

# Re Myatovic & Lowe

IN THE MATTER OF:

**The Dealer Member Rules of the Investment Industry Regulatory  
Organization of Canada (IIROC)**

and

**The By-Laws of the Investment Dealers Association of Canada (IDA)**

and

**Marco Myatovic & Doreen Lowe**

2012 IIROC 47

Investment Industry Regulatory Organization of Canada  
Hearing Panel (Pacific District Council)

Heard: November 14-18, 21-25, 28-30, December 1-2, 2011 and January 23-24, 2012, in Vancouver, BC  
Written Decision: July 31, 2012

## **Hearing Panel:**

John Rogers, Chair, Barbara Fraser and Michael Johnson

## **Appearances:**

Ms. Kathryn Andrews and Mr. Milton Chan, Enforcement Counsel for IIROC; and  
Mr. Dwight Stewart, for the Respondent Marco Myatovic  
Mr. Roderick Anderson, for the Respondent Doreen Lowe

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## **REASONS FOR DECISION**

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¶ 1 A Hearing Panel of the Investment Industry Regulatory Organization of Canada (“IIROC”) was convened on November 14, 2011 pursuant to Part 10 of Rule 20 of IIROC’s Dealer Member Rules, Rule 13 of IIROC’s Rules of Practice and Procedure, and Section 1.9 of Schedule C.1 to Transition Rule No. 1 of IIROC’s Transitional Rules dated June 1, 2008 in response to a Notice of Hearing (“Notice of Hearing”) dated March 4, 2011. As above set out, the Disciplinary Hearing extended to December 2, 2011 at which point it adjourned until January 23, 2012 to reconvene to hear submissions of counsel on January 23 and January 24, 2012.

¶ 2 The Notice of Hearing alleges that Marco Myatovic (“Mr. Myatovic”) and Doreen Lowe (“Ms. Lowe”) (collectively “the Respondents”) committed the following breaches of IIROC’s Dealer Member Rules (the “Dealer Member Rules”), formerly the by-laws and regulations of the Investment Dealers Association of Canada (the “IDA”):

**COUNT 1:** During April 2008 to March 2009, Mr. Myatovic failed in his role as gatekeeper by facilitating manipulative or suspicious trading activity in several client accounts by pre arranging trades and taking instructions from an individual who was not the account holder, thereby engaging in conduct unbecoming, contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.

**COUNT 2:** During April 2008 to March 2009, Ms. Lowe failed in her role as gatekeeper by facilitating manipulative or suspicious trading activity in several client accounts by pre arranging trades and taking instructions from an individual who was not the account holder, thereby engaging in conduct

unbecoming contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.

- (a) **COUNT 3:** From the summer of 2008 to March of 2009, Ms. Lowe engaged in unauthorized trading in client VP's account, which was conduct unbecoming contrary to IIROC Dealer Member Rule 29.1; and
- COUNT 4:** On or about July 2009 to November 2009, Myatovic failed to know his clients in that he opened locked in registered accounts for several clients resident in another province, without making sufficient inquiries into the circumstances of these accounts, contrary to IIROC Dealer Member Rule 1300.1 (a).

## SCOPE OF INVESTIGATION

- ¶ 3 As is above set out, the hearing of this matter involved almost three weeks of testimony followed by two days of submissions by IIROC Staff counsel and counsel for the Respondents.
- ¶ 4 Three witnesses gave evidence. Mr. VP, a client of the Respondent, Ms. Lowe, and Ms. Pat Gerada and Ms. Carolyn Bean, investigators for IIROC. More about Mr. VP's connection to this matter is referred to below. The Respondents exercised their right not to testify before us. However, transcripts of their interviews with members of IIROC Staff were entered into evidence.
- ¶ 5 Ms. Gerada has worked for IIROC or the IDA for thirteen and a half years. She started as a compliance officer going to different member firms and auditing their compliance practices. After two years she became an investigator and has worked in this position for the past eleven years, with the last eight years as a senior investigator. Previous to joining the IDA, she worked in the investment industry for member firms in compliance and training roles and took industry sponsored training courses, including those for partners, directors and officers, options and futures trading, branch manager, and the Canadian Securities and Conduct and Practice Handbook courses.
- ¶ 6 Ms. Bean has worked in the investment industry for over twenty years. For the past seven and a half years she has worked as an investigator at the IDA and IIROC. Previous to her position as an investigator, Ms. Bean worked for five years as first a compliance officer and then a senior compliance officer for the IDA. Before joining the IDA, Ms. Bean had experience as a sales assistant, a retail broker, a compliance officer, as well as working in the cage, in international and domestic settlements, reconciliation and client accounting.
- ¶ 7 In 2007, Ms. Gerada and Ms. Bean, (collectively the "Investigators") were asked to look into the trading of the shares of a number of issuers, including the shares of Great Pacific International Inc. ("GPI") and OSE Corp. ("OSE").
- ¶ 8 The Investigators requested the SelectR trading data and transfer records for these shares and observed two characteristics common to their trading. Firstly, they observed that from the perspective of the entire marketplace there were certain commonalities. These commonalities included the observation that a great deal of the volume for these shares originated at the member firms, Canaccord Genuity Corp. ("Canaccord") and Research Capital Corporation ("Research"); and the observation that there was a fair amount of trading at member discount houses where the trading pattern was that the clients were selling shares of GPI and purchasing shares of OSE.
- ¶ 9 The second characteristic common to the trading in the shares of GPI and OSE was that from January to March of 2008, some of the clients of Mr. Myatovic started to trade actively in the shares of GPI and OSE. This trading was being done with very little money in the clients' accounts thereby creating outstanding debits. Ms. Gerada testified that the market at that time was very illiquid and the clients appeared to the Investigators to be associated with one another.
- ¶ 10 Then around April or May of 2008, the volume of trading of the shares of GPI and OSE dropped, but the prices were maintained at a reasonably constant level, with the trading continuing among Mr. Myatovic's clients' accounts. In June of 2008, the Investigators observed that clients of Ms. Lowe started to trade in the shares of GPI and OSE, with an increase in the volume and trading activity being noticed in these shares. It was also observed that Ms. Lowe and Mr. Myatovic had clients in common. It was this commonality which

encouraged the Investigators to look further.

¶ 11 These further investigations led to the securing of copies of account statements from numerous accounts at Canaccord and Research for which the Respondents were the responsible registered representatives, copies of emails between Mr. Myatovic and a Mr. TSP (“Mr. TSP”), copies of telephone records evidencing communication between telephones associated with the Respondents and Mr. TSP, and copies of text messages between the Respondents and Mr. TSP.

¶ 12 In addition, the Investigators secured copies of the Trades Orders and Quotes Reports (“TOQ Reports”) for the trading of the shares of GPI, OSE, and SNL Enterprises Ltd. (“SNL”), a company of which Mr. TSP was President and CEO.

¶ 13 TOQ Reports are reports generated by the computerized reporting system used by the Toronto Stock Exchange (“TSX”) and the TSX Venture Exchange (“TSX-V”) to record all orders and trades on their market places. This computerized system records all orders submitted and trades executed by participating organizations of the TSX and the TSX-V. Any changes to trading instructions are also tracked and recorded. The TOQ reports are limited to daily activity only and do not show open orders from prior days, nor do they show market depth. Both Canaccord and Research are participating organizations and have their trading information for TSX and TSX-V listed companies captured by the TOQ Reports.

¶ 14 The reason that the TOQ Reports were secured for the trading in the shares of SNL is that while investigating the trading of the shares of GPI and OSE, the Investigators noted that a number of registered accounts at Canaccord owned by residents of Ontario were purchasing large blocks of shares of SNL.

¶ 15 As part of their evidence, Ms. Gerada and Ms. Bean each produced time records which showed that from the time that they commenced their investigation in 2007 until the end of December 2011, they spent almost 5,000 hours working on the various aspects of this investigation. There were no time records produced for time spent by the Investigators for the 2012 calendar year.

¶ 16 We find that the evidence given by both these witnesses to be credible and their investigative abilities to be competent.

## **ADMISSIBILITY OF WORK PRODUCTS**

¶ 17 It would be trite to observe that this investigation produced a significant amount of data. To assist the Hearing Panel to properly understand this data in the context of the hearing and the allegations made against the Respondents, IIROC Staff sought to introduce into evidence work products produced by the Investigators in the form of compilations of these data organized in a manner to present a particular perspective. But, the introduction into evidence of this type of work product raises the question of its admissibility.

### *The Accounts Summary*

¶ 18 This question of admissibility first arose when IIROC Staff sought to introduce into evidence a document which constitutes a summary of certain account statements secured by IIROC Staff from Canaccord (the “Accounts Summary”). The accounts for which these statements were produced were those of the clients of Mr. Myatovic referred to below as the “Myatovic Trading Accounts”. Copies of the account statements from which the Accounts Summary were produced were before the Hearing Panel and copies of these statements had been previously delivered to the Respondents as part of the disclosure by IIROC Staff. The Accounts Summary was prepared by Ms. Gerada from these account statements. Ms. Gerada testified that in completing the Accounts Summary she had copied selected data directly from the account statements and had included them in the Accounts Summary.

¶ 19 IIROC Staff submits that pursuant to Rule 20.2, in determining whether or not to admit a document into evidence, a Hearing Panel is not bound by any legal or technical rules of evidence. Thus a Hearing Panel is able to admit as evidence any document that is relevant to the proceedings.

¶ 20 It is the position of IIROC Staff that the Accounts Summary should be admitted into evidence as an exhibit for the following three reasons:

1. it represents a summary of a large number of detailed records that would be impractical to work through in a hearing setting;
2. the evidence before the Hearing Panel is that Ms. Gerada as a competent witness has examined the selected account statements from Canaccord and has prepared the Accounts Summary based upon this examination; and
3. all the account statements, the source documents upon which the Accounts Summary is based, have been delivered to the Respondents as part of the disclosure process prior to the hearing.

### **Respondents' Objection**

¶ 21 The Respondents object to the inclusion of the Accounts Summary on four grounds.

¶ 22 These grounds are that:

1. the allegations against the Respondents represent very serious charges which require IIROC Staff to meet a higher standard with respect to the admissibility of evidence, especially if this evidence might be detrimental to the Respondents' defense. The Accounts Summary does not meet this high standard as it is not the "best evidence" and therefore inadmissible as hearsay;
2. Ms. Gerada is not qualified to be in a position to prepare a work product such as the Accounts Summary;
3. the account statements upon which the Accounts Summary is based are not that great in number to require them to be summarized; and
4. the Accounts Summary is interpretive and that its introduction into evidence is prejudicial to the Respondents.

¶ 23 The Respondents submit that if the Accounts Summary is to be introduced into evidence before the Hearing Panel, that it should be in the context of the closing argument of IIROC Staff.

¶ 24 Respondents' counsel advised the Hearing Panel that IIROC Staff had advised them that the Accounts Summary was the first of a number of similar work products prepared by IIROC Staff in their investigation of the matter before the Hearing Panel. Based upon the understanding that IIROC Staff intended to introduce into evidence additional work products, the Respondents asked the Hearing Panel to establish principles upon which the admissibility of the Accounts Summary and additional work products of IIROC Staff would be based.

### **Decision**

¶ 25 It is determined that the Accounts Summary should be admitted into evidence as a work product.

¶ 26 Dealer Member Rule 20.2(2) under the heading "Exercise Of Authority" states:

- (2) A Panel is not bound by any legal or technical rules of evidence and may admit as evidence in a hearing, whether or not given or proven under oath or affirmation, anything that is relevant to the proceedings.

¶ 27 We find that this provision is ample authority to enable us to admit into evidence the Accounts Summary on the basis that as a compilation of data in the account statements of the Myatovic Trading Accounts, the Accounts Summary and the data it contains is relevant to the matter before us.

¶ 28 However, in determining to admit into evidence the Accounts Summary, we are mindful of the Respondents' submission on the seriousness of the allegations facing the Respondents and their position that a higher standard should be considered when it comes to the admissibility of the Accounts Summary.

¶ 29 The question as to what such a standard might be was canvassed in the decision of the Ontario Court of Appeal in *R. v. Scheel* [1978] O.J. No. 888, 42 C.C.C (2d) 31. In the *Scheel* decision, the appellant based his appeal on his conviction for fraud partly on the admission into evidence in the court below of certain work products which he claimed were inadmissible. In finding that the work products to which the appellant objected

were in fact admissible into evidence to assist the jury in understanding the entire picture representing the voluminous documentary evidence, the court confirmed that a summary of books and records is admissible provided that cross examination is allowed and the original records from which the work product is sourced are also placed in evidence. The court observed that the introduction of the work product did not offend the rule that requires production of original documents since the documents which were the source of the work product were submitted into evidence.

¶ 30 As Respondents' counsel have asked that we establish principles upon which work products will be admitted into evidence in the matter before us, the decision in *Scheel* might be expressed in the following manner:

Work products which constitute summaries of voluminous amounts of source data are admissible into evidence as an exception to the hearsay rule provided that the following five criteria are met:

1. there are a very large number of detailed records constituting the source documents from which the data for the work product are extracted and it would be impractical for the Hearing Panel during the course of the hearing to attempt to extract the relevant data from these source documents;
2. the source documents from which a work product is produced are disclosed to the party whose interests might be affected at a reasonable time prior to the hearing and are introduced into evidence at the hearing;
3. a competent witness has examined these source documents and has summarized them into the work product sought to be introduced into evidence;
4. this competent witness is present to give evidence before the Hearing Panel; and
5. the respondent has an opportunity to cross examine this competent witness to test this witness' competence in preparing the work product, to test the relevance of the data extracted, and to test the criteria used for the selection of this data.

¶ 31 In the matter before us there is no doubt that the "voluminous" criterion is met. Indeed, the material produced by IIROC Staff and which IIROC Staff has introduced into evidence at the hearing contains almost 4,500 pages. And each one of these pages contains a considerable amount of data.

¶ 32 Dealing specifically with the Accounts Summary, we find that:

1. there is a large volume of detailed business records in the form of account statements from which the data contained in the Account Summary is extracted;
2. the Respondents had prior to the commencement of this hearing received copies of these account statements in the disclosure made to them by IIROC Staff and these account statements have been introduced into evidence before us;
3. Ms. Gerada is a competent person who has examined these account statements and extracted therefrom the data which comprise the Accounts Summary ; and
4. the Respondents have the ability to cross examine Ms. Gerada on her preparation of the Accounts Summary.

¶ 33 We therefore find that the five above enumerated principles have been satisfied and we, therefore, admit the Accounts Summary into evidence.

#### *The Telephone Summary*

¶ 34 In a similar vein, IIROC Staff sought to introduce into evidence a work product which constituted a summary of certain telephone records (the Telephone Summary") secured by IIROC Staff from the telephone company, TELUS, with the assistance of the Ontario Securities Commission and the US Securities and Exchange Commission. The telephone records from which the Telephone Summary has been produced are

before the Hearing Panel and copies of these records were delivered to the Respondents prior to the hearing. The Telephone Summary was prepared by Ms. Gerada from these telephone records. Ms. Gerada has testified that in completing the Telephone Summary she has copied selected data directly from the telephone records and had included them in the Telephone Summary.

¶ 35 It is clear that the telephone records from which the data contained in the Telephone Summary has been taken meet the test of constituting a very large number of detailed records constituting the source documents from which the data for the work products are extracted. This is evidenced by the Telephone Summary itself which contains over 80 pages with each page containing 35 entries. Without the Telephone Summary, it would be extremely difficult for a Hearing Panel to effectively review and extract relevant data from the actual telephone records the source of the data for the Telephone Summary.

¶ 36 We determine that the Telephone Summary meets the five enumerated principles and is, therefore, admissible into evidence.

#### *The Combination Chart*

¶ 37 IIROC Staff sought to introduce into evidence two work products created by Ms. Bean. The first work product presented a summary of certain trading data in the shares of GPI and OSE extracted from the TOQ Reports in relation to accounts for which the Respondents were responsible at Research and Canaccord. The second work product, below referred to as the “Combination Chart”, added to the data collected in the first work document certain communication activity among the Respondents and Mr. TSP, whether that communication was by telephone, text or email.

¶ 38 Copies of the relevant TOQ Reports being part of the source documentation for these work products were delivered to the Respondents prior to the hearing by IIROC Staff together with relevant copies of the telephone records, email exchanges and text messages. Copies of all of these source documents from which these work products were prepared are in evidence before us. We find that Ms. Bean as a competent person extracted the data from these source documents to create the work products. She has been available for cross examination by the Respondents.

¶ 39 However, on each of these work products in a column under a heading entitled “Note” Ms. Bean has included her observations on the data immediately adjacent to this column. As the data in these columns are the observations of Ms. Bean rather than data secured from source documents, we have excluded from the work product admitted into evidence the observations included in these columns.

¶ 40 We therefore determine that these work products meet the five principles above enumerated and, save and except for the data in the form of Ms. Bean’s observations contained in the column of each of these work products entitled “Note”, are admissible into evidence.

#### *The TOQ Reports*

¶ 41 The TOQ Reports that were delivered to the Respondents prior to the hearing and that IIROC Staff sought to introduce into evidence were amended from the original document by the inclusion thereon of different colours to highlight the activity of various parties. For example, an order entered by Canaccord would be coloured blue. The data underneath the colouring was not in any manner changed and the colour was added for the purpose of highlighting the data under the colour and having it stand out from the other data included on the particular page of the report.

¶ 42 The Respondents objected to the admission into evidence of these TOQ Reports on the grounds that the addition of colour coding to the report changed the nature of the report by creating a visual impression that wasn’t present in the original report. This change was not a summary of the data included in the report, but rather is Ms. Bean’s interpretation of this document and should not be admitted into evidence as it is highly prejudicial to the Respondents.

¶ 43 We disagree with the position taken by the Respondents. We believe that the TOQ Reports that IIROC Staff wishes to admit into evidence with the added colour highlighting does fit within the principals we have

above enumerated. The colour is nothing more than an aid to highlight certain data within the reports. It does not in any manner alter the underlying data. Rather than extracting data from these reports, Ms. Bean has chosen to identify the data on the reports themselves. The Respondents in their cross examination of Ms. Bean are able to question the methodology behind this highlighting, to point out errors, and to suggest additions.

¶ 44 We therefore determine that the TOQ reports with the colour coding meets the five principles above enumerated and we admit them into evidence.

### **OTHER DETERMINATIONS MADE DURING THE DISCIPLINARY HEARING**

¶ 45 In addition to the numerous rulings we made during the hearing with respect to the introduction into evidence of work product, additional motions were made by the parties and rulings made by us over the course of the hearing. Some of these rulings are below set out.

#### **Contents of the Notice of Hearing**

¶ 46 At the commencement of this hearing, the Respondents were referred to the Notice of Hearing and were asked if they fully understood and were aware of the allegations made by IIROC Staff against them in the four counts contained in the Notice of Hearing and if they were fully aware of the case they had to meet. Counsel for each of the Respondents confirmed that there was no uncertainty as to the four counts set out by IIROC Staff in the Notice of Hearing.

¶ 47 During the course of the hearing, IIROC Staff sought to amend the particulars contained in the Notice of Hearing. The Respondents did not object to this amendment and the motion by IIROC Staff to amend the particulars contained in the Notice of Hearing was granted so that paragraphs 39, 40 and 63 of the Notice of Hearing are amended to read as follows:

#### **“Market share for GPI and OSE:**

39. In 2008 Myatovic and Lowe’s nominee accounts exerted considerable influence over an illiquid market. In 2008 Myatovic’s nominee accounts were responsible for 30.85% of the buying activity in GPI. Lowe’s nominee accounts were responsible for 14.49% of the buying activity. Myatovic’s nominee accounts were responsible for 14.09% of the GPI sell activity and Lowe’s nominee accounts were responsible for 4.18% of the sells.

40. In 2008 Myatovic’s nominee accounts were responsible for 22.87% of the buying activity for OSE. Lowe’s nominee accounts were responsible for 6.56%. In terms of OSE sell orders, Myatovic’s nominee accounts were responsible for 27.42% and Lowe’s nominee accounts were responsible for 7.72%. These numbers also indicate the considerable influence over the market.

#### **Commissions:**

63. During 2008, more than 51% of Myatovic’s gross commissions were derived from his trading in OSE and GPI alone. During 2008, Myatovic earned approximately \$120,000 (net) in commission related to the trading in the nominee accounts.”

#### **Production of Time Records**

¶ 48 During the course of the hearing, the Respondents applied to have the time records of Ms. Gerada produced relating to her work as an investigator on the basis that these records and the data contained therein were essential to the Respondents’ ability to defend themselves. It appears that Ms. Gerada kept her time records separate from her notes and on that basis, the time records had not previously been disclosed to the Respondents.

