

Re Nott et al

IN THE MATTER OF:

The Universal Market Integrity Rules

and

**TD Securities Inc., Kenneth Nott, Aidin Sadeghi, Christopher Kaplan,
Robert Nemy and Jake Poulstrup**

2011 IIROC 26

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

Heard: January 26, 27, 2011

Decision: April 30, 2011
(211 paras.)

Hearing Panel:

The Honourable Stanley Kurisko, Q.C. (Chair), Donald Lawson, Phillip Ted Norris

Counsel:

James D. G. Douglas & Charles Corlett, IIROC Enforcement Counsel

R. Paul Steep, Rene Sorrell, Alastair McNish, Counsel for the Respondents TDSI Securities Inc., Christopher Kaplan, Robert Nemy, and Jake Poulstrup

Aden Sadeghi, Self-represented

Kenneth Nott, Self-represented

Sanctions Reasons and Decision

INTRODUCTION

¶ 1 On November 30, 2010 this Panel released **Reasons and Decision**¹ in which the Panel found that the Respondents Christopher Kaplan, Robert Nemy, Jake Poulstrup, Kenneth Nott and Aidin Sadeghi, entered Artificial Closing Bids enumerated in the Reasons and Decision, summarized below, contrary to Universal Market Integrity Rule 2.2(2)(b) (“**Rule 2.2(2)(b)**”).

¶ 2 The Reasons and Decision has been replaced by Revised Reasons and Decision² (“**Revised Reasons and Decision**”) released concurrently with the Sanctions Decision and Reasons. References herein are to the Revised Reasons and Decision. Unless otherwise stated all dates in the Sanctions Decision and Reasons are in the year 2005.

¶ 3 This is a Hearing under Universal Market Integrity Rules & Policies (“**UMIR**”) 10.6 which authorizes a Hearing Panel to impose one or more of the following sanctions on the Respondents in accordance with UMIR

¹ In the matter of TD Securities Inc., Kenneth Nott, Aidin Sadeghi, Christopher Kaplan, Robert Nemy and Jake Poulstrup, Reasons and Decision released November 30, 2010

² In the matter of TD Securities Inc., Kenneth Nott, Aidin Sadeghi, Christopher Kaplan, Robert Nemy and Jake Poulstrup, Revised Reasons and Decision released April 30, 2011

10.5:

- (a) a reprimand;
- (b) a fine not exceeding the greater of:
 - (i) \$1,000,000, and
 - (ii) an amount equal to triple the financial benefit which accrued to the person as a result of committing the contravention;
- (c) the restriction of access to the market place for such period and upon such terms and conditions, if any, considered appropriate;
- (d) the revocation of access to the marketplace, and
- (e) any other remedy determined to be appropriate under the circumstances.

¶ 4 The Sanctions Decision and Reasons is divided into nine **PARTS**.

¶ 5 **PART I** (paragraphs [14]-[18]) is a summary of the sanctions imposed.

¶ 6 **PART II** (paragraphs [19]-[61]) is a summary of the Revised Reasons and Decision including the findings of the Panel re Nemy ([paragraphs [39]-[44]), Kaplan ([paragraphs [45]-[47]), Poulstrup (paragraphs [48]-[52]), Nott ([paragraphs [53]-[55]) and Sadeghi (paragraphs [56]-[61]).

¶ 7 **PART III** (paragraphs [62]-[68]) sets out the UMIR Disciplinary Sanction Guidelines and excerpts from *Mills (Re)*³.

¶ 8 **PART IV** (paragraphs [69]-[79]) sets out relevant Sanctions Hearing testimony by Poulstrup (paragraphs [69]-[74], Nemy (paragraphs [75]-[76] and Kaplan (paragraphs [77]-[79].

¶ 9 **PART V** (paragraphs [80]-[84]) sets out the submissions of Counsel re sanctions.

¶ 10 **PART VI** (paragraphs [85]-[158]) sets out the discussion and decision re sanctions imposed on Nemy, Kaplan and Poulstrup.

¶ 11 **PART VII** (paragraphs [159]-[183]) sets out the discussion and decision re sanctions imposed on Nott.

¶ 12 **PART VIII** (paragraphs [184]-[198]) sets out the discussion and decision re sanctions imposed on Sadeghi.

¶ 13 **PART IX** (paragraphs [199]-[211]) sets out Comments.

PART I

SUMMARY OF THE SANCTIONS IMPOSED

¶ 14 Nemy shall pay a fine of \$75,000.00 and costs of \$37,500.00 not later than 30 days after the release of the Sanctions Decision and Reasons. Because of Nemy's inability to obtain employment since September 2008, there is no order of suspension. An order for close supervision for six months shall issue. The terms of close supervision shall be determined by his employer. The fine and costs are payable not later than seven days after Nemy signs an employment agreement with an IIROC member firm but in any event not later than ninety days after the release of the Sanctions Decision and Reasons.

¶ 15 Kaplan shall pay a fine of \$35,000.00 and costs of \$15,000.00. Because of his inability to obtain employment for thirteen months since September 2008 there is no order of suspension. An order for close supervision for six months shall issue. The terms of close supervision shall be determined by his employer. It is ordered that the trade restrictions presently in effect that Kaplan not carry overnight inventory positions and that he not enter orders in the last five minutes of a trading day shall cease to apply immediately. Payment of the fine and costs shall not fall due until thirty days after the release of the Sanctions Decision and Reasons. Time

³ [2001] I.D.A.D. No. 7.

and terms of payment of the fine and costs shall be negotiated and agreed to by Kaplan and IIROC. If an agreement cannot be reached within thirty days of the release of the Sanctions Decision and Reasons, written submissions shall be submitted to the Panel and the Panel will fix the payment terms.

¶ 16 Poulstrup shall pay a fine of \$20,000.00 and costs of \$10,000.00. The Panel considered an order of suspension for a period of six months but because of his inability to obtain employment for thirteen months since September 2008 there is no order of suspension. An order for close supervision for six months shall issue. The terms of close supervision shall be determined by his employer. It is ordered that the trade restrictions presently in effect that he not carry overnight inventory positions and that he not enter orders in the last five minutes of a trading day shall cease to apply immediately. Payment of the fine and costs shall not fall due until thirty days after the release of the Sanctions Decision and Reasons. Time and terms of payment of the fine shall be negotiated and agreed to by Poulstrup and IIROC. If an agreement cannot be reached within thirty days of the release of the Sanctions Decision and Reasons, written submissions shall be submitted to the Panel and the Panel will fix the terms of payment.

¶ 17 Nott shall pay a fine of \$15,000.00 and costs of \$7,500.00. Because of his inability to obtain employment since September 2008 there is no order of suspension. An order for close supervision for six months shall issue. The terms of close supervision shall be determined by Nott's employer. Payment of the fine and costs shall not fall due until thirty days after the release of the Sanctions Decision and Reasons. Time and terms of payment of the fine shall be negotiated and agreed to by Nott and IIROC. If an agreement cannot be reached within thirty days of the release of the Sanctions Decision and Reasons, written submissions shall be submitted to the Panel and the Panel will fix the terms of payment.

¶ 18 Sadeghi shall pay a fine of \$5,000.00 payable not later than two years after the release of the Sanctions Decision and Reasons. There shall be no order of suspension and no order for supervision. The Panel strongly recommends that the close supervision order presently in effect be rescinded.

PART II

SUMMARY OF THE REVISED REASONS AND DECISION

¶ 19 Sanctions must be applied in the context of the Revised Reasons and Decision.

¶ 20 These proceedings were commenced by a Statement of Allegations dated February 22, 2008 in which IIROC Staff alleged that over the period from May 1, 2005 to October 31, 2005 ("**Relevant Period**") each of the Respondents contravened UMIR Rule 2.2(2)(b) by entering high closing bids on either the Toronto Stock Exchange, the TSX Venture Exchange or the NEX Market Place to purchase one or more of five enumerated stocks ("**Five Stocks**") without any intention that the orders would be executed and for no *bona fide* purpose.

¶ 21 The Five Stocks (with their market symbol in parenthesis) are: African Copper PLC ("**ACU**"), Canaco Resources Inc. ("**CAN.H**" until May 26, 2005 while listed on the NEX and "**CAN**" as of May 27, 2005 while listed on the TSX-V, Central Canada Foods Corporation ("**CDF.A**"), Peterborough Capital Corp. ("**PEC**") and Titanium Corporation Inc. ("**TIC**").

¶ 22 The Statement of Allegations identifies 461 Artificial Closing Bids that IIROC Staff alleged were entered in respect of the Five Stocks by each of the Respondents during the Relevant Period. Schedule "B" to the Statement of Allegations consists of a separate table for each of the Five Stocks. Each table sets out details of each of the alleged 461 Artificial Closing Bids (Date, Trader, Time, Volume and Closing Bid Price).

¶ 23 Stemming from the allegation that the Respondents contravened UMIR Rule 2.2(2)(b) IIROC Staff alleged that during the Relevant Period TDSI Securities Inc. ("**TDSI**") failed to comply with its trading supervision obligations contrary to UMIR Rule 7.1 and UMIR Policy 7.1. The Panel dismissed this allegation.⁴

¶ 24 TDSI and the Respondents Kaplan, Nemy and Poulstrup ("**TDSI Respondents**") filed a joint Reply dated March 31, 2008. TDSI denied that it failed to comply with its trading supervision obligations. The TDSI

⁴ Revised Reasons and Decision paragraphs [393]- [456].

Respondents denied the allegations of entering Artificial Closing Bids and stated that each of the orders alleged to be Artificial Closing Bids were entered with the intention of acquiring the security in question. Sadeghi filed a Reply denying the allegations. Nott did not file a defence.

¶ 25 The hearing of the allegations commenced on December 2, 2009 and extended over 24 days concluding on March 31, 2010. Witnesses were called by each of the parties. Two experts gave evidence: Dean Holley (“**Holley**”) on behalf of IIROC Staff and John Boddie (“**Boddie**”) for the TDSI Respondents and TDSI. Nemy, Kaplan and Poulstrup testified. Sadeghi, testified and called a witness. Although Nott had not filed a defence to the allegations he was allowed to testify. Nott stated that he did not consider his closing bids “high closing” but that he was simply “maintaining the bid.”⁵

¶ 26 The first issue the Panel determined in the Revised Reasons and Decision was the meaning of Rule 2.2(2)(b).

