costs Imposed by the IIROC Panel**
ALBOINI		
Count 1	$500,000	$500,000
	One year suspension from registration in all categories	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 categories (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 all supervisory capacities	$25,000 Three months suspension from registration in all supervisory capacities
Count 3	$50,000	$25,000
Costs	$50,000	$50,000
CHORNOBOY		
Count 5(a)	$25,000	$25,000
Costs	$15,000	$15,000

SCHEDULE B

RELEVANT IIROC RULES

17 – Dealer Member Minimum Capital, Conduct of Business and Insurance

…

17.2. Every Dealer Member shall keep and maintain at all times a proper system of books and records.

17.2A. Every Dealer Member shall establish and maintain adequate internal controls in accordance with the internal control policy statements in Rule 2600.

20 – Corporation Hearing Processes

…

20.33 Approved Persons

(1) Upon conclusion of a disciplinarian 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 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 20.34(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, 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).

…

29 – Business Conduct

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 their 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.

…

SCHEDULE C

FORM OF ORDER

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

ORDER
(Section 21.7 and Subsection 8(3) of the *Securities Act*)

WHEREAS on August 20, 2012, Northern Securities Inc. (“NSI”), Victor Philip Alboini (“Alboini”), Douglas Michael Chornoboy (“Chornoboy”) and Frederick Earl Vance (“Vance”) (collectively the “Applicants”) filed with the Ontario Securities Commission (the “Commission”) a notice of application (the “Application”) pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the “Act”), for a hearing and review of the decisions of a hearing panel (the “Hearing Panel”) of the Investment Industry Regulatory Organization of Canada (“IIROC”) dated July 23, 2012 and November 10, 2012 (the “Decision”);

AND WHEREAS the Hearing and Review was heard over three days on February 14, 15, and 20, 2013, and the Commission released its decision and reasons on December 19, 2013, in which, among other matters, it set aside the sanctions and costs imposed on the Applicants by the IIROC Hearing Panel and ordered that the Commission would 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 Hearing Panel, other than its finding with respect to one Count;

AND WHEREAS the Sanctions and Costs Hearing was held on June 9, 10 and 11, 2014 and upon considering the evidence and the submissions, the Commission issued its reasons and decision on sanctions and costs on the date hereof;

AND WHEREAS the Commission has concluded that it is in the public interest to make the following order;

IT IS HEREBY ORDERED THAT:

1. The following sanctions and costs are imposed on Alboini:

   (a) Alboini shall pay a fine of $250,000 to IIROC, such fine to be paid within 30 days of the date of this order;

   (b) Alboini shall disgorge to IIROC commissions of $244,985, such amount to be paid within 30 days of the date of this order;

   (c) Alboini shall be suspended for one year from approval by, or registration with, IIROC in all categories anywhere in the industry, commencing 14 days after the date of this order;

   (d) Alboini shall be suspended for two years from approval by, or registration with, IIROC as an Ultimate Designated Person anywhere in the industry, commencing 14 days after the date of this order;

   (e) Alboini is reprimanded; and

   (f) Alboini shall pay to IIROC costs in the amount of $62,500, such costs to be paid within 30 days of the date of this order;

2. The following sanctions and costs are imposed on NSI:

   (a) NSI shall pay a fine of $50,000 to IIROC, such fine to be paid within 30 days of the date of this order;

   (b) NSI is reprimanded; and

   (c) NSI shall pay to IIROC costs in the amount of $10,000;

3. The following sanctions are imposed on Vance:

    (a) Vance shall be suspended for three months from approval by, or registration with, IIROC in any supervisory capacity, including acting as Chief Compliance Officer anywhere in the industry, commencing 14 days after the date of this order;

    (b) Vance is reprimanded; and

4. Chornoboy is reprimanded.

DATED at Toronto this of , 2014.

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