¶ 49 We granted this motion and ordered the production of Ms. Gerada’s time records. We granted this motion on the basis that Ms. Bean’s records had already been disclosed to the Respondents together with her notes, and as Ms. Bean and Ms. Gerada to a large part worked as a team on the investigation, an indication of the time spent on the investigation had already been disclosed. In addition, IIROC Staff confirmed that the disclosure of these time records would not prejudice their position. Finally, were IIROC Staff to make an

application for an award of costs against the Respondents, these records would be made available at that time.

## **IIROC Investigation**

¶ 50 During the hearing, counsel for Ms. Lowe sought to question Ms. Bean as to her knowledge of an IIROC investigation into the activities of a party associated with the matter before us.

¶ 51 IIROC Staff objected to Ms. Bean answering this question on the basis that any ongoing investigation by IIROC Staff was confidential and not properly a subject of cross examination of Ms. Bean.

¶ 52 We determined not to permit Ms. Bean to answer this question. However, our determination was not made on the basis of confidentiality as submitted by IIROC Staff. Rather, we weighed the necessity of ensuring full disclosure to the Respondents and our reluctance to have their cross examination of Ms. Bean in any way restricted against the possible prejudice that any response might have to the party under investigation.

¶ 53 The party that was the subject of this question is not a party to this hearing and therefore has no ability to defend itself against any allegations that might be made in Ms. Bean's response. This hearing is a public hearing and once the answer is given by Ms. Bean, it becomes a matter of public record.

¶ 54 Finally, the investigatory process within IIROC's jurisdiction is one whereby there are ongoing queries concerning members and Approved Persons. Not every investigation leads to allegations of a breach of Dealer Member Rules by IIROC Staff, and until such a determination is made and the party being investigated informed of that fact, the existence of an investigation must remain confidential.

¶ 55 In summary, we determined not to permit Ms. Bean to answer the question posed by counsel for Ms. Lowe on the basis that the potential prejudice to the party from her response would exceed any prejudice that might be suffered by the Respondents in not receiving the response to the question, whatever that response might be.

¶ 56 In a similar vein, IIROC counsel sought to introduce into evidence a transcript from an interview with another party, which interview was conducted subsequent to the initial interview with this party by IIROC Staff for the purpose of the matter at hand. In seeking to introduce into evidence the transcript from this subsequent interview, IIROC counsel advised the Hearing Panel that although the interviewee had not been under investigation at the time that the initial interview took place, this party was now formally the subject of an investigation by IIROC Staff and the transcript sought to be introduced into evidence was from an interview conducted after this party had been advised that an investigation had been commenced by IIROC Staff.

¶ 57 As with the determination above set out, we did not permit IIROC counsel to introduce the transcript of this subsequent interview into evidence due to the potential prejudice to the interviewee and IIROC counsel was not permitted to question a witness as to the contents of this transcript.

## **FACTS**

### **Overview**

¶ 58 Although there were four counts contained in the Notice of Hearing, this matter broke down into three general allegations by IIROC Staff. The first allegation is that the Respondents failed in their obligations as gatekeepers by facilitating manipulative or suspicious trading activity in the shares of two junior natural resource companies through certain client accounts, below referred to as the "Trading Accounts", by pre-arranging trades and taking instructions from Mr. TSP, a principal of these junior companies and a party who was not the account holder of the accounts through which this trading was conducted.

¶ 59 The second allegation is that Ms. Lowe took instructions from Mr. TSP to execute trading activity in an account opened in the name of Mr. VP. And the third allegation is that Mr. Myatovic breached the "Know-Your-Client Rule" when he opened a certain type of restricted account, known as "Locked-in Retirement Accounts" and below referred to as the "LIRA Accounts", for each of eight residents of Ontario six of whom were suffering financial hardship, without making sufficient inquiries into the circumstances of these parties.

### **The Parties Involved**

¶ 60 As there are a number of parties involved in the evidence before us, below are descriptions of these parties and portions of the evidence before us relative to those parties.

### **Mr. Myatovic**

¶ 61 During the period relating to the allegations of IIROC Staff contained in the four counts above listed (the “Counts”), Mr. Myatovic was employed with the IIROC member firm Canaccord Genuity Corp. (formerly Canaccord Capital Corp.) as a registered representative retail in Canaccord’s branch office located in Prince George, British Columbia. Mr. Myatovic was employed with Canaccord (or its predecessor firms) in this capacity since October 1992 and has been an Approved Person in the industry since 1986. Mr. Myatovic’s employment with Canaccord was terminated in June of 2011 and he is not currently employed in the investment industry.

### **Ms. Lowe**

¶ 62 At all times during the time period relating to the allegations made by IIROC Staff against Ms. Lowe, she was employed with IIROC member firm Research Capital Corporation, or its successor Mackie Research Capital Corporation, as a registered representative retail in Research’s office located in Vancouver, British Columbia. Prior to her registration, Ms. Lowe had worked in the investment industry in various unregistered capacities since 1979. She became registered as an Approved Person in 1997. Ms. Lowe’s employment with Research commenced in January of 2007 and continued until she left Research in October 2010. Ms. Lowe is currently employed with IIROC member firm Global Securities Corp.

### **Mr. TSP**

¶ 63 Mr. TSP is an officer and director of two of the junior resource companies, the trading in whose securities has led to the allegations made by IIROC Staff in the Counts. In the information brochure for SNL Enterprises Ltd., which company is more particularly below described, Mr. TSP is referred to as having over 20 years of experience in financing and managing private and public companies and having raised in excess of 50 million dollars during his tenure as a director and in the management of several public and private companies in oil and gas, mineral exploration and residential development.

¶ 64 Mr. TSP executed the new account application form (“NCAF”) to open his account with Canaccord on January 30, 2004. Mr. TSP executed the NCAF to open his account with Ms. Lowe at Research on January 29, 2008. In this latter NCAF, Mr. TSP stated that the employer of his wife, Ms. SP, was Xcel Management Consulting listed at the same business address as the companies with which her husband is associated.

### **The Issuers**

¶ 65 The Counts involve the trading in the shares of three public companies whose shares were listed and called for trading on the TSX-V and who, during the time period referred to in the Counts, shared a common office address at 7198 Vantage Way, in Delta, B.C.

¶ 66 These public companies are:

#### **SNL Enterprises Ltd.**

SNL is a junior mining company engaged in mineral exploration. In February 2010 it changed its name to “Logan Copper Inc.”. An information brochure entitled “Investment Overview” published by SNL in support of a private placement equity financing in October of 2008 and in evidence before us states that SNL’s exploration vision is based upon “high risk, high impact exploration of early stage properties”. This document states that SNL’s management includes Mr. TSP, as President & CEO, Mr. MS, as a director, and Mr. VP as a director.

This information brochure lists Mr. MS’ occupation as a “Certified Power Engineer” and advises that Mr. MS is president of OSE Corp. “an emerging oil and gas company focused on Montana and Texas”. For Mr. VP, this document lists his occupation as a businessman and teacher in Vancouver since 1975 as well as having served on the boards of directors of several resource companies.

### **Great Pacific International Inc.**

In the material before us, GPI describes itself as a British Columbia based junior oil and gas exploration and production company with operations and exploration rights in Alberta and the Permian Basin, Texas. Its President & CEO is Mr. TSP.

### **OSE Corp.**

OSE describes itself as a junior oil and gas exploration and production company holding producing oil and gas lease interests in Ontario and Texas and petroleum exploration leases and prospect rights in Texas and Montana. As referred to above, its President is Mr. MS, with Mr. RL, a party referred to below, as a director.

### **Mr. VP**

¶ 67 Mr. VP was a client of Ms. Lowe. He was referred to Ms. Lowe by Mr. TSP and opened an account with Ms. Lowe at Research in February, 2008.

¶ 68 After earning a B.A. and a B. Ed. degree at Simon Fraser University, Mr. VP was employed as a high school teacher and basketball coach at Carson Graham Secondary School in North Vancouver from January 1975 until his retirement 35 years later. Mr. VP has had brokerage accounts at a variety of different investment firms in Vancouver from 1972 to 2010 and, since at least 1982, he has been involved in the capital markets of British Columbia having been a director of or having had some involvement with the following public companies:

- Amtronics Inc;
- Levy Development Inc.;
- Saddle Mountain Mining;
- Lumby Resources Corp.;
- Golden Hat Resources Inc.;
- Admiral Bay Resources;
- Global Tree Tech.;
- Rock Resources Inc.;
- Euro Controls;
- Jetta;
- Victory Resources; and
- African Gemstone.

¶ 69 Following an earlier term of employment, from July 2003 to September 2006 Mr. VP was the secretary/treasurer of Kenrich-Eskay Mining Corp., a TSX-V listed issuer. During this time period, Mr. TSP was, as well, a director of Kenrich-Eskay Mining Corp.

¶ 70 Mr. VP testified that as a director of the above listed companies, he was basically a figurehead being there to help out the people behind each of the companies. He was often compensated for the assumption of these roles either through a cash payment or stock options and from time to time he purchased treasury shares in these companies through private placement transactions.

¶ 71 From April 2007 until September 2009, Mr. VP was a director of SNL and was entitled to receive compensation amounting to \$1,500 per month. In December of 2008, Mr. VP purchased 333,667 flow-through shares and 500,000 non flow-through shares in a private placement of SNL securities. He testified that he was not the beneficial owner of these shares even though the subscription agreement for these shares stated to the

contrary.

¶ 72 At the time he opened the account with Ms. Lowe referred to below under the heading “Trading Accounts”, Mr. VP already had an account at Research with another Research employee, Mr. Nelson Siu. In addition, Mr. VP had trading accounts at Bolder Investment Partners Ltd., Wolverton Securities, Blackmont Capital, Canaccord, and Leede Financial Markets Inc. Mr. VP testified that in some of these accounts up until March of 2009, he was trading shares of GPI, OSE and SNL.

### **Mr. RL**

¶ 73 In the NCAF signed by Mr. RL and dated April 30, 2008 whereby a company owned by him opened an account at Research, Mr. RL stated that his occupation was corporate communications and that he was an employee of Xcel Management Consulting. It is to be noted that Ms. DS, one of the clients of Mr. Myatovic listed below as a holder of one of the Trading Accounts, is together with Mr. TSP’s wife, Ms. SP, an employee of Xcel Management Consulting. The offices of Xcel Management Consulting are located at 7198 Vantage Way, Delta, B.C.

¶ 74 In the NCAF opening the account at Research, Mr. RL is stated to be a director of GPI and OSE. In Mr. Myatovic’s interview with the IIROC Staff members, Mr. Myatovic indicated that Mr. RL worked in the capacity of investor relations for SNL and GPI.

¶ 75 In this NCAF, as well, Mr. RL gives as his office telephone number the same business telephone number as Mr. TSP.

### **The Trading Accounts**

¶ 76 The Notice of Hearing identifies seven client accounts at Canaccord for which Mr. Myatovic was responsible and five accounts at Research for which Ms. Lowe was responsible. These twelve client accounts (the “Trading Accounts”) and the relevant information from their new account application forms are as follows:

#### **Mr. Myatovic’s Client Accounts (the “Myatovic Trading Accounts”):**

- Ms. SKP – Ms. SKP is 68 years of age, the spouse of Mr. ASP and the mother of Mr. TSP. She signed her NCAF to open her account with Canaccord on July 19, 2003. This NCAF states that she has no experience with options or commodities/futures but moderate experience with common shares, preferred shares, bonds, money market trading, new issues, mutual funds and venture situations. Her investment objectives are high risk with 25% focused on short term trading and 75% on venture situations. Her residential address is set out as being at 908 Elpaso Road in Kelowna, B.C. This NCAF states that this is not a nominee account, that no other person other than Ms. SKP has any authority over this account, nor does any other person have any financial interest in this account. Concurrently with the opening of this account, 100,000 shares of GPI were deposited into the account.
- Mr. ASP – Mr. ASP is 66 years of age, the spouse of Ms. SKP and the father of Mr. TSP. He signed his NCAF to open his account with Canaccord on April 16, 2003. This NCAF states that that he has no experience with options or commodities/futures, moderate experience with preferred shares, bonds, new issues, mutual funds and venture situations, but extensive experience with common shares and money market trading. His investment objectives are set out as high risk with 50% focused on short term trading and 50% on venture situations. His residential address is the same as Ms. SKP as being at 908 Elpaso Road in Kelowna, B.C. This NCAF states that this is not a nominee account, that no other person other than Mr. ASP has any authority over this account, nor does any other person have any financial interest in this account.
- Ms. SP – Ms. SP is Mr. TSP’s spouse. Ms. SP signed the NCAF opening her account at Canaccord on November 22, 2005. In this NCAF, she states that she is an employee of JCP Financial Ltd. of 7198 Vantage Way, Delta, B.C.; that she has no experience with preferred shares, short sales or margin trading, and moderate experience with common shares, bonds, mutual funds, new issues,

options, commodities/futures, and venture situations; and that her investment objectives are 100% speculative high risk trading. This NCAF states that no other person other than Ms. SP has any authority over this account nor any financial interest in this account. This account was originally opened as a cash account, but in a subsequent document dated January 11, 2008 and witnessed by Ms. DS, Ms. SP requested margin trading privileges.

- Mr. BM –Mr. BM signed the NCAF opening his account at Canaccord on August 27, 2004. In this NCAF, he states that he is employed by Terasen Gas as an install co-ordinator in Surrey, B.C., that he has no experience with new issues, short sales, or margin accounts, and moderate experience with common shares, preferred shares, bonds, money market funds, mutual funds, options, commodities/futures and venture situations. He lists his investment objectives as 50% moderate growth and 50% speculative high risk. This NCAF states that no person other than Mr. BM has any authority over this account nor any financial interest in this account. The NCAF states that the investment adviser responsible for the account had not personally met Mr. BM and that he had been referred to Canaccord by Mr. TSP.
- Mr. RDB – Mr. RDB signed his NCAF to open an account with Canaccord on July 21, 2005. In this NCAF, Mr. RDB lists his occupation as a police officer with the Corporation of Delta and states that although he has a moderate investment experience with money market and venture situations, he has no investment experience with common shares, preferred shares, bonds, mutual funds, new issuers, short sales, options, commodities/futures, or margin, yet states as his investment objectives to be 100% speculative high risk. The NCAF states that no person other than Mr. RDB has trading authority on the account nor has any financial interest in the account. The NCAF also states that the investment adviser responsible for the account had not personally met Mr. RDB and that Mr. TSP had referred Mr. RDB to Canaccord.

Concurrently with the opening of the account, Mr. RDB deposited 270,000 shares of SNL.

- Ms. LN –Ms. LN signed the NCAF opening her account at Canaccord on April 5, 2006. In this NCAF she lists her residence to be in Bolton, Ontario, and her occupation as a hostess/sales person. The NCAF states that she has no experience with preferred shares, new issues, short sales, options, commodities/futures, venture situations or margin accounts. However, she has moderate experience with bonds, money market funds, and mutual funds, and extensive experience with common shares. Her investment objectives are 50% short term trading medium-high risk and 50% speculative high risk. Her approximate income from all sources is listed at \$7,500 and her estimated total net worth at \$682,000, of which her estimated net liquid assets are listed at \$550,000. Concurrently with the opening of this account, \$500,000 of securities were deposited into it. This NCAF states that no person other than Ms. LN has any authority over this account nor any financial interest in this account. The NCAF states that the investment adviser responsible for the account had not personally met Ms. LN and that she had been referred to Canaccord by Mr. TSP.
- Ms. DS –Ms. DS signed the NCAF opening her account at Canaccord on April 25, 2008. In this NCAF she states that she is an employee of Xcel Management Consulting. The NCAF states that she has no experience with preferred shares, bonds, mutual funds, short sales, commodities/futures, or margin accounts. However, she has moderate experience with common shares, money market trading, new issues, and venture situations, and extensive experience with options. Her investment objectives are 50% short term trading medium-high risk and 50% speculative high risk. This NCAF states that no person other than Ms. DS has any authority over this account nor any financial interest in this account.

#### **Ms. Lowe's Client Accounts (the "Lowe Trading Accounts"):**

- Mr. RDB –Mr. RDB was originally a client of Ms. Erica Fearn, another registered representative working at Research. When Ms. Fearn went on maternity leave, Ms. Lowe was overseeing Mr. RDB's account. Ms. Lowe formally took over Mr. RDB's account in June, 2008. Mr. RDB signed

his NCAF to open this account at Research on June 20, 2008 to update the original NCAF signed by him on July 14, 2004. In this new NCAF, Mr. RDB states that he has a good investment knowledge and has had limited investment experience with bonds/strips, limited partnerships, options and futures, he has had average experience with mutual funds, rights/warrants, and short sales. However, he states that he has had a high degree of experience with common shares and new issues. He lists his investment objectives to be 100% short term capital gains with a 100% high risk factor. The NCAF also states that no person other than Mr. RDB has trading authority on the account nor has any financial interest in the account.

- Ms. SKP—Ms. SKP, as was the case with Mr. RDB, was originally a client of Ms. Fearn. This account was taken over by Ms. Lowe in June, 2008. In her new NCAF dated June 1, 2008, Ms. SKP states that she is a sophisticated investor, that although her knowledge of limited partnerships, options, futures, and short sales is limited, her knowledge of rights/warrants is average and her knowledge of common shares, bonds/strips, mutual funds and new issues is high. Her investment objectives are 100% short term capital gains and she lists her risk factors as 100% high. The NCAF also states that no person other than Ms. SKP has trading authority on the account nor has any financial interest in the account.
- Ms. SP—Ms. SP had been a client of Ms. Lowe at Wolverton Securities, another IIROC member, and moved with Ms. Lowe to Research opening her account at Research in March 2007. In her Research NCAF dated March 27, 2007, Ms. SP states that she is a sophisticated investor, that although her knowledge of bonds/strips, mutual funds, limited partnerships, options, futures, and short sales is average, her knowledge of common shares, new issues, and rights/warrants is high. Her investment objectives are 100% short term capital gains and she lists her risk factors as 100% high. The NCAF also states that no person other than Ms. SP has trading authority on the account nor has any financial interest in the account.
- Ms. PS – Similar to Ms. SP, Ms. PS had been a client of Ms. Lowe at Wolverton Securities and moved with Ms. Lowe to Research, signing an NCAF to open an account with Research on May 3, 2008. In this new NCAF, Ms. PS identifies her spouse as Mr. MS and states that he is a director of SNL and President and a director of OSE. Her NCAF claims that her investment knowledge is good and that she has had a high degree of experience with common shares, bonds/strips, mutual funds, new issues, rights/warrants, limited partnerships, options, futures and short sales. She lists her investment objectives to be 100% short term capital gains with a 100% high risk factor. The NCAF also states that no person other than Ms. PS has trading authority on the account nor has any financial interest in the account.
- Mr. VP – As above stated, Mr. VP was referred to Ms. Lowe by Mr. TSP and signed an NCAF to open the account at issue with Ms. Lowe at Research on April 30, 2008. In this NCAF, Mr. VP states that he has a good investment knowledge and has had limited investment experience with bonds/strips, mutual funds, limited partnerships, options, futures and short sales, he has had average experience with rights/warrants and he has had a high degree of experience with common shares and new issues. He lists his investment objectives to be 100% short term capital gains with a 100% high risk factor. Originally these investment objectives were more conservative being listed as 50% short term capital gains and 50% medium term capital gains with the risk factors being set at 50% medium and 50% high risk, but the NCAF was amended to the more aggressive investment objectives and these changes initialed. The NCAF also states that no person other than Mr. VP has trading authority on the account nor has any financial interest in the account.

¶ 77 It is to be noted that with all of the Trading Accounts listed above, the NCAF states that no person other than the account holder has trading authority on the account nor has any financial interest in the account. It is also to be noted that four of the above five Lowe Trading Accounts were opened in the two month period between April 30, 2008 and June 20, 2008. In addition, three of the Lowe Trading Accounts, being the accounts of Mr. RDB, and the members of Mr. TSP family, Ms. SKP and Ms. SP, are clients of both Mr.

### **The LIRA Accounts**

¶ 78 The Notice of Hearing identifies eight clients of Mr. Myatovic which are referred to as the “LIRA Accounts”. The acronym “LIRA” refers to a Locked-In Retirement Account. Under the laws of the Province of Ontario, persons who are entitled to a deferred pension at the time they terminate their membership in a registered pension plan are able to transfer the value of this pension benefit into a locked-in retirement savings account. This type of account is exclusively for money earned in a registered pension plan, and generally speaking, any money transferred into it must remain "locked- in".

¶ 79 However, under Ontario law a party may qualify for special access to his or her LIRA if that party is facing financial hardship. “Financial Hardship” is a term defined by regulation and generally includes situations whereby:

- a person’s annual income from all sources is less than approximately \$32,000;
- the person is at risk of eviction from his or her home or rented residence due to unpaid payments on a debt secured against the home or unpaid rent; or
- the monies are required for the payment of medical expenses.