¶ 27 IIROC said the Closing Bids set out in the Statement of Allegations were entered without any intention that the orders would be executed and for no *bona fide* purpose. IIROC Staff said the high closing bid prices were artificial in that they were not justified by any real demand for the securities and misrepresented the performance and actual demand for the securities to the market. IIROC Staff alleged that the orders were entered with the intention of establishing a high closing bid price in order to improve the daily profit and loss position of one or more of the Five Stocks held by the Individual Respondents in their inventory accounts or to assist their colleagues improve their daily profit and loss position.

¶ 28 TDSI and the TDSI Respondents argued that analysis of whether a closing bid is artificial must focus primarily on empirical trading data within the context of the market. This was the approach adopted by Boddie. He stated that “the manner in which the Traders [the TDSI Respondents] entered orders was generally within the market norms as they existed at the time for the Securities [the Five Stocks]” and therefore “not artificial”. Applying this analysis to each of the bids he concluded that Nemy and Poulstrup did not enter any Artificial Closing Bids and that Kaplan entered only one.

¶ 29 The Panel concluded that Boddie’s analysis confining the interpretation of UMIR Rule 2.2 and UMIR Policy 2.2 to empirical trading data within the context of the market was contrary to the purposive approach that should be adopted in the analysis of artificial trades and disregarded the statements in UMIR Policy 2.2 that the explicitly enumerated categories of manipulation are not finite or closed. The Panel said the opinions and conclusions stated by Boddie were founded on an erroneous interpretation of UMIR. Consequently, his evidence was not helpful with respect to the allegations of Artificial Closing Bids.

¶ 30 The Panel considered *Re Podorieszach*⁶, an Alberta case that dealt with a provision of the *Alberta Securities Act* virtually the same as UMIR Rule 2.2(2)(b) and *Re Shambleau*⁷, a Regulation Services⁸ disciplinary hearing pursuant to a predecessor of UMIR Rules.

¶ 31 In *Podorieszach* under the heading “*Mens Rea* or Intent” the Alberta Securities Commission said:⁹

... we believe that, understood in context, motive or intent is relevant to the determination of whether the second element of subsection 93(b) is present, namely whether an artificial price is created or might result.

¶ 32 The Panel said *Re Shambleau* held that a bid late in the day that would not reasonably have allowed a response from the market was evidence there was no genuine intent to complete a purchase of the shares.

¶ 33 The Panel said that *Re Shambleau* and *Re Podorieszach* support the conclusion that an artificial price results when there is an intention to establish a price that is not justified by real demand or supply in a security.

⁵ Hearing transcript, Nott pages 3655-3659 and 3668-3669.

⁶ [2004] A.S.C.D. No. 360.

⁷ [2003] R.S.D.D. No. 3.

⁸ Predecessor to IIROC .

⁹ Paragraph 75.

The Panel said that in the present case the issue was whether the entry of the closing bid orders was for a *bona fide* purpose, and therefore reflective of genuine demand, or whether the particular circumstances of their entry (and surrounding their entry) demonstrate that the intention was that the bids would not trade but instead would stand as closing bids at the end of a trading day.¹⁰ Succinctly stated, the Panel held that the intention of the person entering the bid price is the key to determining whether the bid is artificial.

¶ 34 On this sanctions hearing Counsel for the TDSI Respondents tried to deflate the effect of the foregoing interpretation by saying there was no consensus on the proper interpretation of UMIR Rule 2.2 and UMIR Policy 2.2 prior to the Relevant Period. The Panel does not agree. *Re Podoriesz* and *Re Shambleau* were both decided prior to the Relevant Period.

¶ 35 Counsel further says the outcome in *Re Shambleau* was based on a telephone call from a client asking the broker to make a dishonest bid and does not stand for the proposition stated by the Panel.¹¹ The time to argue the meaning of *Re Shambleau* is past. The decision of the Panel set out in the Revised Reasons and Decision stands.

¶ 36 In any event, the submission of Counsel for the TDSI Respondents regarding uncertainty has no bearing on what transpired during the hearing of the allegations. None of the TDSI Respondents claimed lack of understanding of the meaning of Artificial Closing Bids during the Relevant Period. They all testified that that each and every bid was made with the intention the bid be accepted. They denied making any bid with the improper intention of maintaining the price of the stock.

¶ 37 Against the backdrop of this defence by the TDSI Respondents the Panel reviewed the evidence submitted by IIROC Staff relating to motive and trading patterns (frequency of setting the closing bids, late time of the closing bid orders, bidding in small lots and the illiquid nature of the stocks) and concluded that IIROC Staff had made out a *prima facie* case, on a balance of probabilities, that the TDSI Respondents, Nott and Sadeghi intended to engage in the improper practice of entering the alleged Artificial Closing Bids in the Five Stocks. The Panel said this finding was buttressed by direct evidence of instant messages and telephone calls between the Respondents plus the evidence of Holley with respect to TIC.¹²

¶ 38 That was not the end of the case. The Panel said the final decision with respect to each TDSI Respondent, Nott and Sadeghi could only be made on the whole of the evidence.¹³ After considering their testimony the Panel made the findings summarized below regarding Artificial Closing Bids by each of the TDSI Respondents, Nott and Sadeghi.

Summary of findings re Nemy

¶ 39 IIROC Staff alleged that Nemy entered 79 Artificial Closing Bids for TIC.

¶ 40 Nemy said his bidding was minute by minute and day by day with the intention that all the bids be accepted for the purpose of price discovery and averaging down his unit cost of TIC. He testified that frequent small bids throughout the day and during the busy last fifteen minutes of trading were part of this strategy to average down the cost of the declining value of TIC. He said that best bids inside the market narrow the spread between the best bid and offer in the context of the market and increase liquidity. He said that all his bids were entered with the intention that they be accepted.

¶ 41 The trading records confirm Nemy's success at lowering the average cost of TIC during the Relevant Period. As a result of his trading Nemy's average cost per share dropped from \$3.997 on May 2 to \$2.2501 by the end of October.

¶ 42 IIROC Staff alleged that in addition to Nemy's successful averaging down bids there were 79 Artificial Closing Bids that were not entered for the purpose of price discovery and averaging down but for the purpose of

¹⁰ Revised Reasons and Decision paragraph 112.

¹¹ Hearing transcript page 261.

¹² Revised Reasons and Decision, paragraph [190].

¹³ Revised Reasons and Decision paragraph [191].

establishing a high closing price to improve the daily profit and loss position of TIC held by Nemy and the Burlington Office traders.

¶ 43 The Panel concluded that the relative illiquidity of TIC and the pattern of 39 of the 79 alleged Artificial Closing Bids by Nemy detailed below in paragraph [44] (small board lots entered in the closing seconds of trading or large board lots entered in the last five seconds of trading¹⁴) all increasing the best bid price, resulted in a low probability of execution. The Panel said these patterns coupled with Nemy's indisputable motive for maintaining the share value of TIC and the other considerations mentioned in the Reasons and Decision negated the plausibility of Nemy's explanation that this bidding was minute by minute and day by day with the intention these bids be accepted for the purpose of price discovery and averaging down his unit cost of TIC. The Panel did not accept this explanation.¹⁵ The Panel said that the critique set out in **PART V** of the Revised Reasons and Decision of instant messages between Rod Dingwall (Nemy's supervisor) on August 31, 2005 and Nemy's conduct relating thereto¹⁶ added weight to Nemy's lack of credibility.¹⁷

¶ 44 The Panel found that Nemy entered 39 Artificial Closing Bids with the improper intention of maintaining the value of TIC on the following dates:¹⁸

May 4, 6, 12, 13, 16, 19, 20, 24, 26, 27. (total 10)

June 9, 15, 16, 20, 21, 22, 23, 24, 27, 28, 29, 30. (total 12)

July 25, 26, 27, 28, 29. (total 5)

August 2, 3, 4, 5. 25 (total 5)

September 2, 6, 27, 30. (total 4)

October 17, 18, 24. (total 3)

Summary of findings re Kaplan

¶ 45 The Statement of Allegations sets out 57 Artificial Closing Bids for CAN by Kaplan. It is also alleged that he entered four Artificial Closing Bids for CDF.A and one for PEC.

¶ 46 Kaplan's defence to the allegations of Artificial Closing Bids in CAN was this: He and Nott each intended to accumulate approximately 250,000 shares of CAN. Each of them took turns bidding and trading CAN. Kaplan said he consistently engaged in price discovery for the primary purpose of accumulating shares. Kaplan said his bids were for small amounts of stock to test selling interest. He said he would often enter bids towards the end of the day when there was greater market interest. He said that trading decisions were made from "second to second".¹⁹

¶ 47 For reasons related to the credibility of Kaplan²⁰ the Panel did not accept Kaplan's testimony. The Panel concluded that Kaplan entered 19 Artificial Closing Bids in CAN with less than two minutes remaining in the trading day between May 12 and October 13²¹ and 18 Artificial Closing Bids earlier in the day between May 13 and October 25²². The allegations that he entered four Artificial Closing Bids for CDF.A and one for PEC were dismissed.

Summary of findings re Poulstrup

¶ 48 IIROC Staff alleged that during the Relevant Period Poulstrup entered 27 Artificial Closing Bids in TIC

¹⁴ Detailed in paragraphs [302]-[309] of the Revised Reasons for Decision

¹⁵ Revised Reasons and Decision paragraph [314].

¹⁶ Revised Reasons and Decision, **PART V**: paragraphs [192]-[208].

¹⁷ Revised Reasons and Decision paragraph [315].

¹⁸ Revised Reasons and Decision paragraph [316].

¹⁹ Transcript page 2019.

²⁰ Revised Reasons and Decision, paragraphs [370]- [389].

²¹ Revised Reasons and Decision, paragraph [357].

²² Revised Reasons and Decision, paragraph [390].

and two in CAN.

¶ 49 Poulstrup and Nemy had electronic trading access to the TSX-V for TIC. Others in the Burlington Office did not. Traders without access to the TSX-V would ask Nemy or Poulstrup to place orders for them.