¶ 80 These eight client accounts and the relevant information from their NCAF forms are as follows:

- CC - Ms. CC signed the NCAF opening her LIRA account at Canaccord on September 18, 2009. In this NCAF, she states that she is unemployed, that her residence is Brampton, Ontario, that she has no experience with common shares, preferred shares, bonds, money market trading, mutual funds, new issues, short sales, options, commodities/futures, venture situations or margin trading. Her investment objectives are set as 50% short term trading with medium high risk and 50% speculative high risk trading. This NCAF states that Ms. CC’s estimated total net worth is \$6,400 and that her approximate annual income from all sources is \$12,000. It also states that the investment adviser had not personally met Ms. CC.
- KF – Ms. KF signed the NCAF opening her LIRA account at Canaccord on August 28, 2009. In this NCAF, she states that she is employed as a cashier, that her residence is in Orillia, Ontario, that she has had moderate experience with mutual funds, limited experience with bonds, and money market trading, and no experience with common shares, preferred shares, new issues, short sales, options, commodities/futures, venture situations or margin trading. Her investment objectives are set as 50% short term trading with medium high risk and 50% speculative high risk trading. This NCAF states that Ms. KF’s estimated total net worth is \$84,000 and that her approximate annual income from all sources is \$17,000. It also states that the investment adviser had not personally met Ms. KF.
- PH – Mr. PH signed the NCAF opening his LIRA account at Canaccord on August 10, 2009. In this NCAF, he states that he is unemployed, that his residence is in Manitouwadge, Ontario, that he has had moderate experience with mutual funds and no experience with common shares, preferred shares, bonds, money market trading, new issues, short sales, options, commodities/futures, venture situations or margin trading. His investment objectives are set as 50% short term trading with medium high risk and 50% speculative high risk trading. This NCAF states that Mr. PH’s estimated total net worth is \$22,000 and that his approximate annual income from all sources is \$53,000. It also states that the investment adviser had not personally met Mr. PH.
- AJ - Ms. AJ signed the NCAF opening her LIRA account at Canaccord on August 28, 2009. In this NCAF, she states that she is disabled, that her residence is in Orillia, Ontario, that she has had moderate experience with mutual funds, limited experience with bonds, and no experience with common shares, preferred shares, money market trading, new issues, short sales, options, commodities/futures, venture situations or margin trading. Her investment objectives are set as 50% short term trading with medium high risk and 50% speculative high risk trading. This NCAF states

that Ms. AJ's estimated total net worth is \$85,000 and that her approximate annual income from all sources is \$30,000. It also states that the investment adviser had not personally met Ms. AJ.

- DL - Mr. DL signed the NCAF opening his LIRA account at Canaccord on August 7, 2009. In this NCAF, he states that he is a delivery driver, that his residence is in Midland, Ontario, that he has had limited experience with common shares, bonds, mutual funds and venture situations, and no experience with preferred shares, money market trading, new issues, short sales, options, commodities/futures, or margin trading. His investment objectives are set as 50% short term trading with medium high risk and 50% speculative high risk trading. This NCAF states that Mr. DL's estimated total net worth is \$22,000 and that his approximate annual income from all sources is \$32,000. It also states that the investment adviser had not personally met Mr. DL.
- BRM – Mr. BRM signed the NCAF opening his LIRA account at Canaccord on July 14, 2009. In this NCAF, he states that he is an industrial pipe-fitter, that his residence is in Ruthven, Ontario, that he has had moderate experience with mutual funds, limited experience with bonds and money market trading, and no experience with common shares, preferred shares, new issues, short sales, options, commodities/futures, venture situations or margin trading. His investment objectives are set as 50% short term trading with medium high risk and 50% speculative high risk trading. This NCAF states that Mr. BRM's estimated total net worth is \$53,500 and that his approximate annual income from all sources is \$20,000. It also states that the investment adviser had not personally met Mr. BRM.
- TR – Ms. TR signed the NCAF opening her LIRA account at Canaccord on September 21, 2009. In this NCAF, she states that she is disabled, that her residence is Toronto, Ontario, that she has had moderate experience with mutual funds, limited experience with money market trading, and no experience with common shares, preferred shares, bonds, new issues, short sales, options, commodities/futures, venture situations or margin trading. Her investment objectives are set as 50% short term trading with medium high risk and 50% speculative high risk trading. This NCAF states that Ms. TR's estimated total net worth is \$32,000 and that her approximate annual income from all sources is \$12,000. It also states that the investment adviser had not personally met Ms. TR.
- SS – Ms. SS signed the NCAF opening her LIRA account at Canaccord on July 15, 2009. In this NCAF, she states that she is an unemployed student, that her residence is Newcastle, Ontario, that she has had limited experience with bonds and mutual funds, and no experience with common shares, preferred shares, money market trading, new issues, short sales, options, commodities/futures, venture situations or margin trading. Her investment objectives are set as 50% short term trading with medium high risk and 50% speculative high risk trading. This NCAF states that Ms. SS's estimated total net worth is \$31,000 and that her approximate annual income from all sources is \$24,000. It also states that the investment adviser had not personally met Ms. SS.

¶ 81 It is to be noted that the NCAF's for the LIRA Accounts indicate that:

1. the LIRA Accounts were all opened within a four month period extending from July 2009 to October 2009;
2. the LIRA Accounts were all opened by residents of Ontario;
3. Mr. Myatovic had met none of the account holders upon the opening of these accounts;
4. the net worth of these account holders ranged from a low of \$6,400 to a high of \$85,000;
5. the annual income for these account holders ranged from a low of \$12,000 to a high of \$53,000; and
6. notwithstanding their lack of investment experience, all of these accounts had exactly the same aggressive investment objectives.

¶ 82 Concurrently with the opening of each of the LIRA Accounts, the account holders were required to sign

and deliver to Canaccord to the attention of Canaccord's compliance department a letter (the "Risk Acknowledgement Letter") which contained the following provisions:

"I wish to acknowledge to your firm that I have been advised of the inherent risk factors associated with short term and venture trading.

I understand that due to the highly speculative nature of many of the companies categorized as high risk that this type of investment may appear unsuitable from the information provided on my Account Information form. Furthermore, I recognize and acknowledge that I could lose all the money I invest.

Although I have been advised of the risks associated with this type of investment, I wish to proceed with these objectives/investments and confirm that I am investing entirely at my own risk.

As such, I hereby indemnify and hold harmless Canaccord Capital, its officers, directors and employees, and my investment advisor for any and all losses that I may incur as a result of purchase orders placed for this account."

### **The Phoenix Group of Companies**

¶ 83 Of the eight LIRA Accounts, six had money withdrawn from them under the Financial Hardship provisions pertaining to LIRA Accounts as referred to above. Of these six, five of the cheques withdrawing these funds were made payable to Phoenix Credit Risk Management Consulting Inc. ("Phoenix CRMC"). The sixth withdrawal originally had instructions from the client that directed payment to Phoenix CRMC, but these instructions were later revised by the client to have the cheque made payable to himself. Mr. JSR ("Mr. JSR") is listed as President and a director of Phoenix CRMC as he is for Phoenix Pension Services Inc. and Phoenix Capital Resources Inc., companies which share a common office with Phoenix CRMC (collectively, Phoenix CRMC, Phoenix Pension Services Inc. and Phoenix Capital Resources Inc. are referred to as the "Phoenix Group of Companies").

### **Mr. BE**

¶ 84 Mr. BE is a client of Mr. Myatovic that was referred to Mr. Myatovic by Mr. JSR for the purpose of opening a LIRA account. Although not part of the allegations contained in Count 4, Mr. BE was interviewed by IIROC Staff and the evidence of his association with Mr. Myatovic, Mr. JSR and the Phoenix Group of Companies was before us.

¶ 85 This evidence is that Mr. BE had been working in Canada with an international IT company until 2006 when he left on good terms to join a US company. In 2008 with the market downturn he lost this job and had difficulty finding replacement employment. This led to him experiencing financial difficulties and to him being directed to Mr. JSR at the Phoenix Group of Companies. Mr. JSR focused on Mr. BE's LIRA account at Assante Capital Management Ltd. amounting to approximately \$310,000 and advised Mr. BE that it was possible to access funds in this account to enable Mr. BE to deal with his residential mortgage which was going into foreclosure and to pay his outstanding personal debts. With the aid of Mr. OM, Mr. JSR's assistant, the necessary documentation was put together and Mr. BE opened an account at Canaccord.

¶ 86 Mr. BE signed the NCAF opening his LIRA account at Canaccord on December 5, 2008. In this NCAF, he states that he is employed as a senior director of sales, that his residence is Burlington, Ontario, that he has had moderate experience with common shares, bonds, money market trading, options and mutual funds, limited experience with preferred shares, new issues, commodities/futures, venture situations or margin trading, and no experience with short sales. His investment objectives are set as 20% preservation of capital/low risk, 30% income/low-medium risk, 40% moderate growth/medium risk, and 10% short term trading/ medium high risk. He has no interest in speculative high risk trading. This NCAF states that the investment adviser, Mr. Myatovic, had not personally met Mr. BE.

¶ 87 Funds were then transferred from Mr. BE's account at Assante Capital Management Ltd. to Mr. BE's new Canaccord LIRA account. Application was made under the Ontario Financial Hardship provisions to release funds from the Canaccord account and, using these funds, Mr. JSR settled the matters with Mr. BE's

residential mortgage and his personal indebtedness. According to Mr. BE, Mr. JSR then suggested that Mr. BE contact Mr. Myatovic and use the remaining funds in the Canaccord account, about \$170,000, to purchase shares of GPI, OSE and SNL, with 37% of the funds being used to purchase GPI shares, 60% OSE shares, and the final 3% for SNL shares. Acting on this suggestion, Mr. BE contacted Mr. Myatovic and gave him these instructions. According to Mr. BE, Mr. Myatovic just took these specific instructions and at no time questioned why Mr. BE had chosen these particular securities or these specific amounts. Nor did Mr. Myatovic suggest any alternative investments that might be more in line with Mr. BE's stated investment objectives.

¶ 88 Mr. BE paid Mr. JSR the sum of \$9,000 for his efforts in facilitating these transactions.

#### **Mr. OM**

¶ 89 Mr. OM was identified as Mr. JSR's assistant. Mr. OM signed the NCAF opening both a cash account and a LIRA account at Canaccord on October 30, 2009. In this NCAF, he states that he is employed as the Office Manager with a company owned by Mr. JSR, with offices at the same address as the Phoenix Group of Companies. He states that his residence is Richmond Hill, Ontario, and that his investment objectives are 100% in speculative high risk trading. This NCAF states that the investment adviser, Mr. Myatovic, had not personally met Mr. OM.

#### **DEALING WITH THE COUNTS**

¶ 90 As noted above, the allegations of IIROC Staff are set out in four counts in the Notice of Hearing. We will deal with the Counts in reverse order of their presentation in the Notice of Hearing commencing with Count 4.

#### **COUNT 4**

¶ 91 This count deals with the allegation by IIROC Staff that Mr. Myatovic failed to know his clients in that he opened the LIRA Accounts for several clients resident in the Province of Ontario without making sufficient inquiries into essential facts relative to the circumstances of the holders of the LIRA Accounts.

#### **Transactions in the LIRA Accounts**

¶ 92 The relevant details of the eight clients which together constitute the LIRA Accounts holders and the particulars of the relevant transactions in their accounts are summarized below. In this summary, these eight accounts are divided into two groups. The first group comprises those six situations where there was a cash financial hardship withdrawal from the account. In all but one of the six instances this cash withdrawal was made by way of a cheque made payable to Phoenix CRMC.

¶ 93 The second group did not involve financial hardship cash withdrawals, but did involve a single transaction where most of the funds in the account were invested in the shares of SNL.

¶ 94 It is also to be noted that all of these accounts purchased shares in SNL, that this trade was marked as being unsolicited, and that for all of these eight accounts but one, the cash remaining in the account after the initiating transactions was minimal.

#### *Financial Hardship Accounts*

Ms. KF:	Employment	Cashier
	Age	39
	Annual income	\$17,000.00
	Net worth	\$84,000.00
	Transferred In – Sun Life	\$25,135.71
	Financial Hardship Withdrawal – Phoenix CRMC	\$11,900.00
	Receiver General of Canada	\$ 2,975.00

	Fees	\$ <u>52.50</u>
	Balance	\$10,208.71
	Purchase of 191,000 SNL	\$ <u>9,870.14</u>
	Remaining Cash Balance	\$ 338.07
Mr. PH:	Employment	Unemployed
	Age	50
	Annual Income	\$53,000.00
	Net Worth	\$22,000.00
	Transferred In – London Life	\$18,263.18
	Financial Hardship Withdrawal – Phoenix CRMC	\$11,900.00
	Receiver General of Canada	\$ 2,975.00
	Fees	\$ <u>52.50</u>
	Balance	\$ 3,335.68
	Purchase of 25,000 SNL	\$ <u>1,100.00</u>
	Remaining Cash Balance	\$ 2,235.68
Ms. AJ:	Employment	On Disability
	Age	42
	Annual Income	\$30,000.00
	Net Worth	\$85,000.00
	Transferred In – OP Trust	\$38,535.48
	Financial Hardship Withdrawal – Phoenix CRMC	\$23,150.00
	Receiver General of Canada	\$ 9,921.43
	Fees	\$ <u>52.50</u>
	Balance	\$ 5,411.55
	Purchase of 57,000 SNL	\$ <u>5,024.89</u>
	Remaining Cash Balance	\$ 386.66
Mr. DL:	Employment	Delivery Driver
	Age	42
	Annual Income	\$32,000.00
	Net Worth	\$22,000.00
	Transferred In - Clarington	\$33,671.10
	Financial Hardship Withdrawal – to DL	\$22,544.27
	Receiver General of Canada	\$ <u>9,661.83</u>
	Balance	\$ 1,465.00
	Purchase of 30,000 SNL	\$ <u>1,450.00</u>
	Remaining Cash Balance	\$ 15.00

Ms. SS:	Employment	Unemployed Student
	Age	40
	Annual Income	\$24,000.00
	Net Worth	\$31,000.00
	Transferred In - Sun Life	\$21,348.42
	Financial Hardship Withdrawal – Phoenix CRMC	\$11,900.00
	Receiver General of Canada	\$ 2,975.00
	Fees	<u>\$ 52.50</u>
	Balance	\$ 6,420.92
	Purchase of 135,000 SNL	<u>\$ 6,291.93</u>
	Remaining Cash Balance	\$ 128.99
Ms. TR:	Employment	On Disability
	Age	51
	Annual Income	\$12,000.00
	Net Worth	\$32,000.00
	Transferred In - London Life	\$29,448.88
	Financial Hardship Withdrawal – Phoenix CRMC	\$ 8,400.00
	Receiver General of Canada	\$ 2,100.00
	Fees	<u>\$ 52.50</u>
	Balance	\$18,896.38
	Purchase of 360,000 SNL	<u>\$18,571.10</u>
	Remaining Cash Balance	\$ 325.28

*No Financial Hardship Withdrawal*

Mr. BRM:	Employment	Industrial-Pipefitter
	Age	52
	Annual Income	\$20,000.00
	Net Worth	\$53,500.00
	Transferred In - Sun Life	\$15,446.47
	Purchase of 297,000 SNL	<u>\$15,327.54</u>
	Remaining Cash Balance	\$ 118.93
Ms. CC:	Employment	Unemployed
	Age	42
	Annual Income	\$12,000.00
	Net Worth	\$ 6,400.00
	Transferred In – RDBC	\$ 6,223.43
	Purchase of 73,000 SNL	\$ 6,049.95

**Ms. TR**

¶ 95 Of the LIRA account holders, Ms. TR had a story similar to that of Mr. BE. Ms. TR advised the IIROC Staff investigator, Ms. Gerada, during an unrecorded interview that she was referred to Mr. JSR and the Phoenix Group of Companies for assistance in dealing with a collection agency to which she owed the sum of \$5,266.47.

¶ 96 It would appear that at that time her sole asset to deal with this debt was her LIRA account at London Life amounting to \$29,448.88. Under the direction of Mr. JSR and his associates at the Phoenix Group of Companies, this asset was transferred to her account at Canaccord with Mr. Myatovic as her Investment Advisor. Ms. TR's claim for financial hardship was then made to the Superintendent of Financial Services for the Province of Ontario and the sum of \$8,400 was paid out of the Canaccord LIRA account to Phoenix CRMC. Of this \$8,400, Ms. TR received \$1,946.90 in cash or less than 25% of the amount paid out, being the monies remaining after the payment of transaction expenses, the payment of her debt to the collection agency, and the payment of \$1,047.35 to Phoenix CRMC as fees for services rendered.

¶ 97 At the time she signed her NCAF to open this LIRA account, Ms. TR was living on income disability benefits. As she set out in her NCAF, she had an annual income of \$12,000 and a net worth of \$32,000. Therefore, as a result of her dealings with Mr. JSR and the Phoenix Group of Companies, an asset in a LIRA account in the amount of \$29,448.88 – most likely Ms. TR's entire net worth – was converted into a debt repayment of \$5,266.47, 360,000 shares of SNL and cash of \$2,272.18.

¶ 98 In evidence before us was a document from an employee of the Phoenix Group of Companies instructing Ms. TR to “contact Marco at Canaccord” to “open an account under Ontario legislation”. Ms. TR's LIRA account with Canaccord was opened in accordance with these instructions.

**Mr. Myatovic and the Phoenix Group of Companies**

¶ 99 In his Response to the Notice of Hearing, Mr. Myatovic acknowledges that he is familiar with Phoenix CRMC, that he opened the LIRA Accounts, and that Phoenix CRMC might have referred to him the holders of the LIRA Accounts. However, in his interview with IIROC Staff on November 3, 2009, when asked if he was familiar with Phoenix Pension Services or if he knew Mr. JSR, Mr. Myatovic claimed that he was unfamiliar with either this company or Mr. JSR.

¶ 100 It is to be noted that Mr. OM signed his NCAF to open his LIRA account with Mr. Myatovic at Canaccord on October 30, 2009 four days before Mr. Myatovic's interview with IIROC Staff where he claimed unfamiliarity with Mr. JSR. As above set out, in his NCAF Mr. OM identifies his employment as being the Office Manager with a company owned by Mr. JSR with offices and telephone numbers the same as the Phoenix Group of Companies.

¶ 101 Evidence was before us in the form of Mr. Myatovic's personal cellular telephone text messages record. This record shows that on December 2, 2008, a text message was received on this cellular telephone from Mr. JSR's cellular telephone, which message stated “Hi marco; its jawad. Call me at this # when free”. Jawad is the first name of Mr. JSR. As well, telephone records in evidence before us show six telephone calls made from this cellular telephone number belonging to Mr. Myatovic to Mr. JSR's cellular telephone between December 2, 2008 and December 6, 2008, one of which calls lasted for eleven minutes. It is to be noted that the date on the NCAF signed by Mr. BE to open his LIRA account with Mr. Myatovic at Canaccord was December 5, 2008.

¶ 102 In her evidence before the Hearing Panel, Ms. Gerada identified fifty-seven telephone calls made between telephone numbers identified with the Phoenix Group of Companies and telephone numbers associated with Mr. Myatovic.

¶ 103 In response, Mr. Myatovic pointed out that SNL had a mining property near Timmins in Ontario and in February and September of 2008 was issuing positive news releases about drilling results on this property. He noted that he was registered in the Province of Ontario and claimed that it was not at all unusual for a registered

representative to be contacted on an out of province basis as he was by the LIRA account holders.

### **Mr. Myatovic's Involvement**

¶ 104 We are not able to accept Mr. Myatovic's contention that he was vaguely familiar with Mr. JSR and the Phoenix Group of Companies and that his being referred to the LIRA Account holders within such a short time frame was merely a coincidence and caused by publicity surrounding work being done by SNL in Ontario.

¶ 105 Based upon the admissions of Mr. Myatovic in his Response and based upon the evidence before us at the Hearing, we find clear, cogent and compelling evidence that during the period from at least December 2008 until November 2009, Mr. Myatovic was part of an arrangement whereby parties known to Mr. JSR and the Phoenix Group of Companies were referred to Mr. Myatovic to open LIRA accounts for the purpose of facilitating a claim by these parties under the financial hardship provisions of Ontario law.

¶ 106 We find further that a basic component of this arrangement was that after the requisite payments were made to Phoenix CRMC out of the financial hardship monies received, most of the remaining funds in these LIRA accounts were invested on the advice of Phoenix CRMC in the shares of SNL, a company promoted by Mr. TSP.

### **The Know-Your-Client Rule**

¶ 107 Although not specifically referred to by name in Count 4, the allegations made by IIROC Staff and contained in Count 4 focus mainly on the LIRA Accounts. The essence of these allegations is that that Mr. Myatovic failed in his obligation to know his client with respect to the account holders of the LIRA Accounts.

¶ 108 The Know-Your-Client Rule is one of the basic tenets that defines the relationship between a registered representative and his or her client. Concurrently with the opening of an account, a registered representative has the obligation to make diligent efforts to learn of and to record the financial and personal circumstances of the client. This research obligation includes a full understanding of the prospective client's entire financial circumstances, both existing and anticipated. It also includes an informed assessment of the prospective client's knowledge and experience with investing and capital markets. This informed assessment is essential to enable the registered representative to work with the prospective client to better define his or her investment objectives and risk tolerances. And this research obligation includes a reasonable inquiry into the prospective client's business and personal relationships to assist the registered representative to properly advise the prospective client with the future trading activity in the account.

¶ 109 The Know-Your-Client Rule extends beyond that of securing the requisite knowledge about the prospective client. The registered representative must then use this knowledge to assist the client in the definition of the investment objectives and risk tolerances for the trading activity to be carried on in the account. Most importantly, if the investment objectives and risk tolerances selected for the account by the prospective client appear to be out of line with what the registered representative has learned about the prospective client's knowledge of investing and capital markets and the prospective client's financial circumstances, the registered representative has an obligation to work with the prospective client to ensure that these investment objectives and risk tolerances are suitably amended.

¶ 110 In other words, it is not sufficient for a registered representative to give a prospective client a blank NCAF form, to request the prospective client to complete and sign the form once it has been completed, and then, with no further involvement, to open and trade in the account in accordance with the provisions of this NCAF. The registered representative must make the inquiries referred to above in a diligent manner. Most importantly, if the information gained as a result of these inquiries does not line up with what the signed NCAF states as the prospective client's investment objectives and risk tolerances, and the registered representative is not able to convince the prospective client to amend these investment objectives and risk tolerances to better reflect the prospective client's situation, the proper course of action is for the registered representative to not open the account.

¶ 111 Once the account has been opened, the Know-Your-Client Rule then extends to the trading in the account. The registered representative has an ongoing obligation to ensure that the trading in the account

reflects the investment objectives and risk tolerances of the client as outlined in the NCAF. This obligation includes monitoring the concentration and the suitability of the securities traded in the account. Monitoring concentration imposes upon the registered representative the requirement to ensure that the holding of securities in the account are not so weighted in favour of one or more securities so that the concentration of the holdings in these securities increases the risk in the account to an extent which exceeds the risk tolerances defined for the account.

¶ 112 Similarly, the registered representative has the duty to monitor the trading of securities in the account to ensure that the securities traded in the account are suitable for the investment experience, investment objectives, and risk tolerances defined for the account.

¶ 113 In the matter at hand, Ms. TR was referred to Mr. Myatovic to open an account at Canaccord to facilitate what we have found to be an ongoing arrangement between Mr. Myatovic and the Phoenix Group of Companies. The NCAF signed by Ms. TR dated September 21, 2009 disclosed that she was unemployed and on a disability pension, that her annual income was \$12,000 and that her net worth at that time was \$32,000. This NCAF states that she has had moderate investment experience with mutual funds, limited investment experience with money market trading and no investment experience with other categories of securities. Despite this very limited investment experience, the investment objectives on this account are 50% short term trading/medium-high risk and 50% speculative trading/high risk.

¶ 114 One is very hard pressed to understand how a registered representative meets the Know-Your-Client Rule in the opening of an account with these investment objectives and risk tolerances given Ms. TR's stated lack of investment experience, her limited net worth, her limited income and, with her disability, her reduced prospects for future income or net asset growth.

¶ 115 On October 29, 2009 the sum of \$29,448.88 was transferred into this account and on November 5, 2009, \$18,571.10 of this amount was used to purchase 360,000 shares of SNL. Following the transactions with the Phoenix Group of Companies on November 26, 2009, there was a cash balance in this account of \$325.28 and there was no further trading in this account prior to March 31, 2010.

¶ 116 Again, one is hard pressed to understand how Mr. Myatovic met his obligations under the Know-Your-Client Rule and the obligation to ensure the suitability of the securities being traded in Ms. TR's account. Surely securities of a high risk junior exploration company such as SNL would not appear to be a suitable investment for a person in Ms. TR's financial situation with the level of her investment knowledge.

¶ 117 As well as being entirely non-suitable for Ms. TR's situation, the transaction whereby 63% of Ms. TR's net worth is being used in one transaction to purchase shares of one company constitutes a gross over concentration of the SNL shares in this account.

### **The Risk Acknowledgement Letter**

¶ 118 In his defense of these actions, Mr. Myatovic points to the Risk Acknowledgement Letter which Mr. BE and all the LIRA Account holders, including Ms. TR, signed. The evidence before us is that this letter is not sent for execution to all prospective Canaccord clients, but only to those clients where circumstances dictate that such a caution is required. The LIRA Account holders fit into that category of client which raised these concerns and therefore this form of letter was sent out to them and the account opened only after a signed copy of the letter was returned.

¶ 119 Mr. Myatovic submits that all these parties were properly cautioned before signing this letter and all knew the risks involved in trading the securities of SNL.

¶ 120 Although we do not have before us Ms. TR's evidence on this point, given her lack of investment knowledge, we have a great deal of difficulty accepting that when she signed the Risk Acknowledgement Letter that Ms. TR understood what she was signing. In any event, in view of the lack of investment sophistication of this client, without Mr. Myatovic demonstrating to us that Ms. TR clearly understood what she was agreeing to, we do not accept that this letter absolves Mr. Myatovic of his obligation under the Know-Your-Client Rule.

¶ 121 Similarly with the balance of the LIRA Account holders. The fact that they were singled out as a type of client requiring specific treatment in the form of securing a signed Risk Acknowledgement Letter imposes a greater obligation upon Mr. Myatovic under the Know-Your-Client Rule.

### **Decision**

¶ 122 Mr. Myatovic was clearly part of an arrangement with Mr. JSR and the Phoenix Group of Companies whereby unsophisticated investors with Ontario LIRA accounts as a result of their very much reduced financial situation were able to qualify as facing financial hardship and thereby access the funds in these LIRA Accounts. Once these funds were accessed and outstanding personal debts satisfied, the majority of the remaining money was used to purchase shares in SNL, a junior resource company promoted by Mr. TSP. Mr. Myatovic was clearly in breach of the obligations behind the Know-Your-Client Rule. How could any investment professional in all good conscience employ 63% of Ms. TR's remaining net worth to purchase shares in SNL?

¶ 123 However, Mr. Myatovic's breach of his know-your-client obligations was not that he failed to learn the essential facts about the LIRA Account holders. He very well knew that they were unsophisticated investors. He knew that they had minimum income and net worth. He knew that they were in financial straits, otherwise they would not be in a position to qualify for the financial hardship payout under Ontario law. Mr. Myatovic's breach was not in the failure to secure the essential facts about his clients, rather it was encompassed in what action he took or permitted to be taken under his watch with respect to the setting of the investment objectives and risk tolerances to enable the unsolicited purchases of the shares of SNL in the LIRA Accounts. He clearly breached his gatekeeper obligations with respect to the suitability of securities being purchased and the concentration of securities in the LIRA Accounts. And he ignored the best interests of his clients in hiding behind the terms of the Risk Acknowledgement Letter and permitting the investment objectives and risk tolerances to define the trading in the LIRA Accounts to enable the unsolicited purchase of the shares of SNL.

¶ 124 But the allegations in Count 4 do not contain allegations of non-suitability or concentration. Rather, Count 4 alleges that Mr. Myatovic breached Dealer Member Rule 1300.1(a) in that he failed to know his clients by opening locked in registered accounts without making sufficient inquiries into the circumstances of these accounts. The allegations concern Mr. Myatovic's failure to learn the essential facts of the clients. But there was no evidence before us that Mr. Myatovic failed to learn these essential facts or that any of these facts in evidence were incorrect or a misstatement.

¶ 125 Under the heading "SUPERVISION OF ACCOUNTS" and the sub-heading "Identity and Creditworthiness", Dealer Member Rule 1300.1(a) states:

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

¶ 126 In other words, under Dealer Member Rule 1300.1(a) when he opened the LIRA Accounts for the account holders, Mr. Myatovic was responsible for ensuring that he learned the essential facts pertaining to the clients on whose behalf he was opening these accounts.

¶ 127 In *Blackmont Capital Inc., Dean Shannon Duke and Investment Regulatory Organization of Canada* 2011 BCSECCOM 490, the British Columbia Securities Commission ("BCSC") took an IIROC panel to task for too broad an interpretation of the allegations made by IIROC Staff. In *Blackmont*, IIROC Staff alleged that the respondents entered into a commission-sharing arrangement "without disclosing the details and the existence of the arrangements" with their customers "contrary to Dealer Member Rule 29.6...and/or...Rule 29.1" (emphasis added).

¶ 128 Dealer Member Rule 29.6 prohibits such commission-sharing arrangement without the prior written consent of the customer first having been obtained. The IIROC Panel found that the Respondents had breached Dealer Member Rule 29.6 as no such written consent had been obtained.

¶ 129 In overturning the IIROC Hearing Panel's finding of liability against the respondents, the BCSC stated commencing at paragraph 22:

22 Yet, as far as Rule 29.6 is concerned, that rule says nothing about disclosure. It requires nothing other than the obtaining of consent.

23 The allegation in Count 1 therefore is not and can not be an allegation that Blackmont and Duke contravened Rule 29.6 – Rule 29.6 contains no disclosure requirement. Count 1 does not allege any other misconduct that could be a contravention of Rule 29.6, and the particulars in the notice of hearing cite only the alleged failure to disclose as required under section 53 of the *Securities Rules* as a basis for the contravention of Rule 29.6. Therefore, the only allegation in Count 1 is that the respondents’ failure to disclose the existence and details of the commission-sharing arrangement to the banks was in contravention of Rule 29.1

¶ 130 Although one might ask how it might be possible to secure a valid written consent without having first disclosed the details and the existence of the commission arrangements with their clients, the BCSC is clearly signalling that the wording of the allegations made by IIROC Staff in the counts contained in the notice of hearing is essential to define the nature of the case that a respondent must meet. It is the actual wording that is important to define the meaning of the allegations made.

¶ 131 We have nothing before us to suggest that there were essential facts for the LIRA Account holders that Mr. Myatovic did not learn. Indeed, the NCAF’s before us paint a rather complete picture of the limited financial circumstances of the LIRA account holders. Mr. Myatovic’s unprofessionalism was marked in participating in the arrangement with the Phoenix Group of Companies, in opening the LIRA Accounts, in accepting without question the investment objectives and risk tolerances with which he was presented, and in accepting the unsolicited trading instructions in these accounts that he did, but we are unable to find that he failed to learn any of the essential facts about the LIRA Account holders.

¶ 132 As we have found that Mr. Myatovic did indeed learn the essential facts of the LIRA Account holders, based upon the direction of the BCSC in *Blackmont* with respect to our obligation to carefully parse the allegations made by IIROC Staff to ensure that our findings with respect to liability are fully in line with these allegations, we find Mr. Myatovic not liable for the breach of Dealer Member Rule 1300.1(a) as alleged in Count 4 in the Notice of Hearing.

### **The OSC Order**

¶ 133 Following the closing of the case for IIROC Staff on December 2, 2011 and prior to the commencement on January 23, 2012 of oral submissions on the merits in this matter by counsel for the parties, IIROC Staff submitted to the Hearing Panel their book of authorities (“Book of Authorities”) prepared in anticipation of these oral submissions. Included within the Book of Authorities was a copy of an order of the Ontario Securities Commission dated December 19, 2011 accepting a settlement agreement (the “OSC Order”) negotiated among certain parties to the settlement agreement and the Ontario Securities Commission. The OSC Order was, as well, referred to in the written submissions (“Written Submissions”) of IIROC Staff submitted to the Hearing Panel in anticipation of the oral submissions of IIROC Staff.

¶ 134 In the Written Submissions, IIROC Staff referred to the OSC Order and specifically to some of the admissions made by the parties to the settlement agreement in the OSC Order. This reference sought to further buttress the evidence previously presented by IIROC Staff in the hearing and to support the allegations made by IIROC Staff in the Notice of Hearing.

### *The Motion To Strike*

¶ 135 Counsel for the Respondents objected to the inclusion of the OSC Order in both the Written Submissions and in the Book of Authorities and Mr. Myatovic brought a motion seeking to have:

1. The OSC Order and any reference thereto be removed from the record of this proceeding, including but not limited to the Book of Authorities and the Written Submissions; and
2. The Hearing Panel make a determination as to whether it is able to disabuse itself of the OSC Decision in our determination of this matter; and

3. In the event that the Hearing Panel is unable to disabuse itself of the OSC Decision in our determination of this matter that the Notice of Hearing in this matter be dismissed in whole or in part; or
4. In the event that the Hearing Panel determines that it may continue with the hearing on the basis that the OSC Decision was never submitted to the Hearing Panel that Count 4 in the Notice of Hearing be dismissed on the basis that IIROC ought never to have submitted the OSC Decision after the close of its case; and
5. Any other remedy that the Hearing Panel may deem just to remedy the prejudice that has already occurred and to prevent such an occurrence from being repeated.

#### *Respondents' Position*

¶ 136 The Respondents submit that IIROC Staff's inclusion of the OSC Decision as a legal authority into the Book of Authorities after IIROC Staff had closed their case is a clear breach of process. This breach is further compounded by specifically referring in the Written Submissions to certain admissions made by the parties in the settlement agreement incorporated into the OSC Decision.

¶ 137 The Respondents question the legal precedential value of an order from the Ontario Securities Commission approving a settlement agreement where the OSC Order is little more than an order from the Ontario Securities Commission attaching the settlement agreement reached among the parties for which the order was made. The Respondents take the position that if IIROC Staff had wished to introduce into evidence the settlement agreement included in the OSC Order as proof of the facts referred to in the settlement agreement, then IIROC Staff should have moved to be entitled to re-open their submissions on evidence and then to apply to submit the OSC Order and the attached settlement agreement into evidence.

¶ 138 The action taken by IIROC Staff in including the OSC Order in its Book of Authorities and then referring in the Written Submissions to the OSC Decision and to the settlement agreement for the purpose of urging the Hearing Panel to accept as facts the matters contained in the settlement agreement constitute an abuse of process and is clearly prejudicial to the Respondents.

¶ 139 The Respondents further submit that as a hearing panel is composed of two members without legal training, that particular care must be taken to ensure that when evidence is presented it is done in a way that ensures that both its form of presentation and its content are compatible with the principles of natural justice. The need for this arises from the concern that members of a hearing panel in coming to a decision might have a great deal of difficulty in disabusing themselves of evidence improperly entered once it was entered before them. This concern therefore imposes upon IIROC Staff an obligation to meet a high standard in its introduction of evidence. This is especially so as the matters usually dealt with by a hearing panel involve a person's livelihood, placing a great onus to ensure that everything possible is done to grant a fair hearing to a respondent in accordance with the best principles of natural justice.

¶ 140 It is the Respondents' position that with the introduction of the OSC Decision into the record of this hearing in the manner in which it was done, IIROC Staff failed to meet this high standard and the Respondents have been prejudiced by this failure.

#### *IIROC's Position*

¶ 141 IIROC Staff submit that the OSC Decision is a decided case that is composed of findings of fact against the parties referred to in the order and includes a description of the contraventions and penalties to which these parties are subject. It is the position of IIROC Staff that the Hearing Panel is entitled to take judicial notice of the findings of the Ontario Securities Commission in the OSC Decision. There is, therefore, no requirement for IIROC Staff to bring a motion to reopen their case and to introduce fresh evidence.

¶ 142 IIROC Staff point to the fact that the OSC Decision did not exist at the time that IIROC Staff was introducing its evidence in this hearing as the date of the OSC Decision followed the closing of the case by IIROC Staff.

¶ 143 Finally, IIROC Staff submit that we as a Hearing Panel have a broad discretion on what we permit to be introduced into evidence and public interest demands that we include the OSC Decision into the record before us as it is very much germane to the issues behind the allegations in the Notice of Hearing.

#### *Decision*

¶ 144 The OSC Decision is not a situation in which the Ontario Securities Commission has made a finding of fact on the evidence before them. Rather, the OSC Decision is a situation whereby the Ontario Securities Commission is presented with a settlement agreement where the parties to the settlement agreement have agreed to the facts contained in the settlement agreement. The finding of the Ontario Securities Commission in the OSC Decision is to accept the settlement agreement, not to test the credibility of the matters contained in the settlement agreement.

¶ 145 We therefore disagree with IIROC Staff that we might take judicial notice of the facts contained in the settlement agreement included in the OSC Decision. The precedential value in the OSC Decision, if any, is in the decision of the Ontario Securities Commission to accept the settlement agreement and not in a finding on the facts contained in this settlement agreement.

¶ 146 We acknowledge that the OSC Decision is currently publicly available and certainly open to the Hearing Panel to access if we see fit to do so. However, that is not the point. The point is that IIROC Staff when they became aware of the OSC Decision following its release on December 19, 2011 rather than applying to re-open their case and to have the facts contained in the OSC Decision introduced as part of the evidence before us, determined to merely include it in the Book of Authorities and in the Written Submissions. This action introduced this evidence onto the record of this hearing without the Respondents having had an opportunity to challenge the admission of this evidence or to test its relevance or credibility.

¶ 147 We agree with the Respondents that the action taken by IIROC Staff in including the OSC Decision in its Book of Authorities with direct reference in its Written Submissions is a clear abuse of process and that any use of the broad powers granted to the Hearing Panel to permit the introduction of the OSC Decision in light of this action by IIROC Staff would be a continuation of this abuse of process and a denial of natural justice to the Respondents.

¶ 148 IIROC Staff in the final result has agreed to withdraw the OSC Decision from its Book of Authorities and its Written Submissions.

¶ 149 The motion by Mr. Myatovic sought five remedies. With respect to this motion and the remedies sought, we condense these remedies into three components and determine that:

1. The OSC Order and any reference thereto be removed from the record of this proceeding, including but not limited to the Book of Authorities and the Written Submissions;
2. We, the Hearing Panel, are able to disabuse ourselves of the OSC Order in our determination of this matter; and
3. Although we agree that IIROC Staff ought never to have submitted the OSC Decision after the close of its case, we will not dismiss Count 4 in the Notice of Hearing for this reason.

¶ 150 When we gave the above decision orally on January 23, 2012 following the submissions on Mr. Myatovic's motion by IIROC Staff counsel and Respondents' counsel, we advised the parties that in making our final determination with respect to Mr. Myatovic's liability for the allegations contained in Count 4 of the Notice of Hearing, we would take into account the prejudice to Mr. Myatovic resulting from the manner in which IIROC Staff introduced the OSC Decision. In that we have found Mr. Myatovic not liable for the allegations contained in Count 4 of the Notice of Hearing, the question of prejudice to Mr. Myatovic caused by the actions of IIROC Staff is rendered moot.

#### **COUNT 3**

¶ 151 This count is focused on the allegation by IIROC Staff that Ms. Lowe took instructions from Mr. TSP for trading in the account of Mr. VP for which she was responsible at Research (the "VP Account") and thereby

engaged in unauthorized trading in this account.

¶ 152 Ms. Lowe denies this allegation claiming that she took instructions only from Mr. VP for any trading activity in the VP Account.

### **The Opening of the VP Account**

¶ 153 During the hearing of this matter, Mr. VP appeared before us and testified as to his involvement with Ms. Lowe and the VP Account. He testified that he opened the VP Account on Mr. TSP's instructions and that the purpose of this account was not to trade securities owned by Mr. VP, but rather to trade securities owned beneficially by Mr. TSP.

¶ 154 To open the VP Account, Mr. VP communicated with Ms. Lowe by telephone and email and did not meet Ms. Lowe in person until about a year later. In his testimony before us, Mr. VP was adamant that the VP Account was in fact Mr. TSP's account and not his own and that Ms. Lowe had complete authority to act on instructions from Mr. TSP.

¶ 155 When asked if he realized that he was personally liable for any debit balances in this account, Mr. VP testified that he realized this, but that he trusted Mr. TSP to take care of any potential liability. Mr. VP testified that he was not compensated directly for entering into this arrangement with Mr. TSP, but that he had hoped that by assisting Mr. TSP in this situation, he might somehow benefit in the future. He testified that despite the fact that he was not the beneficial owner of the securities traded in this account, he declared the losses and gains from these trades in filing his 2008 personal tax returns.

¶ 156 As noted above, the NCAF that Mr. VP signed on April 30, 2008 to open the VP Account clearly stated that no person other than Mr. VP had trading authority on the account, that no person was guaranteeing the account, and that no person other than Mr. VP had any financial interest in the account. When on cross examination he was asked how in the face of this statement Mr. VP could claim that Mr. TSP had trading authority over the VP Account, his response was that the wording of the NCAF did not accurately reflect the situation with respect to the VP Account.