¶ 50 Poulstrup testified that all his bids were intended to advertise his or others' continuing interest in TIC with the intention they be accepted.

¶ 51 Nemy was on holidays the 15 trading days from July 4 to July 22. During Nemy's absence Poulstrup set the closing bid for TIC on 13 days. All the bids were in the context of the market. Nott testified that the purpose of these bids was to maintain the price of TIC.²³

¶ 52 The Panel accepted the unchallenged testimony of Nott in concluding that Poulstrup entered these 13 Closing Bids with the improper intention of maintaining the value of TIC.²⁴ On August 9 he entered another Artificial Closing Bid for a total of 14 Artificial Closing Bids. The remaining allegations of Artificial Closing Bids in TIC and two Artificial Closing Bids in CAN were dismissed.

Summary of findings re Nott

¶ 53 IIROC alleged that Nott entered a total of 230 Artificial Closing Bids consisting of one for ACU, 53 for CAN.H/CAN, 91 for CDF.A and 85 for PEC.

¶ 54 Nott did not file a defence to the Statement of Allegations. He represented himself. He testified and voluntarily stated that the closing bids listed on the Tables to the Statement of Allegations were not motivated by an intention to establish a price justified by real demand or supply. He said his intention was to maintain the price of the security.²⁵

¶ 55 Having ruled that bidding within the context of the market for the purpose of maintaining a closing bid price constitutes an Artificial Closing Bid, the Panel held that the alleged Artificial Closing Bids by Nott set out in the Statement of Allegations had been proved.

Summary of findings re Sadeghi

¶ 56 IIROC alleged that Sadeghi entered 50 Artificial Closing Bids for ACU, two Artificial Closing Bids for TIC, one Artificial Closing Bid for PEC and four for CDF.A.

¶ 57 The Panel stated that IIROC became so swept up in Artificial Closing Bids by the Individual Respondents in the other Five Stocks where there was no Market Maker responsibilities, that it carried over its zeal to the one stock and trader where there was responsibility and continued to look at all of the traders in the same light.²⁶

¶ 58 The Panel held that as Market Maker responsible for maintaining an orderly market on ACU, Sadeghi acted in good faith and appropriately in entering closing bids with respect to ACU. The allegations of entering 50 Artificial Closing Bids in ACU were dismissed.²⁷

¶ 59 The Panel held that Sadeghi entered a single Artificial Closing Bid in PEC on July 15 and Artificial Closing Bids in CDF.A on October 14 and October 21. Reasons of the Panel relating to these Artificial Closing Bids are discussed below in **PART VIII** (sanctions imposed on Sadeghi).

¶ 60 All other allegations against Sadeghi of entering Artificial Closing Bids were dismissed.

¶ 61 It was alleged that Sadeghi knowingly participated in a wash trade in CDF.A on October 26. The Panel held that this wash trade was precipitated by Nott without the prior knowledge or concurrence of Sadeghi. Sadeghi expected Nott would call in and cancel the wash trade in accordance with the responsibility of the

²³ Revised Reasons and Decision paragraphs [331].

²⁴ Revised Reasons and Decision, paragraph [332].

²⁵ Transcript page 3653, lines 17-25.

²⁶ Revised Reasons and Decision, paragraph [252].

²⁷ Revised Reasons and Decision paragraph [255].

aggressive trader. In the circumstances, this expectation was reasonable.

PART III

UMIR DISCIPLINARY SANCTION GUIDELINES AND MILLS (RE)

¶ 62 UMIR Disciplinary Sanction Guidelines (“**Sanction Guidelines**”) dated April 1, 2009 have been prepared by IROC to assist Hearing Panels in the fair and efficient imposition of any penalty or remedy in contested disciplinary proceedings.

¶ 63 The Sanction Guidelines state that disciplinary sanctions are designed to prevent fraudulent and manipulative acts and practices and deter misconduct both generally and specifically.²⁸ This is commonly referred to as “specific deterrence” and “general deterrence”.

¶ 64 The Sanction Guidelines suggest, but do not mandate, appropriate sanctions. The Sanction Guidelines are intended to provide a basis upon which decision-makers can exercise their discretion consistently and fairly.²⁹

¶ 65 When exercising judgment to formulate the appropriate sanctions Hearing Panels must always consider the Sanction Guidelines, the unique facts of each case and the appropriate aggravating and mitigating factors.³⁰

¶ 66 The Sanction Guidelines state that the amount of a fine or other sanction depends on the facts of each matter and the value of the sanction in preventing a recurrence. The nature and extent of any sanction cannot be precisely determined by comparison with the sanctions imposed in other similar proceedings.³¹

¶ 67 In determining appropriate sanctions the Panel may consider (i) general factors,³² (ii) aggravating factors³³ and (iii) mitigating factors.³⁴ When raised by a respondent and supported by sworn evidence the Panel may consider ability to pay in connection with the imposition, reduction or waiver of a fine.³⁵

¶ 68 Although *Mills (Re)* was decided in 2001, the following statements in that case are relevant in applying the Sanction Guidelines:

6 Thus the responsibility of the District Council in a penalty hearing is to determine a penalty appropriate to the conduct and respondent before it, reflecting that its primary purpose is prevention, rather than punishment.

7 An appropriate penalty will achieve both specific and general deterrence. The primary focus of the District Council, however, is the respondent; the appropriateness of the penalty relates most directly to the nature of the respondent's violation, the circumstances in which it was committed and other aggravating and mitigating factors relevant to the respondent's conduct and its consequences, like those identified in the TSE Guidelines.

45 a significant delay in proceeding against a respondent, for which the respondent is not responsible, may be taken into account as a factor in terms of prejudice to the respondent from delay and with respect to consistency of penalties.

PART IV

TESTIMONY OF THE TDSI RESPONDENTS

Testimony of Poulstrup

²⁸ Sanction Guidelines Part 1 – General Principles, paragraph 1.b.

²⁹ Sanction Guidelines paragraph 2.

³⁰ Sanction Guidelines paragraph 2.

³¹ Sanction Guidelines paragraph 3.

³² Sanction Guidelines paragraph 5.

³³ Sanction Guidelines paragraph 6.

³⁴ Sanction Guidelines paragraph 7.

³⁵ Sanction Guidelines paragraph 10.

¶ 69 This is what Poulstrup said to the Panel:³⁶

I would like to start by stating that I fully understand and accept the panel's findings in relation to the IIROC allegations against me. I believe that I've been fairly heard and judged by this respected panel of my peers, and I do not intend to appeal the panel's findings. I accept what the panel has said about 14 bids that I entered for TIC between July 4th and July 21st, 2005, as well as the August 9th, 2005 bid. I do not intend to ever repeat this behaviour again. Whether or not the orders were entered for my own benefit or not, I accept that I am my own moral gatekeeper of last resort and I accept responsibility for my actions. I have taken the panel's decision to heart and will use extreme caution when entering bids in the future. In my current position of employment at W.D. Latimer as a proprietary trader, I am exercising extreme caution with respect to the UMIR rules, especially 2.2 and policy 2.2, and I will do so in any other employment I may have with an IIROC member in the future. If I'm ever unclear about a UMIR provision in the future, I will consult with my supervisors or IIROC market surveillance for clarity before making any actions within the marketplace. I would like to formally apologize for my pattern of late order entry and for my unclear journaling of TIC orders. I truly regret what occurred in 2005. Despite that, I respectfully ask the panel to recognize that I was normally a very responsible and effective trader.

¶ 70 Poulstrup has not earned significant income as a Proprietary Trader since September of 2008, when the Burlington Office of TDSI was closed for business reasons. In March 2009 Poulstrup was offered employment with a non-IIROC firm under the governance of the Ontario Securities Commission (“OSC”). Poulstrup’s application for registration was refused on the basis of the Statement of Allegations. Following a contested hearing before OSC Poulstrup was allowed registration by an order dated October 29, 2008 subject to three trading restrictions: that he (i) work under close supervision; (ii) not carry overnight inventory positions; and (iii) not enter orders in the last five minutes of a trading day except to close off existing positions.

¶ 71 This job was short lived (six months). In May 2010 his employer ceased operations and Poulstrup was again out of work. In August 2010 he found a position with W.D. Latimer, an IIROC member. His application for reinstatement of his registration with IIROC was not granted until October 2010 with the foregoing trading restrictions. He is currently employed by that firm.

¶ 72 Thus, during the 24 months from October 2008 until he started to work for his present employer in October 2010, Poulstrup worked six months and was without work for 18 months.

¶ 73 The trading restrictions under which he has operated severely curtail his earning ability as shown in an affidavit by Poulstrup filed as Exhibit #3 on this Hearing. The affidavit sets out confidential intimate personal financial circumstances. It is ordered that the contents of the affidavit shall not be disclosed or released to any member of the public without an order of this Panel or an IIROC Panel differently constituted.

¶ 74 Poulstrup described the financial and emotional impact of these proceedings:³⁷

These past three years have taken an unquantifiable emotional, reputational and financial toll on myself and my family. I'm married with a sixteen year old child living at home, and my wife is expecting a baby this summer, which I mentioned. Over the past two years I've earned almost no income. I've exhausted the majority of my savings and taken on significant debt in order to meet my household expenses. Financial pressures and my problems finding work and the impact of the charges against me have strained my relationships considerably. The duration of the suspension and the size of the financial sanction sought by IIROC will impose significant hardship on myself and my family, and have added to my emotional distress that I've endured since the findings were released.

Testimony of Nemy

³⁶ Transcript pages 158-159.

³⁷ Transcript pages 179 – 180.