### **Trading in the VP Account**

¶ 157 Mr. VP's evidence was that soon after the VP Account was opened, Ms. Lowe phoned him and sought his authorization for trades on two or three occasions, and he authorized those trades. He also recalled in October 2008 giving authorization for the purchase of shares in a company called Gold Jubilee Capital Corp shares. However, other than these orders, Mr. VP claimed that between June 2008 and March 2009 he did not give Ms. Lowe trading instructions or authorize any of the more than eighty trades in the VP Account during that period. Indeed, he claimed that he "really didn't want to know what was happening" with respect to the trading in the VP Account.

¶ 158 The account statements and trade confirmation slips from trading in the account, Mr. VP acknowledged receiving. But after receipt of the first statement, he claimed he didn't open the envelopes as he didn't consider the VP Account to be his account and that he wasn't comfortable with the "whole operation".

¶ 159 Mr. VP opened the VP Account with a personal cheque in the amount of \$10 drawn on his CIBC bank account in North Vancouver. Shortly after its opening, on June 4, 2008, 249,000 shares of OSE were deposited into the VP Account. These shares were represented by two certificates in Mr. VP's name, one for 49,000 shares and the other for 200,000 shares. Although he knew that there would be a number of shares deposited into the VP Account, Mr. VP claimed that that he had never seen the certificates representing these shares before reviewing the copies shown to him by IIROC Staff prior to this hearing, despite the evidence before us that he signed two powers of attorney to make these certificates negotiable.

¶ 160 In July 2008, the sum of \$94,000 was deposited to the VP Account by way of a bank draft drawn on the Toronto Dominion Bank. This amount was to cover an overdraft in the VP Account. However, Mr. VP testified that he was not notified by Ms. Lowe about this overdraft, that he did not make the deposit and that these were not his funds.

¶ 161 Deposits of \$36,300, \$47,200, \$37,100 and \$80,500 were made to the VP Account by Toronto Dominion Bank drafts dated September 29, 2008, October 10, 2008, November 28, 2008, and December 30, 2008, respectively, to cover debits in the VP Account. Mr. VP testified that he was not aware of these debits or the deposits made to cover them.

¶ 162 On January 19, 2009 Ms. Lowe sent a text message to Mr. TSP stating: “I got ur text! Credit is wanting verns cheque! 2 high they said!”

¶ 163 In his testimony before us, Mr. VP claimed that the first time he was notified that there was a debit in the VP Account was in January of 2009 when Ms. Lowe called him and told him that he needed to deposit monies to cover the debit. Mr. VP claims that he was quite upset at this news and called Mr. TSP’s offices on Vantage Way in Delta, B.C. He was told that someone would be sent over with the necessary funds.

¶ 164 Mr. VP testified that following this call on January 19, 2009, Mr. RL came to Mr. VP’s school in North Vancouver and together they went to Mr. VP’s bank. Mr. VP deposited a cheque in the amount of \$85,500 given to him by Mr. RL into his personal bank account at the CIBC and immediately wrote a personal cheque drawn on that bank account for the amount of \$85,500, dated January 19, 2009, and payable to Research. According to Mr. VP, Mr. RL then took this cheque to Ms. Lowe to deposit into the VP Account on January 20, 2009. A similar procedure was carried out with a cheque in the amount of \$88,500 ten days later on January 30, 2009.

¶ 165 Mr. VP testified that \$85,000 was more than his annual salary. He also testified that with Mr. TSP’s approval, he “borrowed” 25,000 shares of OSE out of the VP Account to be transferred into an RSP account he established at Research in March of 2009. These shares of OSE were shown as having a market value of \$17,500 at the time of the RSP contribution.

### **Closing the VP Account**

¶ 166 Following the transactions with the personal cheques, Mr. VP testified that he no longer felt comfortable with his part in the arrangement with Mr. TSP concerning the VP Account. He contacted Mr. TSP and requested that the arrangement between them be terminated and the VP Account be closed.

¶ 167 However, it wasn’t until October of 2009 that Mr. VP entered into an agreement with Mr. RL’s company whereby in return for Mr. VP receiving the sum of \$7,500 and transferring 633,667 common shares of SNL, 416,833 SNL share purchase warrants, 477,000 shares of OSE and 25,000 shares of Golden Jubilee Capital Corp., and assigning a debt of \$7,500 owed to Mr. VP by SNL, Mr. RL’s company released Mr. VP from any obligation to repay the monies lent to him by this company to cover debits in the VP Account.

### **Finding of Authority**

¶ 168 In his testimony before us, Mr. VP attempted to portray himself as a rather naïve school teacher who got involved in matters about which he understood very little. Much of his testimony was self-serving and we have, therefore, considered it with a great deal of caution. However, although we don’t accept Mr. VP’s protestations of naivety or of complete ignorance, and notwithstanding the statements in the NCAF executed by Mr. VP upon the opening of the VP Account to the effect that no party other than Mr. VP had trading authority over the VP Account, we do accept that that Mr. TSP did indeed have authority to trade securities in the VP Account and that Ms. Lowe was aware of both this authority and of the agreement between Mr. VP and Mr. TSP with respect to the VP Account.

### **Decision on Count 3**

¶ 169 In Count 3, IIROC Staff allege that Ms. Lowe engaged in unauthorized trading in the VP Account. Based upon the evidence before us, we are not able to find that Ms. Lowe engaged in unauthorized trading in the VP Account. As stated above, we find that with Ms. Lowe’s knowledge, Mr. VP gave Mr. TSP authority to trade in the VP Account. We find on the evidence before us that Mr. TSP utilized this authority. And we find that Ms. Lowe took instructions for trading on the VP Account from Mr. TSP based upon this authority.

¶ 170 Dealer Member Rule 200.1(i)(3) requires that where trading instructions are accepted from a person or

corporation other than the customer, there must be written authorization from the account holder on file to accept such trading instructions. It is clear from the evidence before us that neither Ms. Lowe nor Research had on file written authorization from Mr. VP authorizing Mr. TSP to give trading instructions on the VP Account. Therefore, in accepting trading instructions from Mr. TSP on the VP Account without having on file Mr. VP's written authorization to accept such instructions, Ms. Lowe was clearly in breach of Dealer Member Rule 200.1(i)(3).

¶ 171 However, again mindful of the direction of the British Columbia Securities Commission in *Blackmont* referenced above, in making a finding of liability we are required to carefully parse the allegation made by IROC Staff in a particular count. Count 3 alleges a breach of Dealer Member Rule 29.1, not the narrower and more appropriate for the evidence before us Dealer Member Rule 200.1(i)(3).

¶ 172 If IROC Staff had intended the allegation in Count 3 to focus on a breach of Dealer Member Rule 200.1(i)(3) surely they would have so indicated this in Count 3 and Ms. Lowe would have had a clear definition of the allegation she had to meet.

¶ 173 It is a basic tenet of natural justice that a party have a clear and concise definition of the allegation that he or she has to meet rather than a broad statement of obligation that in its broad scope is capable of encompassing the wrong complained of. It would be erroneous to find Ms. Lowe liable for a breach of Dealer Member Rule 29.1 because the evidence before us demonstrated at first instance a breach of 200.1(i)(3). Ms. Lowe had no opportunity at the Hearing to present evidence or to offer a defence against an allegation of a breach of Dealer Member Rule 200.1(i)(3). Indeed, if that had been the specific allegation, she might have presented evidence to rebut the possibility of such a finding.

¶ 174 As we have found that Mr. VP did in fact authorize Mr. TSP to trade in the VP Account, we do not find that Ms. Lowe engaged in unauthorized trading in the VP Account and we therefore find that she is not liable for breaching Dealer Member Rule 29.1 as alleged by IROC Staff in Count 3.

## **COUNTS 1 AND 2**

¶ 175 In Counts 1 and 2 IROC Staff allege that the Respondents failed in their roles as gatekeepers by facilitating manipulative or suspicious trading activity in certain client accounts, including the seven Myatovic Trading Accounts and the five Lowe Trading Accounts, by pre arranging trades and taking instructions from Mr. TSP who was not the account holder of these client accounts.

¶ 176 Count 1 deals with allegations made by IROC Staff against Mr. Myatovic and Count 2 deals with similar allegations against Ms. Lowe. As there are several common threads which tie these counts together we will consider the two counts on a collective basis.

### **Respondents' Relationship with Mr. TSP**

¶ 177 Although it is clear from the evidence before us that the Respondents and Mr. TSP communicated among themselves on a regular basis, the evidence was less clear as to when each of the Respondents first met Mr. TSP. In her interview with IROC Staff in 2009, Ms. Lowe stated that she had known Mr. TSP for ten years. Mr. Myatovic at his interview could not recall how he had met Mr. TSP or how long he had known him.

¶ 178 In her interview, Ms. Lowe testified that she was introduced to Mr. Myatovic by Mr. TSP. Ms. Lowe also testified that Mr. Myatovic had been a good friend of hers for years and that they would speak on a regular basis. She stated that she and Mr. Myatovic would meet every time Mr. Myatovic travelled to Vancouver from his home in Prince George, an event that occurred once or twice a month.

¶ 179 On the other hand, Mr. Myatovic at his interview with IROC Staff testified that he did not meet Ms. Lowe through Mr. TSP, that he met with her no more than once a year and only called her on occasions. Indeed, he testified that there were some months that they didn't speak. In this interview, Mr. Myatovic specifically denied texting Ms. Lowe for business purposes and could not recall having any discussions with Ms. Lowe with respect to trading in the shares of GPI or OSE.

### **Communication Among the Respondents and Mr. TSP**

¶ 180 IIROC Staff presented evidence of three types of communication among Mr. TSP, Mr. Myatovic and Ms. Lowe – telephone, email and text messages.

#### *Cellular Telephone Records*

¶ 181 As referred to above, as part of their investigation leading to the Notice of Hearing, IIROC Staff sought and obtained relevant cell phone records for the period extending from April 2008 to March 2009 for cell phones relating to Respondents and Mr. TSP. The determination of relevance in this context was observations of heavy trading in the shares of GPI, OSE and SNL on the TSX-V. Depending upon the trading pattern, these telephone records were obtained both before and after the periods of heavy trading of these shares.

¶ 182 The cell phone telephone numbers included in the Telephone Summary were either those registered in the names of the Respondents or in the name of Mr. TSP and his wife, Ms. SP. The Telephone Summary also included other telephone numbers related to those set out in the NCAF's for the Trading Accounts or to those identified with the offices of Mr. TSP or Mr. RL or the offices of GPI, OSE or SNL.

¶ 183 The Telephone Summary clearly demonstrates that cell phones registered in the names of each of the Registrants and in the name of Mr. TSP and his wife communicated with each other frequently and on a regular basis between April 2008 and March 2009 often calling the respective numbers many times a day.

#### *Mr. Myatovic's Email Records*

¶ 184 IIROC Staff entered into evidence several emails purporting to constitute communication between Mr. TSP and Mr. Myatovic from Mr. TSP's email address either to Mr. Myatovic's email address at Canaccord or to Mr. Myatovic's personal email address.

¶ 185 These email communications included the following:

- *July 6, 2008* : Email from Mr. TSP to Mr. Myatovic's Canaccord email address:

Commencing email: "hello Marco I do have internet connection. If you receive this, please confirm and if there is another email that I can email you on such as Hotmail or yahoo account. Cheers thal"

Myatovic Response from his personal email address: "Hi Thal, This is an alternate email for me. If possible give me a call tomorrow or if you are out of phone contact during the day, feel free to call me on my cell in the evening. Hope you are having a good trip. Talk to you soon, Marco"

- *July 10, 2008* :Email from Mr. TSP to Mr. Myatovic

Commencing email: "total approx. of 100,000 roll today confirmed at 1.31 and 2.09"

Myatovic Response: "Sounds good. I haven't seen any new orders this week yet, is there anything expected? I am getting saturated with some net sellers this week ..."

Mr. TSP's Response: "... there should be about \$100,000 in new orders today and tomorrow"

Myatovic Response: "Sounds good".

- *July 11, 2008*: Email from Mr. TSP's email address to Mr. Myatovic's email address

Commencing email: "marco there is up tp (sic) \$100,000 new order in the works gpi at 1.39 and ose at 2.09. roll for today is \$200,000 and gpi at .131 and ose at 2.09. call doreen as she needs to do a bunch today .... please do what it takes ..."

¶ 186 "Thal" is the diminutive form of Mr. TSP's first name.

#### *Text Messages*

¶ 187 IIROC Staff entered into evidence copies of text messages among cell phones registered in the name of Mr. Myatovic, Ms. Lowe and Mr. TSP and his wife received from the Respondents' communication provider. These text messages included the following:

- *September 22, 2008*: Text message from Ms. Lowe to Mr. TSP

Commencing text message: “what am I selling ose @?”

- *October 7, 2008*: Text message from Ms. Lowe to Mr. Myatovic

Commencing text message: “1.97 plezzzz”

- *November 4, 2008*: Text message from Ms. Lowe to Mr. Myatovic

Commencing text message: “Cheque 4 \$50,000 deposited 2day! Exchanged 4 the \$98,000”. On November 4, 2008, Mr. RL deposited \$50,000 into his company’s account at Research to deal with a debit of \$98,000 in this account. Mr. RL was not a client of Mr. Myatovic.

- *January 19, 2009*: Text message from Ms. Lowe to Mr. TSP

Commencing text message: “I got ur text! Credit is wanting verns cheque! 2 high they said!” As noted above, on January 20, 2009 Mr. VP’s cheque dated January 19, 2009 in the amount of \$85,500 was deposited into the VP Account following Mr. VP’s receipt of cheque for the same amount from Mr. RL. “Vern” is the first name of Mr. VP.

- *January 23, 2009*: Text message from Ms. Lowe to Mr. TSP

Commencing text message: “have u made plans 4 sihota cheque?” On January 26, 2009, the next business day, a cheque in the amount of \$76,700 was deposited into the Trading Account of PS.

- *February 5, 2009*: Text messages from Mr. Myatovic to Ms. Lowe

Commencing text message: “wants 2 do ose @ \$1.35”

Follow up text message: “can u cfo to .485. We have competion (sic) from TD at .49”

Follow up text message: “please go to .48 this good be our friend who is trying to get some off”

Follow up text message: “please change to .48 if u can”

- *February 24, 2009*: Text message from Ms. Lowe to Mr. Myatovic

Commencing text message: “Me@47”.

- *March 10, 2009*: Text message from Ms. Lowe to Mr. TSP

Commencing text message: “I got a call from credit regarding ur account! They want a cheque by 12 or they will sell out!”

- *March 10, 2009*: Text message from Ms. Lowe to Mr. Myatovic

Commencing text message: “I received call re our friend AC they want cheque or sell out @ 12”.

- *March 11, 2009*: Text message from Ms. Lowe to Mr. Myatovic

Commencing text message: “I have 2500 @ 38 for vern”.

- *March 12, 2009*: Text message from Ms. Lowe to Mr. TSP

Commencing text message: “Make sure u say gifting”. On March 12, 2009, 400,000 shares of OSE were transferred by journal entry from Mr. TSP’s account at Research to the Trading Account of Ms. SP.

- *July 16, 2009*: Text message from Mr. Myatovic to Mr. TSP

Commencing text message: “my order was completed today for 100k of snl. Cheers”.

¶ 188 Although the evidence before us is in the form of communication between cell phones or email addresses and does not constitute direct evidence that either Mr. TSP or the Respondents actually made or received the communication noted, from the cell phone records, Mr. Myatovic’s emails, and from the text messages produced in evidence by IIROC Staff and referred to above, we find that based upon the number of

entries before us there is clear evidence of a pattern of ongoing communication among the Respondents and Mr. TSP with respect to the trading in the shares of GPI, OSE and SNL.

### **TOQ's Reports**

¶ 189 To demonstrate the trading activity resulting from the alleged communication among the Respondents and Mr. TSP, IIROC Staff presented relevant documentation from the TOQ Reports. These TOQ Reports included any changes to order instructions such as a change former order ("CFO") or a cancel order ("CXL"). The TOQ Reports entered into evidence before us consisted of market data taken from the TSX-V for selected trading days and related to the trading of the shares of SNL, GPI and OSE.

¶ 190 IIROC Staff member, Ms. Bean, testified that for all of the Canaccord orders included in the TOQ Reports before us, the TOQ Reports contained the account numbers relating to the clients of Mr. Myatovic. However, Ms. Bean noted, it was not possible to identify clients of Ms. Lowe in this manner.

### **Canaccord Trade Tickets**

¶ 191 In addition, IIROC Staff relied on trade tickets generated by Canaccord for further confirmation of the identities of the accounts behind the trades set out in the TOQ reports. These trade tickets describe a great deal about the intended transaction. For example, the trade ticket indicates whether the ticket is a buy or sell order; the time the order is entered; the security and the number of shares; the name of the client and the client's account number; the order price; whether it is a day trade or a "good until cancelled" trade; where applicable, the date upon which the order expires; whether it's a CFO or CXL; the registered representative requesting the order; and whether or not the order was solicited. The history for the trade ticket contains such information as when the order is filled and when the order is archived. Ms. Bean, testified that with the exception of five missing tickets, she was able to match these trade tickets to the Canaccord orders in the TOQ Reports and was able to identify the clients of the missing tickets by the client account number identification on the TOQ reports.

### **Documentation from Research**

¶ 192 Trade tickets for Ms. Lowe's clients were requested from Research by IIROC Staff, but Research advised that it did not retain copies of the trade tickets requested. Therefore, to identify Ms. Lowe's clients in relation to the TOQ Reports before us, IIROC Staff entered into evidence a report from Research showing selected trading activity from January 2008 to March 2009 reflecting the trades in the shares of SNL, GPI and OSE for the sales codes assigned to Ms. Lowe by Research. In her evidence before us, Ms. Bean testified that this documentation together with subsequent clarification provided by Research personnel was sufficient to enable her to match orders placed by Ms. Lowe for the Lowe Trading Accounts with the relevant data on the TOQ's Reports.

### **The Combination Chart**

¶ 193 To assist the Hearing Panel in understanding the evidence collected and presented by IIROC Staff, as referred to above, the Combination Chart was prepared by IIROC Staff and admitted into evidence. The Combination Chart attempts to link a particular telephone communication from a telephone number relevant to one of the Respondents either to Mr. TSP or to the other of the Respondents with a particular order or trade detailed in the relevant TOQ Report. The majority of the orders listed on the Combination Chart occurred within three minutes of the particular telephone communication occurring. This three minute guideline was used as both of the Respondents in their interviews with IIROC Staff advised that they entered orders immediately after having received instructions from their clients.

¶ 194 The orders on the Combination Chart included initiating orders, CFO's, CXL's, and fills to give a complete picture of the relevant orders and trading activity in the shares of GPI and OSE.

### **Trading Activity Resulting from Communication**

¶ 195 During his interview with IIROC Staff, Mr. Myatovic denied that he had taken trading instructions for a client's account from third parties who were unrelated to this account. Similarly, during this interview, Mr. Myatovic claimed that he had no knowledge that Mr. TSP may have been attempting to influence the price or

volume of shares of GPI or OSE that were traded.

¶ 196 In the same vein, during her interview with IIROC Staff, Ms. Lowe was asked if she had ever taken orders from third parties unrelated to a client account and she replied that she had not. When asked if she had taken instructions from anyone else with respect to the Lowe Trading Accounts, she denied that she took orders or instructions from anyone other than the account holders on these accounts.

#### *Trading Activity Following Emails*

¶ 197 As referred to above, on July 10, 2008 and the next morning, July 11, 2008, there was email correspondence between Mr. Myatovic and Mr. TSP. It is to be noted that these emails referred to GPI and OSE, the numbers 1.31, and asked Mr. Myatovic to “call Doreen as she needs to do a bunch today”. Referring the Hearing Panel to the Combination Chart and the TOQ Reports for GPI for July 10<sup>th</sup> and 11<sup>th</sup>, Ms. Bean pointed out that in the afternoon of July 10<sup>th</sup>, Mr. Myatovic initiated buy orders for shares of GPI at a price of \$1.31 and also changed an existing buy order from \$1.30 to \$1.31. Later on that afternoon, Mr. Myatovic initiated three sell orders for GPI at \$1.31.

¶ 198 The July 10<sup>th</sup> email from Mr. TSP to Mr. Myatovic includes the phrase “total approx. of 100,000 roll today confirmed at 1.31”. The TOQ Reports for GPI for July 10, 2008 show that 92,100 GPI shares were traded on that date at a price of \$1.31, of which 78,900 shares were purchased for the Trading Account of Ms. SP.

¶ 199 The July 11<sup>th</sup> email from Mr. TSP to Mr. Myatovic includes the phrase “roll for today is \$200,000 and gpi at .131”. The TOQ Reports for the shares of GPI for July 11, 2008 show that 152,600 shares of GPI were traded on that date at \$1.31 for a total value of \$199,906.00, of which 30,000 were purchased by the Trading Account of Ms. SKP under Mr. Myatovic’s direction, and the balance of 114,900 shares of GPI were purchased by accounts under the supervision of Ms. Lowe, with 68,400 of these shares being purchased by the Trading Account of Ms. PS. The TOQ Reports for GPI for July 11, 2008 also disclose that the buy order entered for the Trading Account of Ms. SKP for 30,000 shares of GPI was filled in twenty minutes.

¶ 200 Ms. Bean testified that the Telephone Summary delineated the fact that Mr. Myatovic’s cell phone communicated with Ms. Lowe’s cell phone on at least five occasions on July 11, 2008, and each one of these communications was for more than three minutes. Ms. Bean directed the Hearing Panel to the TOQ Reports which showed nine initiating buy orders being entered for shares of GPI at a price of \$1.31 per share for clients of Ms. Lowe and two similar initiating buy orders for clients of Mr. Myatovic.

¶ 201 As above described, for Canaccord accounts the TOQ Reports record the Canaccord account which initiates the trading activity. A review of the TOQ Reports for July 10, 2008 and July 11, 2008 detailing the buy orders for the shares of GPI or OSE referred to above did not record the account number of Mr. TSP’s account at Canaccord. Nor did a review of Mr. TSP’s account statement for his Canaccord Account reflect any trades in the shares of GPI or OSE on July 10<sup>th</sup> or 11<sup>th</sup> 2008.

#### *Trading Activity Following Text Messages*

¶ 202 September 22, 2008 As referred to above, on September 22, 2008, Ms. Lowe sent a text message to Mr. TSP asking “what am I selling ose @?”. This text message was sent to Mr. TSP at 12.06.

¶ 203 The Telephone Summary shows a conversation between Ms. Lowe’s cell phone and Mr. Myatovic’s cell telephone on that date commencing at 12:16 and lasting for approximately 21 minutes until approximately 12:37. The TOQ Reports for OSE for September 29, 2008 show that at 12:31 on this date, a sell order was entered for the Trading Account of Mr. RDB at Canaccord to sell 49,000 shares of OSE at a price of \$1.99. This sell order was filled completely in one minute through three buy orders by other firms.

¶ 204 The Telephone Summary records a subsequent telephone call on that date between Ms. Lowe’s cell phone and Mr. TSP’s cell phone at 12:38 and then the TOQ Reports for the shares of OSE for that date shows a sell order being entered for 35,000 shares of OSE at \$1.99 per share at 12:39. 2,000 shares of this order were purchased for the Trading Account of Ms. SKP, leaving a balance of 33,000 shares. Following a subsequent telephone call from Mr. TSP’s cell phone to Ms. Lowe’s cell phone at 12:39, a CFO for this sell order was

entered to increase the offering price from \$1.99 to \$2.00.

¶ 205 Then at 12:39 there was a call between Mr. Myatovic's telephone and Ms. Lowe's cell phone lasting for about 2 minutes. At 12:40 the TOQ Reports for OSE show that the outstanding order for 33,000 shares was cancelled and a new order to sell 35,000 shares of OSE at \$2.00 per share was immediately entered. Of this order, 32,500 shares were purchased for the Trading Account of Ms. SKP and 900 shares for another client. The balance of the order of 1,600 shares was cancelled at 12:42 following a call from Mr. TSP's cell phone to Ms. Lowe's cell phone at 12:41.

¶ 206 October 7, 2008. As referred to above, on October 7, 2008, Ms. Lowe sent a text to Mr. Myatovic stating "1.97 plezzzz". Two minutes after this text message had been received on Mr. Myatovic's telephone, Mr. Myatovic entered a CFO for the sell order of 3,000 shares of OSE for Ms. SP from \$1.99 to \$1.97. The TOQ Reports for OSE for October 7, 2008 shows that two minutes after Mr. Myatovic entered his change order, Ms. Lowe entered a buy order for 3,000 shares of OSE at \$1.97 for an account other than one of the Lowe Trading Accounts. These orders were matched and a trade completed.

¶ 207 February 5, 2009. As referred to above, on February 5, 2009, the following text message was sent from Mr. Myatovic's cell phone to Ms. Lowe's cell phone: "wants 2 do ose @ \$1.35". There is nothing in the evidence before us to indicate who "wants" to do this trade.

¶ 208 In any event, this text message was sent to Ms. Lowe's cell phone at 11:18 on February 5<sup>th</sup>. At 11:22, four minutes after receipt of the text message, the TOQ Reports for OSE for February 5, 2008 reflect that that Mr. Myatovic entered a sell order referencing the Trading Account of Mr. RDB to sell 75,000 shares of OSE at \$1.35 per share. These TOQ Reports then show that over the next hour Research purchased these 75,000 shares of OSE at \$1.35 per share for the Trading Account of Mr. TSP.

¶ 209 In addition on February 5, 2009, the following message was sent from Mr. Myatovic's cell phone to Ms. Lowe's cell phone at 11:32: "can u cfo to .485. We have competition (sic) from TD at .49". At 11:35, Ms. Lowe entered a CFO changing the sell order for the Trading Account of Ms. PS for 190,000 shares of GPI to an offering price of \$0.485 per share. Following this, at 11:40 and at 11:42 the Ms. SP Trading Account overseen by Mr. Myatovic purchased 40,000 shares and 30,000 shares, respectively, of GPI at \$0.485 per share.

¶ 210 Then at 11:44 and at 11:54, respectively, the following text messages were sent from Mr. Myatovic's cell phone to Mr. Lowe's cell phone: "please go to .48 this good be our friend who is trying to get some off" and "please change to .48 if u can". At 11:55 according to the TOQ Reports for the shares of GPI for February 5, 2009, the sell order referred to above, now reduced from 190,000 shares to 120,000 shares of GPI, had a CFO entered which reduced the offering price of the GPI shares to \$0.48. At 11:57 the TOQ Reports show that 50,000 shares of GPI were purchased by the Ms. SP Trading Account at a price of \$0.48 per share.

¶ 211 February 24, 2009. The TOQ Reports for GPI for February 24, 2009 show that at 10:55 a sell order for 37,000 shares of GPI was placed by Ms. Lowe at a price of \$0.47 per share. The text message from Ms. Lowe to Mr. Myatovic referred to above stating "Me@47" was sent to Mr. Myatovic's cell phone at 10:53. One may well ask why Ms. Lowe is advising Mr. Myatovic that it is her order at \$0.47 when Mr. Myatovic can see from his trading screen that Research has this order entered. From the evidence on Ms. Lowe's trading accounts, it appears that this order is entered for the account of Ms. Lowe's brother and another of her clients.

¶ 212 In any event, the TOQ Reports for GPI for February 24, 2009 show that at 11:36, Mr. Myatovic entered a sell order for the Trading Account of Ms. DS to sell 110,000 shares of GPI at a price of \$0.46 per share. This sell order was filled within the next 21 minutes following a number of trades. Subsequently, Ms. Lowe's sell order for 37,000 shares of GPI at \$0.47 was filled to the extent of 14,000 shares at \$0.47, a price higher than the immediately previous trading prices in which Mr. Myatovic had been involved, whereupon a CFO was entered changing the price to \$0.45 and of the balance of the order, all but 4,500 shares were sold at \$0.45.

¶ 213 March 11, 2009. On March 11, 2009, the following text message was sent from Ms. Lowe's cell phone to Mr. Myatovic's cell phone: "I have 2500 @ 38 for vern". Ms. Bean testified that her review of Ms. Lowe's trading records demonstrated that following an initial order to purchase 2,500 shares of GPI at a price of \$0.38,

2,500 shares of GPI were purchased for the VP Account on March 11, 2009 at a price of \$0.37.

¶ 214 July 16, 2009. As referred to above, on July 16, 2009 the following text message was sent from Mr. Myatovic's cell phone to Mr. TSP's cell phone at 13:09 stating: "my order was completed today for 100k of snl. Cheers". The TOQ Reports for the shares of SNL show that on July 16, 2009 at 12:25, Canaccord entered a day order for 100,000 shares of SNL for a client of Mr. Myatovic who was not Mr. TSP. The trade ticket for this trade was marked "solicited" and the order was filled immediately upon entry. Mr. TSP did not have trading authority for this account and when in his interview with IIROC Staff Mr. Myatovic was queried as to why he was confirming the order with Mr. TSP, Mr. Myatovic claimed he did not know why he would convey this confidential client information to Mr. TSP. This order was the only order entered by Canaccord for shares of SNL on July 16, 2009.

#### *Trading Activity Following Telephone Calls*

¶ 215 The Combination Chart listed 348 orders entered for the selected dates for the shares of GPI and OSE occurring between April 22, 2008 and March 18, 2009. Of these 348 orders, 165 were entered for clients of Mr. Myatovic and 183 were entered for clients of Ms. Lowe.

¶ 216 As above set out, these orders were selected as being entered during or within three minutes of completion of specified telephone calls. Ms. Bean testified that very few of these orders resulted in trades in the accounts owned by Mr. TSP at Canaccord and Research.

¶ 217 Ms. Bean further testified that in reviewing the telephone records relevant to the Respondents and Mr. TSP for the purpose of assembling the Telephone Summary and the Combination Chart, she found no evidence of telephone communication between the Respondents and the holders of the Trading Accounts.

¶ 218 In reviewing the orders listed in the Combination Chart, Ms. Bean felt that there were an unusual number of CFO or CXL orders entered together with day orders entered shortly before market close. She noted that often orders were filled immediately after entry, and that there were situations where although the size of the orders entered were much larger than the bid on the other side they still were still filled. All of these actions suggested to her a pre-arrangement.

¶ 219 During the Hearing, counsel for Mr. Myatovic introduced into evidence telephone records resulting from a calling card used by Mr. Myatovic while he was employed by Canaccord, but which were not part of the records originally obtained and reviewed by IIROC Staff. Ms. Bean reviewed these records and testified that of the 164 orders entered by Mr. Myatovic above referred to, 14 of them were preceded by telephone communication to account holders of the Myatovic Trading Accounts.

¶ 220 Of the 348 orders set out in the Combination Chart, counsel for Ms. Lowe asked Ms. Bean to identify on the Combination Chart only those trades whereby in her opinion it was evident from the TOQ Reports that one party to that particular trade had advance knowledge of an existing order which if matched by the new order resulted in a trade. The term used for this type of trade was a "pre-arranged trade". Specifically, Ms. Bean was asked to identify trades which would appear to result from an agreement between any of Mr. TSP, Mr. Myatovic and/or Ms. Lowe. Using these criteria set by counsel for Ms. Lowe, counsel for Ms. Lowe submitted that Ms. Bean identified on the Combination Chart 45 such trades for shares of GPI and 15 such trades for shares of OSE.

#### **Trading Accounts Significant Source of Trading**

¶ 221 The total number of GPI shares traded during the period from April 1, 2008 until March 31, 2009 on the TSX-V was 26,281,200 shares. The total number of shares of OSE traded during that period was 17,923,000 shares. The account statements for the 12 Trading Accounts for that period reveal that 18,264,200 shares of GPI and 12,703,700 shares of OSE were traded through these accounts during this period.

¶ 222 It is to be noted that the trading data from the account statements of the Trading Accounts reflect settlement date data and not trading date data. This difference we do not consider significant. It must also be noted that some of the trades in the account statements from the Trading Accounts could be matched trades. In

other words, both the buy side and the sell side of the trade is reflected in the account statements from the Trading Accounts. Obviously therefore, if all of the trades reflected in the account statements from the Trading Accounts were matched trades, there would be a complete double counting of the trading data.

¶ 223 It is further to be noted that the above figures include only trading data obtained from the account statements of the Trading Accounts. It does not include data from the trading accounts of Mr. TSP at either Research or Canaccord.

¶ 224 However, despite our inability to determine precisely which of the trades reflected in the account statements from the Trading Accounts were matched, the comparison of these data is rather revealing. If there was no matching of trades, over the twelve month period from April 1, 2008 until March 31, 2009, 69.5% of the total trading volume of GPI shares traded on the TSX-V were traded through the Trading Accounts. Similarly, if there were no matched trades, over this twelve month period 70.9% of the total trading volume of OSE shares traded on the TSX-V were traded through the Trading Accounts.

¶ 225 On the other hand, if every one of the trades was matched, a scenario which we know was not the situation, over the twelve month period from April 1, 2008 until March 31, 2009, these trading numbers would be reduced to 45.6% of all GPI shares and 36.5% of all OSE shares traded on the TSX-V being traded through the Trading Accounts. The irony with this observation is that the greater the number of trades matched within the Trading Accounts, although demonstrating a lower percentage of the overall trades, the further the evidence of manipulative or suspicious trading.

¶ 226 A more detailed analysis of the trading in the shares of GPI and OSE demonstrates that for 2008 the Myatovic Trading Accounts were responsible for 30.85% of the purchase of GPI shares, while the Lowe Trading Accounts were responsible for 14.49% of the GPI purchases. On the sell side during this time period, the Myatovic Trading Accounts were responsible for 14.09% of the GPI shares sold and the Lowe Trading Accounts were responsible for 4.18% of the sales.

¶ 227 For the trading of the shares of OSE during 2008, this analysis reveals that the Myatovic Trading Accounts were responsible for 22.87% of the purchases of OSE shares while the Lowe Trading Accounts were responsible for 6.56% of these purchases. For sales of OSE shares, the Myatovic Trading Accounts were responsible for 27.42% of these sales and Lowe's Trading Accounts were responsible for 7.72% of all sales.

¶ 228 For the twelve month period from April 1, 2008 until March 31, 2009, of the 26,281,200 GPI shares traded on the TSX-V, the Trading Accounts purchased 11,984,200 shares accounting for 45.6% of the purchases of these shares and sold 6,280,000 shares accounting for 23.9% of the sales. A similar comparison for the 17,923,000 shares of OSE traded on the TSX-V during this period shows that the Trading Accounts purchased 6,548,100 shares, accounting for 36.5% of the purchases, and sold 6,155,600 shares, accounting for 34.4% of the sales.

¶ 229 In summary, even accounting for the possibility that some of the trading data from the account statements of the Trading Accounts constituted double counting in that they were matched trades, the data above set out clearly demonstrates that the Trading Accounts accounted for a significant source of the trading in the shares of GPI and OSE between April 1, 2008 and March 31, 2009.

### **Difference in Trading Volumes and Share Prices**

¶ 230 Also entered into evidence was the trading volume of the shares of GPI and OSE on the TSX-V from July 2007 until March 31, 2009. During the last six months of 2007, this trading volume ranged from a low of approximately 5,000 shares traded per month to a high of approximately 79,000 shares traded per month. However, during the period from January 2008 until March 31, 2009 the volume of OSE shares traded increased markedly from a monthly low of approximately 220,000 shares to a monthly high of almost 4 million shares.

¶ 231 Prior to January 2008, the monthly volume of the shares of GPI trading on the TSX-V ranged from a monthly low of approximately 600,000 shares per month to a monthly high of approximately 1.6 million shares in December 2007. As with the shares of OSE, during the period from January 2008 until March 31, 2009, the

monthly volume of GPI shares trading on the TSX-V increased markedly ranging from a monthly low of approximately 500,000 shares increasing to a monthly high of approximately 3.8 million shares traded during March 2009.

¶ 232 Between June and December 2007, the shares of OSE traded on the TSX-V at prices ranging from a low of \$0.15 to a high of \$0.95. During most of 2008, the OSE shares traded at a price of approximately \$2. However, by March 2009, when the trading activity in the Trading Accounts at both Canaccord and Research was restricted due to compliance concerns as referred to below, this price fell to less than \$0.10. For the shares of GPI, the price reached a high of \$1.54 in April 2008, but fell to \$0.08 by March 2009 with the restriction in the Trading Accounts at Canaccord and Research.

¶ 233 Similarly with the shares of GPI. Between June and December 2007, the shares of GPI traded on the TSX-V at prices ranging from a low of \$0.88 to a high of \$1.10. In January 2008 the month end closing price for the shares of GPI on the TSX-V was \$0.95. During 2008, this closing price increased to a high of \$1.54 in May 2008. However, by March 2009, when trading activity in the Trading Accounts at both Canaccord and Research was restricted, this price fell to less than \$0.10.

¶ 234 Although there is no doubt that by March 2009 there was a severe downturn in the prices of shares of most junior resource companies trading on the TSX-V, a decrease from a high of \$1.54 to a price of \$0.08 for the shares of OSE and a decrease from a high of \$1.10 to a price of less than \$0.10 for the shares of GPI over an eleven month period lends credence to the allegation that there was more than market forces affecting the prices of these shares.

### **Purpose of Trading Accounts**

¶ 235 A review of the account statements for the Trading Accounts for period from April 1, 2008 to March 31, 2009 clearly demonstrates that trades in securities other than shares of GPI or OSE occurred very infrequently and always for a minimal amount.

¶ 236 This observation leads IIROC Staff to submit that the primary purpose of the Trading Accounts was to enable what IIROC Staff alleges is suspicious and manipulative trading activities in the shares of GPI and OSE.

### **Funding of Trading in Trading Accounts**

¶ 237 The account statements for the Trading Accounts for the period from April 1, 2008 until March 31, 2009 reveal that the total dollar value of the shares of GPI traded through these accounts during this period was \$10,392,400. For OSE it was \$8,964,100. This resulted in a total trading value for the shares of both companies of \$19,356,500.

¶ 238 The account statements show that during this twelve month period, the total of the cash deposits made into these accounts amounted to \$6,155,900. Allowing for expenses charged against these accounts, such as interest or fees, these cash deposits accounted for approximately 32.7% of the total purchases made through these accounts. This of course meant that the balance of the trading value, or approximately 67.3%, was funded by selling activities.

¶ 239 During most of this twelve month period, the market value of the shares of GPI and OSE was decreasing which, in turn, was likely a contributing factor to debit balances in the Trading Accounts caused by the “rolling” activity and uneconomic trading patterns of trading in the shares of GPI and OSE. The debit balances experienced by Mr. VP in the VP Account is illustrative of this occurrence.

### **Re-Aging of Debit Balances**

¶ 240 As was referred to above, during most of the twelve month period from April 1, 2008 until March 31, 2009, the market prices of the shares of GPI and OSE were falling. However, during that time period there continued to be substantial activity in the Trading Accounts resulting in trading losses. Some of these trading losses were covered by cash deposits as referred to above, but in the majority of situations selling occurred at the end of an accounting period bringing the account back in order for reporting. Once the end of the accounting period had occurred, new trading was undertaken and the account went back into a debit position.

¶ 241 IIROC Staff entered into evidence a review of the trading activity which occurred in the Myatovic Trading Accounts based upon account statements from these accounts for the period from April 2008 to January 2009. This review demonstrated that apart from the account of Mr. ASP, the Trading Accounts regularly demonstrated overdue debits, some of which debits were quite large.

¶ 242 The re-aging technique used for these accounts was that some of the accounts would sell OSE and purchase GPI, while other accounts would do the opposite, selling GPI and purchasing OSE.

¶ 243 For example, based upon settlement date trading the account statement for the Trading Account at Canaccord for Mr. RDB for August 2008 showed an opening debit balance of approximately \$39,000. On August 1, 2008 this debit was paid off by selling shares of GPI at \$1.36 per share. On the same day, shares of OSE were purchased at a price of \$2.01 per share resulting in a new debit balance of approximately \$91,000. To cover the new debit balance, the account sold GPI shares on August 15, 2008 at \$1.18 and \$1.19 per share, but purchased additional OSE shares in the days following to create a new debit balance of \$98,000. This debit balance was covered by selling shares of GPI on August 26, 2008 and August 29, 2008 at \$1.17 and \$1.18 per share, but then shares of OSE were purchased resulting in a month end debit balance of approximately \$95,000. Due to the activity in this account, the month end debit balance was considered to be only two days old. It is to be noted that during the period of this trading, when the debit balance in the account increased from approximately \$39,000 to approximately \$95,000, there was no cash brought to the account, and the activity in the account focused on selling shares in GPI and buying shares of OSE.

¶ 244 It is also to be noted that the account statement for this Trading Account for June 2008 showed that two months earlier this account was a net purchaser of 63,500 shares of GPI at prices ranging from \$1.40 to \$1.51 having purchased 105,500 shares and having sold 42,000 shares during this month.

¶ 245 In contrast to the activity in the Mr. RDB account, the trading activity in the Trading Account of Ms. SKP based upon settlement date trading as set out for the monthly statement of this account for August 2008 showed selling of shares of OSE and buying of shares of GPI. The account started the month with a debit balance of approximately \$88,000 and ended the month with a debit balance of approximately \$98,000. A bank draft drawn on the Toronto Dominion Bank in the amount of \$13,500 was deposited on August 19, 2008. During the month of August 2008, 87,900 shares of OSE were sold for prices ranging from \$2.01 to \$2.04 and 164,600 shares of GPI were purchased at prices ranging from \$1.15 to \$1.33. For this account the debit balance was re-aged by selling OSE shares and by purchasing GPI shares.