¶ 75 The following excerpts from the testimony of Nemy are relevant:

I would like to start by saying that I understand what the panel has said about my conduct, particularly placing orders in stocks very late in the trading day, and I will certainly intend to steer very clear of this type of activity in the future. I believe how I conduct myself in the future is a central consideration in these proceedings. I have taken the decision to heart and will exercise extreme caution in any new job I may get with an IIROC member firm. I believe the decision helps to clarify section 2.2 and policy 2.2, and before the decision I had been reading the rules and policy incorrectly. I also realize that I was not sensitive enough to the financial impact on me of the changes in bid price on my inventory value. I can see that some of my bids were entered too late for the market to properly react. I understand how those bids could be regarded as artificial.³⁸

I believe I created these problems for myself *because I truly saw myself as the de facto market maker in TIC. I kept a tight spread all day long and, like a market maker, I tried to attract trades and volume and tried to make a profit.* I thought the renewal of my bids the next day pre-opening would display my *bona fide* intention in relation to the late bids on the previous day. I understand that my belief was wrong.³⁹ [emphasis added]

After what I've been through the last five years, I can assure you there's just no chance of me violating the rules in the future. I've been in the securities industry for 25 years. During this period, I've been a trade supervisor, served as a governor on various industry committees, and have not hesitated to report inappropriate conduct to my supervisors or regulators. Trading is all I really know. I honestly don't have any other way of earning a decent living.⁴⁰

I have a clean discipline record, and I must stress that. A clean record of this length is not an accident and should be given a major weighting as to a reliable guide to my future conduct.⁴¹

As you know, it is crucial in the securities industry to be recognized as honest and trustworthy. Even to be accused of a rule violation is very damaging to one's career, and I can most certainly attest to that. The findings of misconduct will require that I address this issue for the balance of my career. It makes it even more important to get back to work so that I can show that I do get it and that my conduct is beyond reproach. I have something personally to prove to both myself and the industry.⁴²

When TDSI closed the Burlington proprietary business in September 2008, the Statement of Allegations has already been widely publicized, and since August 2008 I explored job opportunities as proprietary trader with a number of investment dealers. The basic attitude was that until the charges were resolved I could not be considered for employment. The findings of the panel and any sanctions imposed will determine and weigh heavily on whether I can re-enter the business at all.⁴³

³⁸ Transcript page 189.

³⁹ Transcript page s 189-190.

⁴⁰ Transcript page 191.

⁴¹ Transcript pages 191-192.

⁴² Transcript page 192.

⁴³ Transcript page 193.

I also pursued an opportunity to become a partner in a major and what is now a very successful precious metals fund. However, the findings have all but eliminated my role despite the tremendous efforts on my behalf to make financial success. To this date, it has been a big career blow for me from this decision. It was a dream of mine and now it has little chance of being realized.⁴⁴

Notwithstanding there has been significant impact on my family, I cannot possibly describe the amount of stress that we've gone through as a result of this case.⁴⁵

My conduct will not be a concern going forward. I simply cannot find myself in a situation again with my family and my career, and I respect the industry that I've given my life to.⁴⁶

¶ 76 On cross-examination Nemy reiterated his role as a market maker for TIC:⁴⁷

... one of the things that we do as market makers, and why we were hired at TDSI, is to – is to get listings. And in order to get listings, you do the box of the stock, which I was, and I traded it back and forth, back and forth and I advertised at the end of the day, and I rebid at the next day and I thought I was doing my job, as far as trying to get the listing on TIC.

Testimony of Kaplan

¶ 77 Kaplan's employment experience was identical to Poulstrup with respect to the contested hearing before the OSC, the three trading restrictions set out in paragraph and reinstatement of his registration with IIROC with the same trading restrictions as set out above in paragraphs [70]. He is currently employed by the same firm as Poulstrup.

¶ 78 The trading restrictions under which he has operated severely curtail his earning ability as shown in an affidavit by Kaplan filed as Exhibit #4 on this Hearing. The affidavit sets out confidential intimate personal financial circumstances. It is ordered that the contents of the affidavit shall not be disclosed or released to any member of the public without an order of this Panel or an IIROC Panel differently constituted.

¶ 79 The following excerpts from the testimony of Kaplan are relevant:

I understand and accept what the Panel has said about my conduct, and I intend to take the decision to heart and approach every bid entry I make with caution in the future. I will not engage in the conduct described in your reasons again.⁴⁸

CAN turned out to be an exceptional illiquid stock. It was very slow to implement the business plan that I thought it would follow. I was a young trader at the time, and I simply lacked the experience to cope with the situation. But CAN was not a true representation of my trading or my attitude to trading, and I acknowledge and take to heart the Panel's reaction to my evidence. I definitely made a mistake in my approach to CAN.⁴⁹

⁴⁴ Transcript page 194.

⁴⁵ Transcript page 194.

⁴⁶ Transcript page 195.

⁴⁷ Transcript pages 201-202.

⁴⁸ Transcript page 182.

⁴⁹ Transcript page 182.

The reasons will affect me apart from any sanction that is imposed. The credibility and the number of ECPs found are going to be a part of my career that I'm not going to be able to change. I hope, given the opportunity, to rebuild my career with a new record of performance.⁵⁰

I will consult with my supervisor and IIROC market surveillance whenever I am uncertain about any UMIR provisions required. Prior to this case I've had a clean discipline history with IIROC and my employer, and my recent history has been blameless.⁵¹

Prior to the issuance of the Notice of Hearing I earned a good living. I am the sole earner in my household of five. I've incurred debt, depleted personal savings to support my family, and any further suspension, financial sanction or continued trading restrictions will just add to my family's financial hardship.⁵²

To establish an inventory on day-to-day basis has been difficult and unprofitable. I am, of course, prepared to remain under close supervision.⁵³

The securities industry is really all I know. I don't have any other way of earning a decent living. Breaking the rules again is the last thing I would intentionally do after this experience.⁵⁴

The past three years have taken an emotional and physical and financial toll on my family. I'm married with three children, two of whom have been born after the Statement of Allegations. Over the past two years I have brought home no income and had to take on debt to meet our expenses. Financial pressure, problems finding work and the impact of charges against me have strained my relationship.⁵⁵

Right now I would just like the opportunity to put this ordeal behind me and work at W.D. Latimer. I have no real means of employment. I intend to never jeopardize my career in the future and my family again. I would just like to put my head down and get my feet above water one day at a time.⁵⁶

PART V

SUBMISSIONS RE SANCTIONS

Counsel for IIROC Staff

¶ 80 In its written Penalty Submissions IIROC Staff says the Respondents' conduct strikes at a fundamental element of our securities regulatory system – the maintenance of market integrity and public confidence in those markets. Fair and orderly markets are dependent upon persons dealing at arm's length and with *bona fide*

⁵⁰ Transcript page 183.

⁵¹ Transcript page 183.

⁵² Transcript pages 183-184.

⁵³ Transcript page 184.

⁵⁴ Transcript page 184.

⁵⁵ Transcript pages 185-186.

⁵⁶ Transcript page 186.

intentions so that the prices displayed can be trusted.

¶ 81 Manipulative and deceptive trading of any type is a serious contravention of UMIR as it undermines the integrity of the marketplace and impacts the public's perception and confidence in the capital markets. The Respondents' conduct undermined these principles. The Respondents were experienced registrants, occupying a privileged role in the securities regulatory framework. Registrants are entrusted and expected to conduct themselves with competence and integrity. The misconduct that Nott, Kaplan Nemy and Poulstrup, and to a lesser degree Sadeghi, were found to have engaged in is a matter of integrity. The extent, duration and nature of that conduct are relevant to the sanctions.

¶ 82 In accordance with the principles of general and specific deterrence IIROC Staff proposes: (i) fines in varying amounts (Nott: \$200,000; Sadeghi: \$25,000; Kaplan \$200,000; Nemy \$350,000; Poulstrup \$75,000); (ii) suspension of access to all marketplaces regulated by IIROC: (Nott; 2 years; Kaplan 3 years; Nemy 3 years; Poulstrup 6 months); (iii) 6 months close supervision of each Respondent if employed in a registered capacity with a Participant; (iv) A joint and several order for payment of a portion of the costs incurred as a result of this proceeding.

Counsel for Nemy, Kaplan and Poulstrup

¶ 83 Counsel submits that the lengthy suspensions and heavy financial penalties proposed by IIROC Staff are punitive and go beyond what is needed to prevent future violations of UMIR Rule 2.2(2)(b) by these Respondents and achieve general deterrence. In particular, a suspension and heavy fine are punitive sanctions to impose on first time offenders for a practice whose manipulative character was not clearly recognized. Counsel proposes: (a) reprimands for each of Kaplan, Nemy and Poulstrup; (b) a suspension not exceeding 8 months for Nemy and Kaplan and 3 months for Poulstrup to be entirely offset by the period of their enforced exclusion from the securities industry during the period since September, 2008, when each ceased to be an employee of TDSI Inc.; (c) on resuming employment with any IIROC member, a period of close supervision of 12 months for Nemy; 8 months for Kaplan and 6 months for Poulstrup; (d) fines of \$50,000 for Nemy and in light of their financial circumstances \$35,000 for Kaplan and \$15,000 for Poulstrup to be paid in instalments; (d) costs of \$10,000 for Nemy, \$5,000 for Kaplan and \$1,000 for Poulstrup.

¶ 84 In support of these penalties Counsel says: (i) this case shows there was no consensus on the proper interpretation of UMIR Rule 2.2 and UMIR Policy 2.2; (ii) only about half the allegations against Kaplan, Nemy and Poulstrup were proven; (iii) the sanctions sought by IIROC Staff are too harsh; (iv) specific deterrence can be achieved through a lesser penalty than IIROC Staff is seeking; (v) General deterrence can be achieved through publication of these Reasons; (vi) leniency is justified in the circumstances; (vii) Kaplan, Nemy and Poulstrup have already been excluded from the industry or had restricted access to it for a substantial period; (viii) the delay following commencement of this proceeding is relevant to determining sanctions.

PART VI

SANCTIONS RE NEMY, KAPLAN AND POULSTRUP

¶ 85 The facts and circumstances relevant to the Sanction Guidelines and *Mills Re* will now be reviewed.

General factors

¶ 86 The Sanction Guidelines state that General factors that may be considered relate primarily to assessing harm to the marketplace including the extent of harm to market integrity, reputation of the marketplace or both, extent of harm to investors, extent of harm to market participants and investors, extent of harm to listed companies, the number and size of securities and transactions, the time frame of the misconduct and any other factors that may be appropriate in the circumstances.⁵⁷

Harm to the marketplace

¶ 87 The Holley Report states that through the entry of very small or very short lived buy orders in the

⁵⁷ Sanction Guidelines paragraphs 5 and 8.

context of the market that were not intended to be executed, Nemy and Poulstrup narrowed the closing bid-ask spreads in TIC and increased the posted bid price close to the last trade price.⁵⁸ (Kaplan adopted the same technique in CAN.)

¶ 88 The Holley Report further states:

97. This is not to say that the closing bids established by the Respondents were fundamentally inconsistent with the last sale prices for the shares of TIC, or that the Respondents engaged in trading that artificially inflated those last sale prices.

¶ 89 In other words, the Artificial Closing Bids by the TDSI Respondents did not ramp up or ladder the price of the TIC or CAN and cause the market to ascribe a higher value to the stock than its last trade price.

¶ 90 There is no evidence concerning the extent or nature of the harm to investors or market participants or listed companies as a result of the Artificial Closing Bids. Portfolios are generally priced on the last sale. Closing bids are usually only used in the absence of a sale that day.

¶ 91 Deceptive trading of any type that undermines the integrity of the marketplace and impacts the public's perception and confidence in the capital markets is a serious contravention of UMIR. That said, however, the degree of harm to the market place by the Artificial Closing Bids is a primary consideration in determining the amount of the fine and other sanctions.

¶ 92 The Panel believes the TIC and CAN Artificial Closing Bids in the context of the market would cause much less harm to investors, market integrity and reputation of the market place than the market manipulation schemes that increase market price.

Mitigating factors

¶ 93 The Sanction Guidelines state that mitigating factors that may be considered include whether an individual has given assurance against future violations, whether any individual respondents have been subject to appropriate internal discipline and any other factors that may be appropriate in the circumstances.⁵⁹

Assurance against future violations

¶ 94 Poulstrup said he fully understands and accepts the Panel's findings concerning the IIROC Staff allegations against him. He said he has taken the Panel's decision to heart and will use extreme caution when entering bids in the future.

¶ 95 The Panel is satisfied beyond doubt that Poulstrup is genuinely remorseful and will not repeat his behaviour. There is no risk of future violations by Poulstrup.

¶ 96 Nemy said he understands what the Panel has said about his conduct, particularly placing orders in stocks very late in the trading day. He also said he has "taken the decision to heart" and will steer clear of this type of activity in the future.

¶ 97 Kaplan said he understands and accepts what the Panel has said about his conduct. He said he intends to "take the decision to heart" and approach every bid entry with caution in the future. "I will not engage in the conduct described in your reasons again."⁶⁰ "I intend to never jeopardize my career in the future and my family again."⁶¹

¶ 98 Kaplan said he was a young trader and lacked experience to cope with the situation. He said: "I definitely made a mistake in my approach to CAN."⁶²

¶ 99 Nemy and Kaplan have lamented the damage to their reputation resulting from the IIROC Staff

⁵⁸ Revised Reasons and Decision paragraph [189] quoting from paragraph 97 of the Holley Report.

⁵⁹ Sanction Guidelines paragraph 7.

⁶⁰ Transcript page 182.

⁶¹ Transcript page 186.

⁶² Transcript page 182.

allegations and findings of the Panel. They said that working in the investment industry is the only way they know to earn a living and asserted their intention to regain their reputations for trustworthiness and honesty as Traders.

¶ 100 The panel is satisfied that there is no risk of future violations by Nemy or Kaplan.

Whether the TDSI Respondents have been subject to internal discipline

¶ 101 As far as TDSI was concerned Nemy, Kaplan and Poulstrup did not enter any Artificial Closing Bids. Unlike Nott and Sadeghi (discussed below) TDSI was of the view there was no reason for internal discipline. Indeed in November 2006 Nemy was promoted to a formal supervisory role and appointed a vice-president. When the Burlington Office closed for business reasons in September 2008 the TDSI Respondents were given severance pay.

¶ 102 The release of the Statement of Allegations on February 22, 2008 had a devastating financial effect when the TDSI Respondents tried to obtain employment after the Burlington Office closed.

¶ 103 During the 24 months period from October 2008 until November 2010 Poulstrup and Kaplan worked six months (November 2009 until their employer ceased operations in May 2010) for a firm regulated by the Ontario Securities Commission (“OSC”). Despite their best efforts they were unable to obtain employment during the remaining 18 months. In November 2010 they started to work for their present employer.

¶ 104 Nemy has been unable to obtain employment since September 2008.

¶ 105 It is apparent the investment industry does not tolerate even *allegations* of improper conduct. Although the TDSI Respondents were not disciplined by TDSI they have experienced the deterrent implications (specific and general) of the investment industry policy against improper trading activity.

Other factors: past conduct and regulatory history

¶ 106 Before joining TDSI on December 11, 2003 Nemy had been a Proprietary Trader for 16 years and had experience supervising traders at various other firms.⁶³ His discipline record during this period is clean. Nemy correctly stated, a clean record of this length is not an accident.⁶⁴

¶ 107 Kaplan began working in the securities industry in 1998. He was a Registered Trader and Proprietary Trader with Canaccord’s Burlington Office for seventeen months prior to joining TDSI on May 9, 2005 where he assumed the same trader responsibilities.⁶⁵

¶ 108 Poulstrup started in the securities industry in 1996 and worked at various jobs. He joined TDSI on December 11, 2003 as part of the group recruited by TDSI for the Burlington Office. Prior to that he had been a Registered Trader and Proprietary Trader with Canaccord for approximately one and a half years.⁶⁶

¶ 109 Poulstrup and Kaplan have no record of any trading infractions prior to the Statement of Allegations.

Other factors: ability to obtain employment and ability to pay

¶ 110 The testimony of Poulstrup and Kaplan and the affidavits they filed establish they have been impoverished as a result of their inability to obtain employment and have gone deeply into debt. Consequently, their ability to pay a fine is critically limited. This is a significant mitigating factor in determining the amount of the fine to be imposed.

¶ 111 Nemy said he has been unable to obtain employment since the Burlington Office. He said he has been trying to make a living trading out of his basement with very limited capital. However, Nemy does not plead financial hardship.

⁶³ Revised Reasons and Decision [278].

⁶⁴ Transcript page 191.

⁶⁵ Revised Reasons and Decision paragraph [346].

⁶⁶ Revised Reasons and Decision paragraph [323].

Other factors: delay

¶ 112 After TDSI made a Gatekeeper Report in November 2005 this case took about two years to investigate. The Hearing of the Statement of Allegations released February 22, 2008 did not commence until December 2, 2009 and concluded March 31, 2010 after 24 days of hearing. The Panel released the Reasons and Decision on November 30, 2010.

¶ 113 There is no evidence that IIROC Staff is responsible for the significant delay in concluding this matter. The lengthy period is consistent with the volume and complexity of the evidence: 4,378 pages of transcript, detailed oral and written submissions by TDSI, Nemy, Kaplan Poulstrup and Sadeghi and 56 exhibits including two Annotated Market Reports (Exhibits 18 and 19) containing 695 pages and 50,731 lines setting out the time and summary of instant messages, telephone calls and all the details of trading in the Five Stocks during the Relevant Period.

¶ 114 The TDSI Respondents are not responsible for the protracted period of time it has taken to conclude this matter. They were justified in defending the allegations and were successful in seeing over half the allegations dismissed.

¶ 115 The delay has protracted the time Nemy Poulstrup and Kaplan have been exposed to the uncertainty, emotional upset and dire economic consequences they experienced after the release of the Statement of Allegations. As stated in *Mills Re*, this can be taken into account with respect to penalties.

Aggravating factors

¶ 116 Aggravating factors that may be considered include the financial benefit obtained, whether the misconduct was intentional or willfully blind to regulatory requirements and any other factors that may be appropriate in the circumstances.⁶⁷

Financial benefit obtained

¶ 117 The Artificial Closing Bids were in pennies. Holley said that every one cent improvement in the closing bid of TIC increased the value attributed to the inventory position held by Nemy and the Burlington Office by several thousand dollars.⁶⁸ This had an influence within TDSI but did not affect the market price on the date the Artificial Closing Bid was entered. If anything, narrowing spreads was more likely to aid liquidity than cause harm to the market place.

¶ 118 The 37 Artificial Closing Bids by Kaplan in CAN had the same context of the market characteristic as the Artificial Closing Bids by Nemy and Poulstrup in TIC. Each one cent change in the closing bid reduced or increased the unrealized value of CAN held by Kaplan more than a thousand dollars depending on the number of shares owned at the time.⁶⁹

¶ 119 It must be noted that the amount of the quarterly payments to the TDSI Respondents was determined by actual sales transactions (mark to market) resulting in a realized profit.⁷⁰ Over the Relevant Period the Artificial Closing Bids likely slowed down the rate at which the market price of TIC and CAN declined. One can only speculate as to the extent to which the Artificial Closing Bids buoyed the amount of the quarterly payments in TIC and CAN. The fact is however, that the motivation for the Artificial Closing Bids was to obtain a financial benefit.

Blindness to regulatory requirements

¶ 120 Nemy said: "I believe I created these problems for myself because I truly saw myself as the *de facto* market maker in TIC. I kept a tight spread all day long and, like a Market Maker. I tried to attract trades and

⁶⁷ Sanction Guidelines, paragraph 6.

⁶⁸ Revised Reasons and Decision paragraph [189] quoting from paragraph 99 of the Holley Report.

⁶⁹ Revised Reasons and Decision paragraph [359].

⁷⁰ See Revised Reasons and Decision paragraph [39] for a detailed explanation of the method of calculating trader compensation.

volume and tried to make a profit.⁷¹ On cross-examination Nemy reiterated his role as a Market Maker for TIC.⁷²

¶ 121 UMIR Rule 2.2 prohibits such activity unless the trader has been assigned Market Maker responsibilities by the TSX that are protected by UMIR Rule 2.2(3). Nemy did not have Market Maker protection but nevertheless assumed a Market Maker role in TIC.

Other factors: frequency and time period of Artificial Closing Bids

¶ 122 Nemy entered 39 Artificial Closing Bids in TIC between May 4 and October 24. Kaplan was virtually the same. He entered 38 Artificial Closing Bids between May 12 and October 25. Poulstrup entered 13 Artificial Closing Bids between July 4 and July 22 while Nemy was on holidays plus one on August 9.

Sanctions to be imposed

¶ 123 The following sanctions are imposed on the basis of the Sanction Guidelines and *Mills*. Certain considerations that are particularly relevant may be mentioned. This does not detract from the relevance or applicability of the other considerations discussed above.