¶ 246 This pattern of activity was demonstrated to occur during other months from April 2008 to January 2009 from the account statements of the other Myatovic Trading Accounts entered into evidence before us.

¶ 247 For the Lowe Trading Accounts at Research the re-aging process was different from that carried on in the Myatovic Trading Accounts at Canaccord. The Lowe Trading Accounts would purchase and sell shares of GPI and OSE and create debit balances within the calendar month. In most cases the debit balances would be settled towards the end of the month by selling securities. But at month end the account would purchase securities for settlement at the commencement of the next calendar month. Therefore, although the account was really in a trade date debit at the end of the month, settlement date did not occur until the start of the following month giving the month end account statement a credit balance, or a negligible debit balance.

¶ 248 For example the account statement dated August 31, 2008 for the Trading Account for Mr. RDB at Research showed that this account started the month with a credit balance of \$697.70. On August 1, 2008, this account purchased 65,200 shares of GPI at \$1.30 per share, immediately putting it into a debit position. Later on during the month, 140,700 shares of GPI at prices ranging from \$1.20 to \$1.31 were sold from this account, with 75,000 of these shares being recorded as sold as of August 29, 2008. 44,900 shares of OSE were purchased at \$2.00. Therefore, the account ended the month in a credit position of \$101.37 with no cash being deposited into the account during the month.

¶ 249 However, 43,000 shares of OSE were purchased at month end for settlement in September 2008, so that the actual closing debit after settlement for this account was in fact the debit amount of \$85,692.63 rather than the small credit of \$101.37.

¶ 250 As referred to above, the VP Account regularly accumulated debit balances. Unlike the re-aging transactions which went on in the other Trading Accounts, these debit balances as outlined above were cleared by the deposit of bank drafts drawn on the Toronto Dominion Bank. Mr. VP claims to have no knowledge of the five deposits totaling \$295,100 deposited to the VP Account between July 2008 and December 2008. However, as the responsible registered representative for the VP Account, Ms. Lowe was aware of these debit balances. Indeed, in their interviews with IIROC Staff, both Ms. Lowe and Mr. Myatovic confirmed that they regularly reviewed the Trading Accounts under their administration and were aware of outstanding debit balances in these accounts.

### **Compliance Concerns**

¶ 251 In March of 2009, the trading activity in the Myatovic Trading Accounts at Canaccord began to trouble Canaccord's compliance department to the extent that in the middle of that month it ordered a liquidation of the shares in these accounts to clear their debit balances.

¶ 252 In an email dated March 12, 2009 requiring this liquidation, Canaccord's compliance department noted that the Trading Account of Ms. SKP purchased shares of OSE and sold the same shares to cover the debit, observing that "That is not a proper settlement".

¶ 253 The compliance concerns at Research started quite a bit earlier with evidence before us of some of them coming to light in 2007. However, in July of 2008, Research's compliance department raised specific concerns about the "cross" trading activity between accounts held by a closely knit group who were all associated with the companies whose shares were being traded.

¶ 254 Between August 29, 2008 and December 2, 2008 the Branch Manager role at Research was filled by Mr. Andrew Dunlop. During this time, Research's compliance people were concerned about the trading in the shares of OSE, GPI and SNL in certain accounts under Ms. Lowe's supervision, including the Lowe Trading Accounts. In an email dated October 21, 2008 Research's Senior Compliance Officer cautioned that an analysis of the trading in the shares of SNL, GPI and OSE suggested that these securities were "being traded only by a small group of individuals that are somehow connected to the companies themselves and/or insiders of these companies".

¶ 255 On October 27, 2008, this compliance officer wrote the following email to Ms. Lowe:

"Hi Doreen,

The trading for OSE/GPI/SNL in the accounts mentioned below is rather concerning. The answers you provided are helpful but do not entirely eliminate the issue. There appears to be a small group of clients which include insiders and individuals who are "affiliated" to the insiders, trading these very thinly traded securities, between and amongst each other, for no or very little economic gain. Since this type of pattern is suspect to the Regulators, we recommend that you divest yourself of these accounts and trading in these securities by these individuals cease. Again, there is no activity or transaction that has breached any particular rule or regulation, however, as you must be aware of by now, such patterns of trading have been the focal point of many Regulatory investigations that include, as of very recently US policing authorities as well.

It is also important that you as an IA and as a registrant, remember that although you are receiving "unsolicited" orders, you still have an obligation to act as "Gatekeeper", meaning that it is your responsibility to know and understand why your clients are trading these securities and for what purposes (other than to make money as it is a general understanding that individuals invest in the market to make a profit). If you choose to keep these accounts, please ensure that your gatekeeper responsibilities are fulfilled and that you note the aspects of these conversations with your clients so that they may be relied upon in the future if need be. If you have any questions now, or at any time, please feel free to contact Compliance for direction. Let me know if you wish to continue business with these accounts (monitoring their activities as explained above), or if you wish to ask these accounts to close their activities at RCC as some time in the future."

¶ 256 Later in the day on October 27, 2008, Ms. Lowe responded to this email with the following email:

“I understand as an IA where my obligations are and my role as a “GATEKEEPER”.

I have been dealing with all these clients for years and met them at many of times, I know they have all been investors for years on these companies, a lot of their stock is from private placements, so their cost is very low. I know I can always rely on them in the future, it is all about “know your client rule”.

Also, I feel I have followed all rules concerning cash account rules (cheques do always come in to cover o/s debt) pertaining to the debt/equity.

.....

I thank you for the email and your concerns, and I will continue to do my best to act as roll of a Gatekeeper.”

¶ 257 It is to be noted in passing that Mr. VP was one of the parties referred to in these emails. Mr. VP’s testimony before us was that upon opening the VP Account on Mr. TSP’s instructions, he dealt with Ms. Lowe by telephone and email and did not meet her in person until well after the date of these emails.

¶ 258 It would appear that these emails did not have the desired effect as by an email dated October 30, 2008, Mr. Dunlop, the acting branch manager, advised Ms. Lowe that effective October 31, 2008, Ms. Lowe was instructed that although she could accept sell orders from her clients, she was not to accept any buy orders for the shares of GPI, OSE or SNL. Ms. Lowe sought relief from this restriction by appealing without success to Research’s VP of Compliance.

¶ 259 Thus this restriction on Ms. Lowe’s trading remained in place until Mr. Dunlop’s role as acting branch manager was assumed by Mr. Justin Ahrens as the newly appointed branch manager on December 2, 2008. On December 4, 2008, Mr. Ahrens removed this trading restriction on the basis that Ms. Lowe had agreed to abide by certain due diligence undertakings arising from her responsibility as a gatekeeper.

¶ 260 Prior to the imposition of this trading restriction, Ms. Lowe was working with a specific trader at Research. This trader had initially assisted Ms. Lowe in the trading of shares of SNL, GPI and OSE in the Lowe Trading Accounts. However, when he started questioning the number of times that orders for these shares were filled immediately for orders he was placing for Ms. Lowe related to the Lowe Trading Accounts, Ms. Lowe terminated the relationship. He described the practice of Ms. Lowe whereby he was instructed to work with large blocks of these shares which would be “iceberged” with only a portion of the block being exposed to the market. What was unusual was that when a disclosed portion of the iceberged order was filled and the next portion shown, this new portion was often executed right away.

¶ 261 It appears that Research Compliance and Credit were not happy with how Ms. Lowe carried out her due diligence undertakings as on March 23, 2009 a direction came from Research Compliance and Credit as a result of the debit balances to liquidate the Lowe Trading Accounts and a restriction was placed on the Lowe Trading Accounts to the effect that any purchases of shares of SNL, GPI or OSE would require cash in advance.

### **Commissions Generated By the Trading Accounts**

¶ 262 To demonstrate the Respondents’ reliance on the Trading Accounts to generate commission income for the Respondents’ benefit, IIROC Staff introduced into evidence reports prepared by the Respondents’ employers for the calendar year 2008 constituting summaries of the trading activities initiated by the Respondents during calendar 2008 and the gross commissions generated thereby.

¶ 263 From the monthly IA/Branch Reports prepared by Canaccord and reporting the trades completed by Mr. Myatovic for that month, it was possible to calculate the percentage of gross commissions generated by the trading of the shares of GPI and OSE in the seven Myatovic Trading Accounts. These calculations demonstrate that during calendar 2008 more than 50% of the gross commissions earned by Mr. Myatovic in that calendar year were earned from trading in the shares of GPI and OSE. More definitively, of Mr. Myatovic’s more than 600 clients, the seven clients represented by the Myatovic Trading Accounts generated almost 40% of the gross commissions earned by Mr. Myatovic in that year. And this 40% figure does not include commissions

generated from trading in Mr. TSP's account.

¶ 264 In other words, for calendar 2008 the seven clients representing the Myatovic Trading Accounts, or 1% of his total client base, generated almost 40% of the total gross commissions earned by him in that year, and this was in trading only two stocks – GPI and OSE.

¶ 265 Similar calculations were made for Ms. Lowe for calendar 2008 based upon documentation supplied to IIROC Staff by Research. These calculations showed that 42% of Ms. Lowe's gross commissions earned that year were generated by trading in the shares of GPI and OSE. These calculations did not break out the trading in GPI and OSE which were generated from the Lowe Trading Accounts, but rather reflected all the trading in the shares of GPI and OSE for which she was responsible. However, what these calculations did show was that during November 2008, the period referred to above when Ms. Lowe was restricted from buying shares in OSE or GPI, the amount of gross commissions earned by her during that time period fell to approximately one third of what she might have otherwise been expected to generate during that period.

¶ 266 It is obvious from these calculations that the income of the Respondents for the calendar year 2008 was substantially composed of the commissions generated by the trading of the shares of GPI and OSE.

### **Submissions of IIROC Staff on Counts 1 and 2**

¶ 267 IIROC Staff alleges that Mr. TSP was the principal participant and orchestrator of certain suspicious and manipulative trading activities in the shares of GPI, OSE and SNL

¶ 268 These trading activities were conducted under the direction of Mr. TSP, the acquiescence of the holders of the Trading Accounts, and the willing assistance of the Respondents through various accounts under the Respondents' administration, including the Trading Accounts. In fact, IIROC Staff submits, the Trading Accounts were no more than nominee accounts for Mr. TSP where he beneficially owned the securities in these accounts and controlled the trading activity therein.

¶ 269 In addition, IIROC Staff submits that the evidence clearly points to Mr. TSP as the directing mind behind the deposits of the Toronto Dominion bank drafts into the VP Account to address outstanding debit balances in this account. As the registered representative responsible for the VP Account, IIROC Staff alleges that Ms. Lowe failed in her obligation as a gatekeeper to not question why such sizeable sums were deposited into the VP Account in bank drafts drawn from bank branches not near Mr. VP's home or place of employment and upon a bank with which Mr. VP did not deal.

¶ 270 By enabling Mr. TSP to carry on these suspicious and manipulative trading activities, it is IIROC Staff's position that the Respondents failed in their most basic duties and responsibilities as gatekeepers to the investment industry.

¶ 271 In their submissions, IIROC Staff counsel point to the discrepancies between the evidence given by Mr. Myatovic and Ms. Lowe as to the frequency of communication between them. Mr. Myatovic suggesting that it was infrequent, Ms. Lowe stating otherwise.

¶ 272 Similarly with respect to Mr. Myatovic's relationship with Mr. TSP. IIROC Staff claims that in his interview, Mr. Myatovic downplayed the frequency of his communication with Mr. TSP. It is the position of IIROC Staff that Mr. Myatovic in his interview misled IIROC Staff as to the frequency of his contact with Ms. Lowe and Mr. TSP in order to conceal his relationship with Mr. TSP.

¶ 273 It is the submission of IIROC Staff that the credibility of the Respondents is in issue. Despite the Respondents' repeated assertions of never having taken orders from any individual other than the account holders of the Trading Accounts, the text messages clearly demonstrate that such was not the case. The frequent telephone contact between cell phones associated with the Respondents and Mr. TSP and the orders entered either during or after this contact contradict these assertions. Similarly, the email correspondence between Mr. Myatovic and Mr. TSP gives further lie to these assertions.

¶ 274 IIROC Staff submit that the Respondents are not credible and that the Respondents' self-serving denials and assertions made during their interviews with IIROC Staff should be given no weight.

¶ 275 Based upon the evidence of the cell phone contact, the emails and the text messages, it is the position of IIROC Staff that the Respondents, registered representatives in two different cities, were actively assisting Mr. TSP in influencing the trading in the shares of GPI and OSE. Further, IIROC Staff submit, that the emails of July 10<sup>th</sup> and 11<sup>th</sup> 2008 between Mr. Myatovic and Mr. TSP and the subsequent trading activity in the shares of GPI and OSE demonstrate that the Respondents took instructions from Mr. TSP for orders in accounts of their clients, including the clients holding the Trading Accounts. IIROC Staff submit that it is open for the Hearing Panel to find that Mr. TSP was in fact directing the trades in the Trading Accounts and likely some of the trades in other accounts under the Respondents' administration. IIROC Staff goes further to submit that Mr. TSP and the Respondents treated the Trading Accounts as merely conduits to trade shares in GPI and OSE.

¶ 276 In alleging that this trading activity was part of an overall promotional scheme orchestrated by Mr. TSP, it is IIROC Staff's position that the Respondents facilitated this trading activity to create the illusion of an active market in GPI and OSE. Evidence of this scheme is demonstrated by five main effects. Firstly, the trading volumes of the shares of OSE and GPI. Secondly, by the concentration of these securities in the Trading Accounts. Thirdly, by a systematic re-aging of the debits and lack of timely settlement in the Trading Accounts. Fourthly, the compliance concerns voiced by both Canaccord and Research and the eventual restrictions imposed by these firms on the trading activity in the Trading Accounts. And, fifthly, the large amount of commission income earned from the trading in these shares relative to the other business of the Respondents during the same time period. These five effects are expanded on as follows:

1. *Trading Volumes*

¶ 277 With respect to the trading of the shares of OSE and GPI through the Trading Accounts relative to the entire trading of these securities on the TSE-V during the period in question, IIROC Staff submits that it was apparent that the trading in the shares of GPI and OSE emanating from the Trading Accounts exerted a considerable influence over an illiquid market for these securities and created an illusion of an active market for them.

2. *Concentration*

¶ 278 Moreover, given the concentration of and active trading in the shares of GPI and OSE in the Trading Accounts to the almost exclusion of other securities, IIROC Staff submits that the primary purpose of the Trading Accounts was to enable the suspicious and manipulative trading activities in the shares of GPI and OSE.

3. *Re-Aging*

¶ 279 In addition, IIROC Staff alleges, the Respondents orchestrated the extensive and systematic re-aging of overdue debit balances in the Trading Accounts to evade detection of these debit balances in the Trading Accounts by compliance and credit personnel at Research and Canaccord. If the Respondents had been innocent bystanders of this activity, the persistent overdue debits should have been red-flags that should have prompted the Respondents to make further inquiries and to deal with the practice rather than to assist in its continuation.

¶ 280 Indeed, IIROC Staff submits, the Respondents willfully ignored the red-flags because the Respondents were fully aware of the fact that the Trading Accounts were in reality nominee accounts run by Mr. TSP and by so ignoring their responsibilities permitted the Trading Accounts to generate significant market activity in the shares of GPI and OSE with very little cash involved. IIROC Staff submits that on the evidence it is open to the Hearing Panel to find that each of the Respondents took active and deliberate steps to ensure trading activities in the Trading Accounts could take place with such little cash.

4. *Compliance Concerns*

¶ 281 IIROC Staff points to the concerns voiced by the compliance departments of both Canaccord and Research and discussed above.

5. *Commissions*

¶ 282 It is IIROC Staff's further submission that the Respondents' incomes during the material time were heavily dependent upon the trading activities of accounts and issuers related to Mr. TSP and that the commissions earned by the trading activities involving the shares of GPI and OSE were a key factor in leading the Respondents to willfully disregard their gatekeeper duties and to actively facilitate the impugned trading activities for Mr. TSP.

¶ 283 In summary, IIROC Staff alleges that the overwhelming evidence is that most of the orders and trades in the shares of GPI and OSE were directed by Mr. TSP or one of the Respondents with little or no involvement from the holders of the Trading Accounts. IIROC Staff submits that the Respondents were clearly acquiescent to Mr. TSP's scheme and took active roles to facilitate that scheme. The Respondents ought to have known that the trading created a false impression of market activity and ought to have made further inquiries when a group of related clients were buying and selling the same shares, incurring large debit balances, re-aging the debits, and creating significant volumes in the market. The absence of these inquiries, IIROC Staff submits, is a clear indication that the Respondents facilitated the scheme orchestrated by Mr. TSP.

### **Submissions of Mr. Myatovic on Count 1**

#### *Lack of Direct Evidence*

¶ 284 Counsel for Mr. Myatovic in his closing submissions stresses the lack of evidence of intent to manipulate the market or the effect of the trades in the shares of GPI and OSE on the market. In addition, he notes that there are allegations of the Respondents taking instructions from an individual who is not the account holder without any direct evidence or testimony from the particular account holder.

¶ 285 Specifically, counsel submits that there was no effort made by IIROC Staff to determine whether the holders of the Myatovic Trading Accounts may have been calling from phone numbers not listed in Canaccord's documentation or otherwise recorded by Myatovic. His position is that it is probable that the account holders may have called from numbers other than those searched for by IIROC and that these account holders should have been before us to give evidence as to whether or not they did indeed give Mr. Myatovic instructions.

¶ 286 Nor was there any direct evidence from the Member Firms on the other side of the trades of the shares of GPI and OSE which are referred to in the Combination Chart.

#### *No Complaints*

¶ 287 With respect to the allegation by IIROC Staff that the account holders of the Myatovic Trading Accounts were merely nominees, counsel observes that there is before us no evidence of complaints by these account holders of the trading activity in their accounts or of the losses that were incurred in these accounts from the trading in the shares of GPI and OSE.

¶ 288 In addition, some of these account holders had online access to their accounts and were perfectly capable of knowing what was going on in their accounts by observing their accounts online and not requiring direct contact with Mr. Myatovic.

#### *Market Volatility*

¶ 289 Commencing during 2008, the evidence before us demonstrates that there was a great deal of market volatility, especially among shares of junior resource issuers. This volatility, counsel submits, might explain at least a portion of the data on the trading in the shares of GPI and OSE before the Hearing Panel.

#### *No History*

¶ 290 Mr. Myatovic's counsel notes that Mr. Myatovic has not before faced any disciplinary allegations by IIROC Staff.

#### *Negligent Conduct Not Sufficient*

¶ 291 Mr. Myatovic's counsel points out that a finding of negligent conduct alone is not sufficient grounds for finding a breach of Dealer Member Rule 29.1. Rather Dealer Member Rule 29.1 is primarily intended to focus upon quasi-criminal and unethical conduct.

## **Submissions of Ms. Lowe on Count 2**

### *Lack of Evidence*

¶ 292 As with Mr. Myatovic's counsel, counsel for Ms. Lowe submits that IROC Staff have provided no clear and convincing evidence that the impugned trading by Ms. Lowe was manipulative; that this trading was suspicious; that the impugned trades were pre-arranged; that Ms. Lowe took instructions from an individual who was not the account holder; or that any of Ms. Lowe's conduct was unbecoming and, therefore, contrary to Dealer Member Rule 29.1.

### *Pre-Arranged Trades and Manipulative Trades*

¶ 293 Counsel for Ms. Lowe submits that where the timing of an order is lined up so that it's arranged for it to match a corresponding order on the other side it might be defined as a "pre-arranged" trade. He submits that there is nothing wrong with such a transaction and that it is certainly not against the trading rules.

¶ 294 Of the 15 pre-arranged trades of OSE and the 45 pre-arranged trades in GPI identified by Ms. Bean and in which Mr. Myatovic and Ms. Lowe is alleged to have participated in, counsel for Ms. Lowe points out that the total number of these trades for OSE involving the Lowe Trading Accounts was five trades involving a total volume of 84,000 shares of OSE. With respect to the shares of GPI, of the 45 trades identified, only 12 trades involved the Lowe Trading Accounts, with Canaccord on the other side, and the total volume of the shares traded were only 361,900 shares. These trades occurring between April 1, 2008 and March 31, 2009 accounted for only 1.38% of the overall trading in the shares of GPI during that time period and 0.47% of the trading in the shares of OSE during that time period over a period of 5 and 4 trading days, respectively.

¶ 295 These trades, counsel for Ms. Lowe submits, were statistically insignificant compared to the overall market activity during this time period and certainly couldn't have led to the creation of a false or misleading appearance as to market activity or price.

¶ 296 Counsel for Ms. Lowe suggested that a manipulative trade is one that is intended to create a false or misleading appearance as to market activity or price. The evidence before the Hearing Panel might demonstrate some pre-arranged trades, but, he submitted, it certainly doesn't demonstrate manipulative trades.