Fine payable by Nemy

¶ 124 Harm to the market place is a primary consideration in determining sanctions. As stated above the Panel believes the TIC and CAN Artificial Closing Bids in the context of the market would cause less harm to investors, market integrity and reputation of the marketplace than the classic market manipulation schemes. The lesser degree of harm reduces the range of the fines suggested by IIROC Staff (\$350,000.00 for Nemy, \$200,000.00 for Kaplan and \$75,000.00 for Poulstrup) to a much lower amount. In light of this consideration the fines suggested by IIROC Staff exceed appropriate deterrent amounts and would be tantamount to punishment.

¶ 125 Nemy was the most active, experienced and successful Trader in the Burlington Office. He was regarded as the supervisor by the other Traders even though he did not officially hold this position. His trading activity would be noted by the other Traders.

¶ 126 Nemy entered 39 Artificial Closing Bids between May 4 and October 24. Nemy assumed the unauthorized role of Market Maker in TIC. The evidence shows that financial benefit was a motivating factor in making the Artificial Closing Bids. These are very important aggravating considerations in fixing the amount of the fine he should pay.

¶ 127 It is ordered that Nemy pay IIROC the sum of \$75,000.00. This amount satisfies the requirements of specific and general deterrence and relates to the nature of the Nemy's violations, the circumstances in which they were committed and the other aggravating and relevant mitigating factors discussed above.

Fine payable by Kaplan

¶ 128 Kaplan entered 37 Artificial Closing Bids between May 12 and October 25 over virtually the same time period as Nemy. This is two less than the Artificial Closing Bids by Nemy in TIC. Like Nemy, financial benefit was a motivating factor in making the Artificial Closing Bids. Because of these similarities the amount of the fine payable by Kaplan should be similar to Nemy.

¶ 129 However, the Panel is satisfied that Kaplan cannot afford to pay the same fine as Nemy. Ordering the same or a similar fine would go beyond deterrence and amount to punishment.

¶ 130 Kaplan shall pay IIROC the sum of \$35,000.00.

¶ 131 Counsel for Kaplan says the amount of the fine should be substantially reduced because IIROC Staff failed to prove more than half of the alleged Artificial Closing Bids. The amount of this fine is commensurate with the number of allegations that were proved. If a greater number of Artificial Closing Bids had been proved

⁷¹ Transcript pages 189-190.

⁷² Transcript pages 201-202.

the fine would have been increased.

Fine payable by Poulstrup

¶ 132 The frequency and duration of the Artificial Closing Bids by Poulstrup are substantially less than Nemy and Kaplan. Unlike Nemy and Kaplan, there is no evidence of any financial benefit intended or obtained by Poulstrup as a result of his Artificial Closing Bids. These considerations place the amount of the fine at a much lower level than Nemy and Kaplan.

¶ 133 Poulstrup shall pay IIROC the sum of \$20,000.00.

¶ 134 The Panel is satisfied that Poulstrup cannot afford to pay a greater amount.

Costs

¶ 135 IIROC Staff prepared a Bill of Costs outlining certain expenses incurred as a result of this proceeding (\$296,212.71) and reduced this by approximately 50 per cent to \$148,000.00. IIROC Staff asks that this amount be assessed on a joint and several basis against the TDSI Respondents, Nott and Sadeghi.

¶ 136 Although the amount claimed for costs is reasonable and realistic adding this amount to the fines would be excessive. The Panel orders that Nemy pay costs in the amount of \$37,500.00. Kaplan shall pay \$17,500.00. Poulstrup shall pay \$10,000.00.

¶ 137 The request for payment of costs on a joint and several basis is denied.

Time for payment of the fine and costs.

¶ 138 The time for payment of the fine and costs by Nemy is discussed below.⁷³

¶ 139 Payment of the fine and costs by Kaplan and Poulstrup shall not fall due until thirty days after the release of the Sanctions Decision and Reasons. Time and terms of payment of the fine shall be negotiated. If an agreement cannot be reached within thirty days of the release of the Sanctions Decision and Reasons, written submissions shall be submitted to the Panel and the Panel will fix the terms of payment.

Suspending access to the market

¶ 140 IIROC Staff asks for an order an order suspending access of the TDSI Respondents to all marketplaces regulated by IIROC.

¶ 141 The Panel views the inability of the TDSI Respondents to obtain employment for the periods of time described above as tantamount to an adequate period suspension from access to the market. The order for suspension is denied.

Trade restrictions

¶ 142 As noted above⁷⁴ an Order of the OSC dated October 29, 2008 imposed three trading restriction on Poulstrup and Kaplan pending resolution of the IIROC Allegations: (i) that they work under close supervision; (ii) that they not carry overnight inventory positions; (iii) that they not enter orders in the last five minutes of a trading day except to close off existing positions.

¶ 143 In October 2010 the IIROC Registration Department continued these restrictions when Poulstrup and Kaplan applied for reinstatement of their registration with IIROC and agreed to the terms and conditions of the OSC Order being continued.

¶ 144 Having regard to the finding of the Panel that there is no risk of future violations by Poulstrup or Kaplan the trading restrictions are no longer required from a supervisory perspective. The ability to earn enough income to pay the fines imposed under the Sanctions Decision and Order is integral to the rehabilitation of Poulstrup and Kaplan as productive members of the investment industry and society. With the trade restrictions in place

⁷³ See paragraphs [150] and [151].

⁷⁴ See paragraph [70].

they cannot earn enough income to pay a fine.

¶ 145 The Panel concluded that common sense and fairness dictate that the trading restrictions should cease.

¶ 146 On February 23, 2011 the Panel advised the parties it had come to a conclusion regarding the sanctions to be imposed in this matter. The Panel said that completing the Sanctions Decision and Reasons would require an uncertain amount of time. The Panel said that although the Reasons are important, first and foremost the parties want to know the Decision. The Panel provided a Draft of the sanctions that would be set out in the Sanctions Decision and Reasons (“**Draft Sanctions**”).

¶ 147 On April 4, 2011 the Panel received an e-mail from Counsel for Poulstrup and Kaplan (copied to Counsel for IIROC and the other parties) asking for an order removing that the two trade restrictions immediately. A draft of the proposed Sanctions Order (“**Sanctions Order**”) was included.

¶ 148 By e-mail dated April 6, 2011 to all the parties the Chair of the Panel wrote:

The order set out in the Draft Sanctions released February 23 does not order the removal of the trade restrictions with respect to Poulstrup and Kaplan as set out in the [draft] Sanctions Order you have prepared. The Draft Sanctions **recommend** that the restrictions be removed immediately.

Rather than delay matters by revising the Sanctions Order it is my belief, subject to confirmation by the Panel members, that the Sanctions Order should issue as prepared by you ...

The [draft] Sanction Order states that the restrictions presently preventing Poulstrup and Kaplan from carrying overnight inventory positions and preventing them from entering orders in the last five minutes of a trading day shall cease to apply immediately.

There is an issue as to the power or jurisdiction of the Panel to make this order. There are conflicting views as to whether the IIROC Registration Department would be bound by such order and required to remove the trade restrictions or whether such order would only have persuasive effect.

The Panel has been advised that the trade restrictions remain in effect because registration officials of IIROC are reluctant to act on the Draft Sanctions document but would be prepared to act if the Panel converted the Draft Sanctions document into a final order. Subject to confirming that there has not been non-compliance with the restrictions to date, a senior IIROC official has indicated that IIROC would give due weight to the Panel's decision.

The Panel has decided to make the order requiring removal of the trade restrictions on the basis of this information. This is not to be taken as a precedent on the issue stated above as to the power or jurisdiction of a Hearing Panel to make such an order and the effect of such order on the IIROC Registration Department.

¶ 149 There were no objections or comments re the foregoing from any of the parties and the Panel authorized issuance of the Sanctions Order.

¶ 150 Subparagraph 1. (c) of the Sanctions Order requires Nemy to pay the fine and costs imposed on him thirty days after release of the Sanctions Decision and Reasons. Nemy has requested an extension of the time for payment.

¶ 151 The request by Nemy is granted. It is ordered that subparagraph 1.(c) of the Sanctions Order be changed to read as follows

The amounts payable pursuant to subparagraph 1. (a) are payable not later than seven days after Nemy signs an employment agreement with an IIROC member firm but in any event not later than ninety days after the release of the Sanctions Decision and Reasons.

Close supervision

¶ 152 The Panel orders that Nemy, Poulstrup, Kaplan and Nott shall be subject to close supervision with the terms of close supervision to be determined by their employer.

¶ 153 IIROC Staff is of the view the Panel does not have the authority make this close supervision order because this would be an improper delegation of a discretionary decision-making power given under UMIR Rules and Policy 10.5.

¶ 154 The Panel failed to consider this objection at the time the Draft Sanctions was released. Consequently the provision to which IIROC objects was included in the Draft Sanctions and the subsequent Sanctions Order.

¶ 155 IIROC Staff says the Panel should adopt the standard form used by the IIROC Registration Department for the close supervision of Pro Trader⁷⁵ which sets out the terms that IIROC Staff suggest are appropriate to include in the order for close supervision. The Panel chooses not to do so.

¶ 156 The IIROC Staff objection to the close supervision order made by the Panel is a non-issue because as explained below the same result occurs whether or not the Panel has authority to make an order for close supervision as determined by the employer.

¶ 157 The close supervision order issued by the Panel is not mandatory. The employer can decide not to impose any terms of close supervision. If, instead of making this order the Panel recommends that the employer place Nemy, Kaplan, Poulstrup and Nott under close supervision for a period of six months, the employer would have the right not to impose any terms of close supervision. Thus both orders have the same practical result.

¶ 158 If the order made by the Panel is invalid then there is no order in effect and the employer would have the discretion whether or not to place the Traders under close supervision. Again the same result.

PART VII

SANCTIONS RE NOTT

¶ 159 Nott became registered to work in the securities industry in 1995. He worked at Canaccord for approximately nine years before he was hired by TDSI on April 4, 2005 as an Inventory Trader, a Registered Trader and as the Trader responsible for client order flow from the United States destined for execution on the TSX-V. Nott worked in the TDSI Toronto office.

Testimony by Nott

¶ 160 Nott was dismissed by TDSI on November 30, 2005 under circumstances described in the Revised Reasons and Decision.⁷⁶ Prior to this he had no record of any trading infractions. He has not had steady employment since then. Currently he has been working for about ten months in an unrelated field.

¶ 161 The loss of his job and the subsequent proceedings by IIROC have had traumatic financial and emotional consequences:⁷⁷

I just want to note that the other persons here that, you know, stayed employed with TD received severance packages, which I never received, and I also had to sell my house throughout this incident. I've used up all my savings as far as RSPs, the kids' education funds, every bit of savings I had is gone. I sold my house, which I built, and I'm pretty well living off the equity of my home left over.

The emotional devastation of this entire thing has been drastic on me. I've always been a happy-go-lucky guy, but this event has changed my life. I've been treated for depression through my family doctor, and this event has changed me forever.

⁷⁵ http://www.iiroc.ca/English/ComplianceSurveillance/Registration/Documents/SupervisionReportProTraders_en.pdf

⁷⁶ Paragraph [45].

⁷⁷ Transcript page 365.

¶ 162 Nott filed his tax returns for 2007 and 2008 which show income of less than \$10,000.00. He was unable to find his 2009 return. (The tax returns shall not be disclosed to any member of the public without an order of this Panel or an IIROC Panel differently constituted.) While working at Canaccord his earnings were well in excess of \$100,000.00

¶ 163 At the Hearing Nott testified that his superiors Dingwall and Tucker had the same definition of high closing as he did which meant not to go higher but you could maintain the bid.⁷⁸ He said that when Poulstrup put in a bid maintaining in the context of the market “ I don’t think Jake [Poulstrup] or myself ever considered that high closing”⁷⁹

¶ 164 He reiterated these statements on this Sanctions Hearing.⁸⁰

... when Jake [Poulstrup] put those orders in when he [Nemy] was away in July, Rob Dingwall and Tucker hounded me, and I use that term -- you know, not loosely -- hounded me to make sure that I told Jake to put those bids in. Okay. So if that's not sanctioned, I don't know what is.

¶ 165 Nott testified that in his entire time at TDSI he was never warned about his trading.⁸¹

Submissions by Nott

¶ 166 In written submissions Nott says that if the Panel applied its definition of Artificial Closing Bids to his bids in the same manner as the definition was applied to the other Respondents “I should only have been convicted of 69 artificial closing (bidding after 5 minutes to the close).” He says he realizes this is a large number of infractions but this approach and not 230 Artificial Closing Bids should be used in determining sanctions on “a level playing field”.

¶ 167 Nott says the amount of change to the market resulting from his bids was as small as possible. The trading range on CAN.H was \$.01, PEC \$.005 and CDF.A \$.01 and had minimal effect on the integrity of the market. He says that all these bids did not involve client’s orders and no client complaints were made.

¶ 168 Nott says his trading style of maintaining the bid in the context of the market was known and encouraged by management. He says if management or compliance had indicated to him his trading was inappropriate he would have immediately stopped. He says that at no time did he knowingly break any rules.

¶ 169 Nott says his testimony has been consistently truthful. “I did not invent wild theories to account for my actions.”

¶ 170 Nott says that having regard to the consequences he has experienced as a result of his “wrongful dismissal” and the IIROC proceedings -- economic loss, emotional cost, loss of reputation, disgrace, inability to obtain gainful employment -- he has suffered more than the TDSI Respondents who continued to work and received severance pay. He says he should not be punished any further.

Discussion

¶ 171 IIROC alleged that that Nott entered 230 Artificial Closing Bids consisting of one for ACU, 53 for CAN.H/, 91 for CDF.A and 85 for PEC. On the Hearing Nott admitted that all 230 Bids were entered in the context of the market for the purpose of maintaining the closing bid price of the stock. There being no evidence limiting this admission, the Panel had no alternative but to hold that the IIROC allegations had been proved.

¶ 172 On this Sanctions Hearing Nott says the Panel should limit the number of Artificial Closing Bids to 69 bids entered after five minutes to the close. There is a great likelihood that in the absence of Nott’s admission, analysis of his bidding in a manner similar to Poulstrup would significantly reduce the number of Artificial Closing Bids. However, the Panel cannot arbitrarily negate the blanket admission by Nott in the manner

⁷⁸ Hearing transcript page 3653, lines 17-25 and Revised Reasons and Decision paragraph [230].

⁷⁹ Hearing transcript page 3655, lines 1-7.

⁸⁰ Sanction transcript page 374.

⁸¹ Sanction transcript pages 379-380.

suggested by Nott for the purpose of leveling the sanctions playing field.

Mitigating factors

¶ 173 Most of the mitigating factors that apply to the TDSI Respondents also apply to Nott. The panel is satisfied there is no risk of future violations by Nott. The amount of change to the market price caused by the Artificial Closing Bids was small and the harm to the integrity of the market in the very low range. Nott's dismissal on November 30, 2005 precipitated emotional upset and dire economic consequences. This was exacerbated by the release of the Statement of Allegations on February 22, 2008 and the element of uncertainty was added. The delay in concluding this matter has protracted the duration of these consequences.

¶ 174 There is no evidence of financial benefit to Nott resulting from the Artificial Closing Bids. Nott's financial circumstances negate his ability to pay a fine.

¶ 175 There are additional important mitigating considerations. Nott's was honest and straightforward. His testimony regarding Poulstrup and Kaplan was extremely relevant and helpful. Because Nott admitted that the purpose of his bidding was to maintain the value of the stocks in the context of the market the Panel was not required to go through the demanding exercise of analyzing the evidence to ascertain Nott's intention.

¶ 176 Coupled with his admission of "guilt" Nott says that if management or compliance had indicated to him his trading was inappropriate he would have immediately stopped and that at no time did he knowingly break any rules. He says it was not his intention to break any rules.

Decision re Nott sanctions

¶ 177 Nott's assertion that his style of maintaining the value of a stock in the context of the market was in accordance with the culture of bidding at TDSI is consistent with the Boddie Report and the evidence of Mathew Cooper, Acting Chief Compliance Officer for TDSI.⁸² No evidence was called to contradict Nott and he was not cross examined by anyone.⁸³

¶ 178 In light of the foregoing it would be inappropriate to accept only the admission of guilt and disregard the rest of his testimony. It is reasonable to conclude that Nott did not think he was violating any UMIR rules. His lack of intention is a significant mitigating consideration in imposing sanctions.

¶ 179 However, this does not exonerate Nott. He cannot plead ignorance and shift the blame for entering Artificial Closing Bids to his superiors at TDSI. Breach of UMIR Rule 2.2 (2)(b) and UMIR Policy 2.2 for whatever reason must be deterred.

¶ 180 Having regard to the mitigating considerations, with particular regard to Nott's honest and helpful evidence, his financial circumstances and his lack of intent Nott shall pay IIROC a fine of \$15,000.00 and costs of \$5,000.00.

¶ 181 Payment of the fine and costs shall not fall due until thirty days after the release of the Sanctions Decision and Reasons. Time and terms of payment of the fine shall be negotiated. If an agreement cannot be reached within thirty days of the release of the Sanctions Decision and Reasons, written submissions shall be submitted to the Panel and the Panel will fix the terms of payment.

¶ 182 Nott shall be the subject of close supervision for six months with the terms of close supervision to be determined by his employer.

¶ 183 The order requested by IIROC suspending access by Nott to all marketplaces regulated by IIROC is denied.

PART VIII

SANCTIONS RE SADEGHI

⁸² Revised Reasons and Decision paragraphs [459]- [462] discussing the evidence of Cooper.

⁸³ Revised Reasons and Decision paragraph [332].

¶ 184 Sadeghi graduated from York University in 1995 with a Masters degree. He was hired by The Toronto Stock Exchange as a floor operator in 1997. After the floor closure of the TSX Trading Floor in 2000 he worked for Cannacord Capital as an assistant Trader and later in 2001 became licensed as a Registered Trader. In 2003 TDSI extended an employment offer through Nemy but Sadeghi opted to stay at Cannacord. Sadeghi says he became the most profitable Trader for Cannacord from 2003 to 2005. On May 9, 2005, after numerous contacts by Nemy and Tucker, he resigned from Cannacord and along with Kaplan joined TDSI at the Burlington Office under the supervision of Nemy.⁸⁴

Testimony by Sadeghi

¶ 185 Sadeghi was dismissed by TDSI on November 30, 2005 under circumstances described in the Reasons and Decision.⁸⁵ Prior to this he had no record of any trading infractions.

¶ 186 After his dismissal Sadeghi worked for Canaccord from December 2005 until December 20, 2007. He says that on that date the allegations in the Statement of Allegations became known to Canaccord and he was immediately dismissed. He was unable to obtain employment until October 2010 but could not actually start as a Trader until he obtained the written approval of the Ontario District Council Registration Subcommittee of IIROC under IIROC Rule 20.18(2). The approval dated January 12, 2011 placed Sadeghi under close supervision for a minimum period of one year and requires the employer to file signed written monthly supervision reports for Traders in the manner prescribed by IIROC within ten days of each reporting period ("**Ontario District Council Decision**"⁸⁶). After one year his employer may apply to have these conditions removed.

¶ 187 The economic consequences of being unemployed for three years are similar to those experienced by Kaplan and Poulstrup. He cashed in his RSP, refinanced his home, is indebted to his bank for almost \$49,198.02 and has borrowed more than \$50,000.00 from a relative. This information is confirmed by documents in Exhibit 8 including a summary of his tax returns for the years 2006 – 2009. It is ordered that tax returns and documents contained in Exhibit 8 shall not be disclosed to any member of the public without an order of this Panel or an IIROC Panel differently constituted.

¶ 188 Sadeghi described the effect of his dismissal by TDSI, the loss of his job at Canaccord, the proceedings by IIROC, and the Globe and Mail article (discussed below):⁸⁷

The impact has been tremendous. The impact that it -- I mean, not only financially, but even emotionally. The release of IIROC allegations and the fact that the wording of it, the fact that there was a Globe and Mail article on two occasions,⁸⁸ I don't think anybody can really imagine the -- aside from the financial hardship, the emotional and reputational damage that it causes to you.