### *No Market Expertise*

¶ 297 Ms. Lowe's counsel contends that while Ms. Bean and Ms. Gerada may be competent investigators, they are not experts on the stock market. Their evidence focused on orders as reflected on the TOQ Reports and dealt with very few trades.

¶ 298 The Investigators were not able to opine on the effect of the entry of the impugned orders or alleged pre-arranged trades on the appearance of active market activity or price, nor were they qualified to do so. Their evidence was largely just lining up order entry and timing of trades with the electronic communications. Counsel for Ms. Lowe submits that there is no question that the Investigators were not focused on pre-arranged trades at all, but were focused on orders.

¶ 299 It is Ms. Lowe's counsel's submission that if one can't get a feeling for what the market looked like one can't get a real feeling for what effect, if any, an order would have on the appearance of the market at any given time. This lack of evidence of what impact a trade had on the market of the shares of GPI or OSE is fatal to the position of IROC Staff as without it IROC Staff is not able to establish that there was an attempt to create a false or misleading appearance as to market activity.

¶ 300 As importantly, he submits there is no evidence from the party on the other side of the trade, where there was a trade. Without this evidence of the party on the other side of the trade, counsel for Ms. Lowe queries how IROC Staff can claim that a trade was "pre-arranged" with the intention to create a false appearance of market activity.

### *Credit Issues*

¶ 301 Counsel for Ms. Lowe acknowledges that there were credit issues with respect to the Lowe Trading

Accounts, but submits that they are not significant. Management of both Canaccord and Research were aware of these credit issues. There was no attempt by Ms. Lowe to disguise anything.

### *Conjunctive Interpretation*

¶ 302 The Notice of Hearing in both Count 1 and Count 2 alleges that the Respondents facilitated manipulative or suspicious trading activity in several client accounts by “pre- arranging trades and taking instructions” from an individual who was not the account holder. This allegation must be interpreted as being conjunctive in meaning so that to demonstrate liability, IIROC Staff must prove both the pre-arranging of trades and the taking of instructions from an individual who was not the account holder. This IIROC Staff has not done, Ms. Lowe’s counsel submits.

### *Account Concentration*

¶ 303 When it comes to parties actively trading in securities of junior resource companies, Ms. Lowe’s counsel submits that it is not at all unusual to see only securities of a few junior resource companies in a particular account. It is a trading situation with the trading focused on specific securities.

## **Finding on Counts 1 and 2**

### *Financing Junior Resource Companies*

¶ 304 Acting as a principal of a public junior resource company is not an easy task. As well as the multitude of responsibilities involved with the operation of the business of the company, be the company involved in mineral exploration or exploratory drilling for hydro carbons, risk capital must be raised to ensure the company’s survival. This activity of raising capital in British Columbia usually commences with the raising of seed capital from family, friends and close business associates, followed up by private placements of shares among a small group of interested parties, and, then in most cases the listing and trading of the company’s shares on a stock exchange, such as the TSX-V.

¶ 305 Both before and following the listing of the company’s shares, a principal of the company is actively involved in promoting the company and its securities. This promotional activity includes continual contact with members of the brokerage community to keep the company’s profile before this community and to encourage the following of and the trading in the shares of the company. This promotional activity also includes an ongoing attempt to ensure an orderly market for the trading of the company’s shares by being aware of when orders for the company’s shares might be coming to the market and, wherever possible, facilitating the fulfillment of these orders. Therefore, it is not unusual for a principal to refer to a broker a party interested in purchasing shares of the company which the principal is promoting.

¶ 306 Although these promotional activities are a necessary requisite for the promotion of a public junior resource company, they must not be performed in a manner that creates a false market for the company’s shares. Therefore, activities such as trading these shares where there is no change in beneficial ownership, commonly known as wash trading, are not permitted. Nor are activities permitted such as having a group of parties trade the shares of the company in concert and subject to a single directing mind. These prohibitions arise as such trading is likely to result in the creation of an artificial price for the security and the illusion of independent market activity. One of the indices of these forms of prohibited activity is the trading of a company’s shares through brokerage accounts which are registered in the name of a third party when that third party has no beneficial ownership in the shares traded. In other words, the practice of trading through nominee accounts.

¶ 307 The allegations made by IIROC Staff in Counts 1 and 2 involve the activities of the Respondents in assisting the promotional activities of Mr. TSP in his efforts to promote the trading of the shares of GPI and OSE. The question facing us as the Hearing Panel is whether or not the trading organized by Mr. TSP in carrying out his promotional activities was contrary to lawfully accepted practices, and, if they were contrary, did the Respondents facilitate Mr. TSP in carrying out these unlawful practices.

### *Overall Scheme*

¶ 308 As above observed, during the twelve month period from April 1, 2008 until March 31, 2009, between

69.5% and 45.6% of the total trading volume of shares of GPI and between 70.9% and 36.5% of the total trading volume of shares of OSE traded on the TSX-V were traded through the twelve Trading Accounts. No matter whether these percentages are calculated based upon orders matched or shares traded, these percentages alone suggests that there was in place an overall trading scheme for the promotion of the shares of GPI and OSE and that there was a central or controlling mind behind this trading scheme.

¶ 309 The evidence before us clearly demonstrates that there was a general understanding among the Respondents and Mr. TSP for the trading scheme to be employed by them in the trading of the shares of these companies. For example, when Mr. Myatovic received from Mr. TSP the rather cryptic emails on July 10<sup>th</sup> and 11<sup>th</sup> there was no evidence of an email back from Mr. Myatovic querying these instructions. Rather, in his responses on July 10<sup>th</sup>, on two occasions he makes the statement “sounds good”. It appears that Mr. Myatovic had no doubt about what was expected of him by Mr. TSP in playing his part in the trading of the shares of GPI and OSE for July 10<sup>th</sup> and 11<sup>th</sup> 2008.

¶ 310 In the same vein, these emails of July 10<sup>th</sup> and 11<sup>th</sup> 2008 instruct Mr. Myatovic to “call doreen..”. Again, there are no instructions from Mr. TSP to Mr. Myatovic as to what instructions Mr. Myatovic was to convey to Ms. Lowe. It was assumed that both of the Respondents knew what was expected of them.

¶ 311 A similar involvement in this overall scheme either intentionally or through willful ignorance was carried out by the account holders of the Trading Accounts. Mr. VP in his evidence exemplified this position when he testified that that he “really didn’t want to know what was happening” with respect to the trading in the VP Account.

¶ 312 The sheer volume of trading in the shares of GPI and OSE in the Trading Accounts combined with the “rolling” activity and uneconomic trading patterns provide clear evidence of an overall trading scheme of the shares of GPI and OSE in which the Respondents and Mr. TSP were directly involved. This overall trading scheme was largely financed by a systematic re-aging of the debits and lack of timely settlement in the Trading Accounts. The concentration of shares of GPI and OSE in the Trading Accounts and the subsequent compliance concerns voiced by both Canaccord and Research leading to the eventual restrictions imposed by these firms on the trading activity in the shares of GPI and OSE in the Trading Accounts provide further evidence of the overall scheme. And finally, the benefit the Respondents gained in the commission income earned by the trading of the GPI and OSE shares in the Trading Accounts suggests that the Respondents were well compensated for their part in the scheme.

#### *Required Elements of Proof*

¶ 313 However, the allegations in Counts 1 and 2 are more specific in their scope than alleging this overall scheme. These allegations contain three elements that must be proven by IIROC Staff if we are to find the Respondents liable as alleged in these counts. The first element is evidence of communication among Mr. Myatovic, Ms. Lowe and Mr. TSP with respect to the trading in the shares of GPI and OSE. The second element is evidence of manipulative or suspicious trading activity in the Trading Accounts. And the third element is evidence of the Respondents’ involvement in pre-arranging trades for the Trading Accounts and taking instructions from an individual who was not the account holder, namely Mr. TSP, for these trades.

¶ 314 The evidence to establish each of these three elements must be to us clear, cogent and compelling and must prove on a balance of probabilities that the element in question in fact occurred.

#### *Evidence of Communication Among the Respondents and Mr. TSP*

¶ 315 From the evidence before us as summarized above, we find that during the period from April 2008 to March 2009, there was regular and frequent communication among the Respondents and Mr. Mr. TSP in the form of telephone calls, emails and text messaging.

#### *Evidence of Manipulative or Suspicious Trading Activity in the Trading Accounts*

¶ 316 During the hearing, we asked counsel for assistance in putting before us examples of industry rules or standards against which we should determine whether or not the trading activity in evidence before us was in

fact “manipulative or suspicious trading activity”. No such standards were submitted.

¶ 317 The Dealer Member Rules do not define manipulative or suspicious trading activity. However, Rule 2.2 of IIROC’s Universal Market Integrity Rules (“UMIR”) addresses manipulative and deceptive market activities.

¶ 318 UMIR 2.2 states:

#### 2.2 Manipulative and Deceptive Activities

(1) A Participant or Access Person shall not, directly or indirectly, engage in or participate in the use of any manipulative or deceptive method, act or practice in connection with any order or trade on a marketplace if the Participant or Access Person knows or ought reasonably to know the nature of the method, act or practice.

(2) A Participant or Access Person shall not, directly or indirectly, enter an order or execute a trade on a marketplace if the Participant or Access Person knows or ought reasonably to know that the entry of the order or the execution of the trade will create or could reasonably be expected to create:

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

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

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

¶ 319 Subsection 2 of UMIR 2.2 would appear to be applicable to the matter at hand.

¶ 320 The portion of this rule particularly relevant to the evidence before us prohibits a party from directly or indirectly entering an order or executing a trade on a market place if the party knows or ought reasonably to know that the entry of the order or the execution of the trade will create or could reasonably be expected to create either:

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

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

¶ 321 We find that the evidence before us clearly demonstrates that the sheer volume of trading in the shares of OSE and GPI through the Trading Accounts combined with the “rolling” and uneconomic trading patterns in these shares through the Trading Accounts lead to the false or misleading appearance of trading activity in or interest in the purchase and sale of the shares of OSE and GPI.

¶ 322 We therefore find clear evidence that in conducting the overall trading scheme, the Respondents and Mr. TSP engaged in manipulative or suspicious trading activity through the Trading Accounts.

#### *Evidence of Pre-arranging Trades and Taking Instructions from Mr. TSP*

¶ 323 Even though she did not agree with the restriction placed upon her by counsel for Ms. Lowe in his definition of a pre-arranged trade, out of the 348 orders set out in the Combination Chart, Ms. Bean in her evidence identified 45 trades for shares of GPI and 15 trades for shares of OSE which occurred within three minutes of telephone communication among the telephones of the Respondents and Mr. TSP.

¶ 324 In his submissions, counsel for Ms. Lowe further refined his definition of applicable pre-arranged trades and submitted that the number of pre-arranged trades which met this refinement constituted with respect to the Lowe Trading Accounts a statistically insignificant number in terms of the number of trades, the number of shares traded and the number of days over which these trades occurred. However the fact remains, that there were pre-arranged trades that did meet this rather restrictive definition.

¶ 325 The communication evidence referred to above to us clearly indicates trading instructions being received by and acted upon by the Respondents in the trading activity in the Trading Accounts.

¶ 326 The July 11<sup>th</sup> email from Mr. TSP to Mr. Myatovic referred to above is a good example of this communication. This email read: : “marco there is up tp (sic) \$100,000 new order in the works gpi at 1.39 and ose at 2.09. roll for today is \$200,000 and gpi at .131 and ose at 2.09. call doreen as she needs to do a bunch today .... please do what it takes ...” This email is clearly sending trading instructions from Mr. TSP to Mr. Myatovic and involving Ms. Lowe in these instructions.

¶ 327 A good example of communication and the pre-arranged trading resulting therefrom is the activity which occurred on February 5, 2009 which in summary went as follows:

Four minutes after the text message sent from Mr. Myatovic’s cell phone to Ms. Lowe’s cell phone stating “wants 2 do ose @ \$1.35” Mr. Myatovic enters a sell order referencing the Trading Account of Mr. RDB to sell 75,000 shares of OSE at \$1.35 per share and over the next hour the Lowe Trading Accounts purchase 75,000 shares of OSE at \$1.35 per share.

Later the same day after the following text message is sent from Mr. Myatovic’s cell phone to Ms. Lowe’s cell phone “can u cfo to .485. We have competition (sic) from TD at .49” Ms. Lowe enters a CFO changing the sell order for the Trading Account of Ms. PS for 190,000 shares of GPI to an offering price of \$0.485 per share. And then immediately following this CFO, the Ms. SP Trading Account overseen by Mr. Myatovic purchased 70,000 shares of GPI at \$0.485 per share.

Next on that same February 5<sup>th</sup> and after the following text messages were sent from Mr. Myatovic’s cell phone to Mr. Lowe’s cell phone: “please go to .48 this good be our friend who is trying to get some off” and “please change to .48 if u can the sell order referred to above, now reduced from 190,000 shares to 120,000 shares of GPI, had a CFO entered which reduced the offering price of the GPI shares to \$0.48 and following that 50,000 shares of GPI were purchased by the Ms. SP Mr. TSP Trading Account at a price of \$0.48 per share.

¶ 328 The examples of email and text messaging highlighted above are merely two of those contained in the evidence before us.

¶ 329 We therefore find that there is clear evidence of the Respondents being involved in the pre-arranging of trades and taking instructions from Mr. TSP for these trades through the Trading Accounts.

#### *Evidence of the Three Elements*

¶ 330 In summary, we find that the evidence before us is clear, cogent and compelling proof on a balance of probabilities that the Respondents facilitated manipulative or suspicious trading activity in the Trading Accounts by pre arranging trades and taking instructions from Mr. TSP who was not the account holder.

#### *Lack of Evidence from Holders of the Trading Accounts*

¶ 331 In his closing submissions, counsel for Mr. Myatovic submits that without the direct evidence of the holders of the Trading Accounts the evidence submitted by IIROC Staff is incomplete. If these holders had been called to give evidence, their evidence might have been to the effect that Mr. Myatovic received instructions from them for each trade effected through their account.

¶ 332 We had before us the testimony of one of the holders of the Trading Accounts, Mr. VP. Mr. VP was quite adamant in his assertions that his role as an account holder was that of a mere nominee. Although the evidence of the balance of the holders of the Trading Accounts might have added to the evidence before us, we find that the position taken by Mr. Myatovic’s counsel to be sheer speculation and we do not find the lack of this evidence fatal to the case made by IIROC Staff. Although we have not found it as a fact, there is a strong suggestion that the account holders of the Trading Accounts played a role similar to that of Mr. VP as willing accomplices to the trading scheme participated in by the Respondents and Mr. TSP.

#### *Lack of Expert Witnesses*

¶ 333 In his closing submissions, counsel for Ms. Lowe submits that the evidence of IIROC Staff is incomplete as not bringing forward an expert witness to testify as to the possible effect that the trading of the shares of GPI and OSE through the Trading Accounts had on the market of the shares of GPI and OSE. This evidence together with evidence from traders on the other side of the impugned trades other than Canaccord or Research would give a more complete picture of the possible effect of the trading of the shares of GPI and OSE on the market.

¶ 334 We find that neither the testimony of the suggested expert witness nor of the accounts on the other side of the transaction necessary for the IIROC Staff to establish the elements referred to above.

#### *Responsibility as Gatekeeper*

¶ 335 Having found compelling evidence that the Respondents were willing participants in the overall trading scheme with Mr. Mr. TSP as above described, we must determine if this participation led to a breach of Dealer Member Rule 29.1 as alleged by IIROC Staff in failing in their roles as gatekeepers?

¶ 336 In *Re Wenzel* [2005] A.S.C.D. No 153 at paragraphs 52 and 53, the Alberta Securities Commission noted that:

52 Registrants ..... help to sustain the integrity of the capital market. Securities salespersons are meant to know and understand the capital market, securities laws, their client and the client's investment objectives and financial circumstances. They must then apply this knowledge and understanding to ensure that every purchase or sale of a security that they participate in for a client is in accordance with the law, suitable for the client and, in the absence of valid discretionary authority, specifically authorized by the client.

53 A salesperson who fulfills these obligations to the particular client will be in a position to spot suspicious or unusual circumstances that could have an effect on the integrity of trading and the capital market. The salesperson can then alert the client or the ... firm, to potential improprieties, inadvertent or otherwise, and decline to participate in or facilitate improper activity. In this way, the registered salesperson is a gatekeeper for the broader public interest.

¶ 337 In *Re: Trenholm*, [2009] IIROC No. 40 the Hearing Panel referred to the following passage from the 2000 version of the Conduct and Practices Handbook at paragraph 25:

“A group of clients is trading in a particular security and the security is not one normally followed by the IA and/or the member firm’s research department. The IA must particularly note that one of the group has trading authority for some or all of the others. In addition, the IA must remain alert to detect other indications that the clients are connected and are acting in concert. This might include use of the same mailing address, same employer, or same last name or phone numbers. Similarities in the timing and pricing of orders would be another clue. Clients engaging in this conduct may be manipulating the price of the stock by trading among themselves or maybe attempting to give the appearance of an active market.”

¶ 338 The Hearing Panel in *Trenholm* went on at paragraph 26 to comment on the role of a registered representative as a “gatekeeper” for the investment industry and the resulting enhancement of the integrity of the capital markets from their assumption of this role.

The Hearing Panel observed that:

“Gatekeeper obligations have been imposed by courts because registrants are in a unique position, and even better than regulators, to effectively monitor market activities and to apply their knowledge to spot any potential impropriety”.

¶ 339 We find that the Respondents failed in their gatekeeper obligations in that not only did they fail to spot and report the trading scheme in the shares of GPI and OSE engaged in by Mr. TSP through the Trading Accounts, they were willing and active participants therein and benefited financially therefrom.

#### **Decision on Count 1**

¶ 340 We find that during April 2008 to March 2009, Mr. Myatovic failed in his role as gatekeeper by facilitating manipulative or suspicious trading activity in several client accounts by pre-arranging trades and taking instructions from an individual who was not the account holder, thereby engaging in conduct unbecoming, contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.

### **Decision on Count 2**

¶ 341 We find that during April 2008 to March 2009, Ms. Lowe failed in her role as gatekeeper by facilitating manipulative or suspicious trading activity in several client accounts by pre-arranging trades and taking instructions from an individual who was not the account holder, thereby engaging in conduct unbecoming contrary to IDA By law 29.1 and IIROC Dealer Member Rule 29.1.

### **Identity of the Account Holders**

¶ 342 The Notice of Hearing identifies the twelve Trading Accounts and identifies the holders of these accounts by their initials rather than by their full proper names. Although the evidence given before us at the Disciplinary Hearing identified these account holders by their proper names, in these reasons we have chosen to follow the practice of the Notice of Hearing and to identify these account holders by their initials.

¶ 343 The reason we have determined to adopt this practice is that one of the members of the Hearing Panel is concerned that by virtue of the fact that IIROC's jurisdiction over the matter before us is contractual, IIROC does not have jurisdiction over any party referred to in this decision and reasons other than the Respondents as these other parties are not a party to this contractual arrangement. Because of this lack of jurisdiction, this Hearing Panel member believes that to identify these individuals would be improper and a breach of their privacy rights as this decision and reasons will be published upon its release.

¶ 344 The other two members of the Hearing Panel disagree with this position. They believe that apart from the LIRA Accounts holders, all of the parties referred to above were participants in this scheme either directly or by benign neglect and should be referred to by their proper names rather than by their initials.

¶ 345 The majority of the panel members note that at the Disciplinary Hearing all of the parties named in the Notice of Hearing, including the LIRA Account holders, were identified by their proper names. The Disciplinary Hearing was open to the public and a transcription record has been produced.

¶ 346 It is further the opinion of the majority of the members of the Hearing Panel that by being participants in the securities markets, the account holders of the Trading Accounts exposed themselves to identification and publicity if found to have acted in a manner which reflected poorly on these markets. Pursuant to Section 24 of the *Securities Act* of British Columbia, the BCSC has granted regulated authority to IIROC to regulate the activities of the Respondents within the Province of British Columbia. This authority would appear to extend to any culpable party who participates with the Respondents in one or more activities found to be in breach of IIROC's Dealer Member Rules. The extension of this authority would appear to give IIROC limited inherent authority over these parties when it comes to their participation in the securities markets to the extent that they are named in a Disciplinary Hearing and the resulting decision and reasons.

¶ 347 However, the Hearing Panel is faced with a dilemma. If it proceeds on the majority view and discloses the names of these parties, although the dissenting member of the Hearing Panel might issue a dissenting opinion, the identities of these parties will have been disclosed and the matter will be considered moot. Therefore, the two members of Hearing Panel in favour of disclosure have agreed to the minority view and have endorsed a decision and reasons which does not disclose the proper names of the account holders of the Trading Accounts.

Dated at the City of Vancouver, Province of British Columbia, this 31st day of July 2012.

R. John Rogers

Barbara Fraser

Michael Johnson