I want the panel for just a second to put themselves in my shoes, having been dismissed for cause from TDSI and having charges -- severe charges laid against you by IIROC. Even your wife is going to think, "This guy might have done something seriously wrong to be in a position that he is in." So it's a very lonely place to be in life.

Submissions by Sadeghi

¶ 189 The substance of Sadeghi's submissions is this. He made an error in judgment with respect to the three Artificial Closing Bids which he regrets and which will not happen again. The Artificial Closing Bids had no adverse effect on the integrity of the market or clients. He did not profit from the bids. The economic,

⁸⁴ Revised Revised Reasons and Decision paragraph [236].

⁸⁵ Paragraph [45].

⁸⁶ Filed as Exhibit 9.

⁸⁷ Sanction Hearing transcript pages 351-352.

⁸⁸ There is no evidence as to the content of the second article.

emotional and damage to reputation consequences of the IIROC allegations and proceedings are disproportionate to the three minor Artificial Closing Bids found by the Panel. Consequently he has suffered far more than the other Respondents. He should not be punished any further. No remedial purpose is achieved by imposing a fine or costs.

Discussion

¶ 190 IIROC alleged that Sadeghi entered 50 Artificial Closing Bids for ACU, two Artificial Closing Bids for TIC, one Artificial Closing Bid for PEC and four Artificial Closing Bids for CDF.A.

¶ 191 The Panel held that as Market Maker responsible for maintaining an orderly market on ACU, Sadeghi acted in good faith and appropriately in entering closing bids with respect to ACU. The allegations of entering 50 Artificial Closing Bids in ACU were dismissed.⁸⁹

¶ 192 Sadeghi was a very credible witness. Based on his open and frank admission the Panel held that Sadeghi entered a single Artificial Closing Bid in PEC on July 15. Were it not for this admission the Panel would have dismissed the allegation. The Panel stated that the admission could not be disregarded. Sadeghi admitted entering Artificial Closing Bids in CDF.A on October 14 and on October 21. Based on these admissions the Panel made the requisite finding. All the other allegations of Artificial Closing Bids were dismissed.

¶ 193 Sadeghi did not gain any profit or advantage from any of these Artificial Closing Bids. There is no evidence of the actual harm to the marketplace.

¶ 194 The Panel is satisfied that Sadeghi regrets his error in judgment and that there is no risk of future violations. Sadeghi testified:⁹⁰

But the question is do I regret putting those three bids in there? Sure I do. Would I do it again if I had to? Of course I won't. Would I pay extra attention to any activity that I would make in the marketplace in the future? Yes, of course. That goes without saying.

Decision re Sadeghi sanctions

¶ 195 As will be seen from the discussion below there is substance to the submission regarding the disproportionate consequences Sadeghi has experienced as a result of certain unfair publicity discussed below.

¶ 196 However, notwithstanding this unfair publicity, deterrent sanctions must be imposed for breach of UMIR 2.2(2) and UMIR Policy 2.2 in accordance with the Sanction Guidelines and the facts and circumstances applicable to the offence and the offender.

¶ 197 Sadeghi shall pay IIROC \$5,000.00 not later than two years after the release of Sanctions Decision and Reasons. There shall be no order of suspension.

¶ 198 The Panel recommends that an application be made forthwith by Sadeghi's employer to rescind the Ontario District Council Decision regarding close supervision. The Panel unequivocally recommends that the application be immediately granted.

PART IX

COMMENTS

¶ 199 IIROC issued a news release dated December 20, 2010⁹¹ (*News Release*) that inaccurately stated the Panel found that Poulstrup entered Artificial Closing Bids "14 times between May 10, 2005 and August 29, 2005." The dates of the Artificial Closing Bids were between July 4 and July 22 (13 Artificial Closing Bids) and August 9 (one).

¶ 200 The Panel will discuss the unfair publicity by IIROC has circulated regarding Sadeghi and the

⁸⁹ Revised Revised Reasons and Decision paragraph [252].

⁹⁰ Sanctions transcript page 352.

⁹¹ <http://docs.iiroc.ca/DisplayDocument.aspx?DocumentID=330B121769D845C6A02A4F4FFBECD3C9&Language=en>

inaccuracy of a statement regarding Sadeghi published in the Globe and Mail.

Unfair publicity by IIROC re Sadeghi

¶ 201 The IIROC News Release set out the findings of the Panel. An IIROC Notice with the same information was published the same day containing similar information.⁹² The News Release reads in part as follows: (emphasis is original)

IIROC News Release dated December 20, 2010:

IIROC announces disciplinary decision for Kenneth Nott, Aidin Sadeghi, Christopher Kaplan, Robert Nemy, Jake Poulstrup and TD Securities Inc.

December 20, 2010 (Toronto, ON) – A Hearing Panel of the Investment Industry Regulatory Organization of Canada (IIROC) has found that five employees at TD Securities Inc. violated the Universal Market Integrity Rules (UMIR) by entering artificial closing bids in 322 instances over a six-month period.

After reviewing the five individuals' trading activity in five stocks, the panel found that each had entered artificial closing bids for one or more of the five stocks as follows:

Kenneth Nott, 230 times between May 2, 2005 and October 26, 2005;

Aidin Sadeghi, three times between June 1, 2005 and October 27, 2005;

Christopher Kaplan, 37 times between May 12, 2005 and October 27, 2005;

Robert Nemy, 39 times between May 2, 2005 and October 31, 2005; and

Jake Poulstrup, 14 times between May 10, 2005 and August 29, 2005.

¶ 202 Although the News Release (and Notice) accurately state the findings of the Panel they only partially state the decision of the Panel regarding Sadeghi. They do not mention the Panel dismissed 50 alleged Artificial Closing Bids for ACU because the Panel said Sadeghi acted in good faith and appropriately in entering the closing bids with respect to ACU.

¶ 203 Failure to mention this finding was unfair and one-sided and should be remedied when reporting the Sanctions Decision and Reasons.

¶ 204 Bundling Sadeghi's three infractions in the same category or group as the infractions by the other Respondents was inappropriate because, unlike the infractions by the other Respondents, the Panel said that (i) none of the three Artificial Closing Bids by Sadeghi were part of a pattern of entering Artificial Closing Bids⁹³ and (ii) the single Artificial Closing Bid in PEC on July 15 was innocuous and without any negative effect on the market place.⁹⁴

Globe and Mail article

¶ 205 On March 4, 2008, the Globe and Mail published an article about the IIROC allegations against TDSI and the Respondents.⁹⁵ In that article Sadeghi says he was specifically singled out as a rouge trader who inflated the price of his ACU position by \$25,623. The article states:

In one example cited by RS [now IIROC] former TD Securities trader Aidin Sadeghi was alleged to have inflated the value of his portfolio by \$25,623 after pushing up the closing price on African Copper. Mr. Sadeghi was fired with cause, by TDSI Securities in November 2005 according to the regulator.

⁹² <http://docs.iiroc.ca/DisplayDocument.aspx?DocumentID=1416F4EF702F4A4DBCABC99601FEAA08&Language=en>

⁹³ Revised Reasons and Decision paragraph [275].

⁹⁴ *Ibid* paragraph [264].

⁹⁵ The article in its entirety can be viewed by following the URL: <http://www.theglobeandmail.com/globe-investor/investment-ideas/streetwise/watchdog-targets-td-securities/article670942/>.

¶ 206 This statement appears to have been based on paragraph 33 of the Statement of Allegations which reads:

The ACU Closing Bid Orders had the effect of artificially increasing the value of Sadeghi's inventory account over the relevant period. For instance, on October 25, 2005 (the last full day before Tucker and Dingwall learned of potentially suspicious trading by Nott and Sadeghi), the value of Sadeghi's ACU position was inflated by \$25,623.00 when compared to its value if the last independent bid price was used.

¶ 207 The Panel is of the opinion that this statement was totally unwarranted. This conclusion is based on a Memorandum by Panelist Donald Lawson which reads as follows:

Paragraph 33 of the Statement of Allegations contains the accusation that on October 25th, Sadeghi's last day, that his bid inflated his inventory value by \$25,623 when compared to the last independent bid price. Sadeghi held 40,283 shares at the time. If we divide the dollars by the number of shares ($25,623/40,283$) the amount per share is 0.636 over the independent bid.

Trading details are as follows:

October 18 Closing Bid 1.22, Opening Price 1.20, High for day 1.25, Low for day 1.20, Last Sale 1.25, Volume 200 shares

October 19 Closing Bid 1.24, No Trades during day

October 20 Closing Bid 1.24, No trades during day

October 21 Closing Bid 1.24, No trades during day

October 24 Closing Bid 1.19, Opening Price and low for day 0.90, High and last price for day 1.20, Volume 1,000 shares. Short seller hit Sadeghi bid at 1.20 at 12.49 pm

October 25 Closing Bid 1.19 entered at 14.43.10.11 No trades during day.

If we deduct the increase in price of .636 (.64) from 1.19 the last independent bid must have been 0.55, far outside the trading range of the past days and the last purchase by Sadeghi. Frequently, orders whose price is so far off the market are not accepted by the system. To me the use of that low independent bid and the dollar ramifications is outrageous, totally unwarranted, and the accusation possibly the most damaging to his reputation.

¶ 208 Hopefully, these comments will help alleviate the damage.

¶ 209 It is apparent the investment industry does not tolerate even *allegations* of improper bidding. The Respondents have all experienced the deterrent consequences of this intolerance. In addition there are the sanctions imposed by the Panel.

¶ 210 The Globe and Mail article states that "compared to various rogue trader scandals the scale of the infractions here is minor league." In stating that the Panel does not disagree with this statement the Panel does not detract from the seriousness of any breach of breach of UMIR Rule 2.2(2) and UMIR Policy 2.2.

¶ 211 The Respondents are very competent Traders. They have paid an extremely heavy price for their errors in judgment. The panel is satisfied there is no risk of them repeating their conduct. They should not be black-balled by the industry and thereby be deprived of the ability to establish a good reputation, earn a decent livelihood and make a useful contribution to the industry.

The above Revised Reasons and Decision is approved April 30, 2011.

Hon. Stanley Kurisko, Q.C., Panel Chair

Donald Lawson

Phillip Ted Norris

